Ruling Cases.

ARRANGED, ANNOTATED, AND EDITED

BY

ROBERT CAMPBELL, M.A.,

OF LINCOLN'S INN, BARRISTER-AT-LAW, ADVOCATE OF THE SCOTCH BAR, AND LATE FELLOW OF TRINITY HALL, CAMBRIDGE.

ASSISTED BY OTHER MEMBERS OF THE BAR.

WITH AMERICAN NOTES

BY

IRVING BROWNE,

FORMERLY EDITOR OF THE AMERICAN REPORTS AND THE ALBANY LAW JOURNAL.

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MANORIAL RIGHT—MISTAKE

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RULING CASES.

MANORIAL RIGHT.

WESTERN *v.* BAILEY.

(C. A. 1896.)

RULE.

WHERE, by the custom of a manor, the lord is entitled, upon the death of a copyhold tenant, to his best beast as a heriot, the property in the beast (when ascertained) is considered as having vested in the lord upon the death of the tenant, and the lord is entitled to seize it wherever it is found, whether within the ambit of the manor or not.

Western v. Bailey.

66 L. J. Q. B. 48–53 (s. c. 1897, 1 Q. B. 86; 75 L. T. 470; 45 W. R. 115).

Copyhold. — Customary Heriot. — Right of Lord to take Heriot outside [48] *Manor.*

Where, upon the death of the tenant of a copyhold tenement, a customary heriot of the best beast of the tenant is due to the lord of the manor, the property in the beast vests in the lord upon the death of the tenant, and the lord has a right to seize it wherever it be found, whether in or out of the manor, and a right of action against any person misappropriating it.

Appeal on the part of the defendants from the judgment of WILLS, J., for the plaintiff, at the trial of the action before him without a jury (65 L. J. Q. B. 641; [1896] 2 Q. B. 234).

The plaintiff, as lord of the manor of Mundon Hall, in the county of Essex, claimed from the defendants, as executors of one George Christy, a deceased copyhold tenant of the manor, damages for eloigning two heriots of the best beasts of the tenant, which accrued due to the plaintiff, as lord of the manor, on the tenant's death.

By an admission dated July 2, 1879, George Christy was admitted tenant of certain copyhold hereditaments of the plaintiff's manor, including two parcels, called respectively Scotts and Langmead, which the plaintiff alleged were heriotable tenements.

[*49] *George Christy died seised of these tenements on December 13, 1894.

The plaintiff alleged that the tenements were held at the will of the lord of the manor by the tenure of paying and rendering to the lord a heriot in respect of each tenement when the same should happen, and in the alternative that from time whereof the memory of man runneth not to the contrary there had been within the manor a custom that the lord should take and have upon the death of every copyhold tenant dying seised of a customary heriotable tenement the best beast of the tenant for a heriot.

The defendants denied that the tenements were heriotable, and also alleged, as the fact was, that George Christy had not at the time of his death and never had any beasts whatever within the manor. George Christy died possessed of beasts without the manor, which the defendants sold without any notice of the plaintiff's claim. The best beast was sold for £63.

At the trial of the action WILLS, J., held that Scotts was not a heriotable tenement, but that Langmead was held by heriot service, and gave judgment for the plaintiff for £63.

The defendants appealed.

Elton, Q. C., and J. C. Earle, for the appellants. — The Judge was wrong in holding that this copyhold tenement was held by heriot service, since heriot service is only applicable to freeholds, and is not applicable to copyholds, inasmuch as it depends upon a special reservation in a grant. Scriven (5th ed.), p. 257; Blackstone's Commentaries, Book II. ch. 28; Stephen's Commentaries, Book II. Part I. ch. 22. If there had been a grant and a reservation the land would have ceased thereby to be copyhold. Bracton and Fleta, in the passages cited by WILLS, J., in his judgment, — Bracton, Book II. c. 36, s. 9, and Fleta, Book III. c. 18, — are not speaking of heriot service, but of heriot custom, as appears from the observation of Bracton: "Magis fit de gratia quam de jure." It may be that there is a custom in this manor to take a heriot, that being for the plaintiff to prove, but there can be no heriot service. See Gilbert on Distress, pp. 8 and 9. If, therefore, there had been a beast on the tenant's land, or a

beast which, having been on the tenant's land, had been driven off it to avoid seizure, the lord might have seized it by heriot custom. *Woodland* v. *Mantel* [1551], Plowden, 94, and Viner's Abridgment, vol. xiv. p. 298, Heriot (E). But a custom is a custom of the manor only and local, and can only be exercised within the manor, except where the heriot has been driven out of it to avoid seizure. All copyholds were in their origin mere licenses to cultivate land, and if a heriot is payable in respect of a copyhold it is payable by custom only.

[Lord ESHER, M. R. — How is the fact that the heriot custom does not apply to all the tenements of the manor to be explained?]

By the fact that in many cases the heriot has been compounded for, the tenement remaining copyhold in other respects. The result of the examination of the cases by WILLS, J., was that there is no case in which the seizure of a heriot has been justified on the ground of its being due as heriot service from a copyholder, although there are many cases in which the justification has been that the heriot was due as a service to be rendered by a free tenant of the manor, and many in which it has been alleged to be due from a copyholder by the custom of the manor. A custom of a manor to seize for a heriot a beast which had never been within the manor would be unreasonable and bad.

Bosanquet, Q. C., and Lyttelton, for the respondent. — It is immaterial whether the heriot is due by heriot service or heriot custom, since there is ample authority that, even if it be due by heriot custom, it can be seized outside the manor. In *Parker* v. *Gage* [1688], 1 Shower K. B. 81, Holt, 337, it was held in terms by HOLT, Ch. J., that "either heriot service or heriot custom is seizable off the manor, because it lies *en prender.*" See also *Austin* v. *Bennet* [1692], 1 Salk. 355, and *Garland* v. *Jekyll* [1824], 2 Bing. 273, 2 J. L. (O. S.) C. P. 227 (27 R. R. 630). There is, on the contrary, no authority for the appellants' suggestion that, if there is a custom, the heriot is seizable [* 50] within the manor only. In Scriven on Copyholds, p. 255, it is stated that heriot custom may be seized by the bailiff or other officer of the manor for the lord's use wherever it may happen to be found, whether in or out of the manor, and if it be eloigned, the lord may have trover or detinue for it; and this is in accordance with the cases cited and with *Price* v. *Woodhouse* [1847], 1 Ex. 559. In Watkins on Copyholds, also, vol. 2, p. 163 (4th ed.

1825), it is said that it appears now settled that the lord may seize for heriot service as well as for heriot custom, though contrary to the distinction in the ancient books; and, as the property in the best beast or good becomes vested in the lord on the death or alienation of the tenant, he may seize it wherever it may be found, as well without his seigniory as within; and that, whether the heriot be due by custom or as a service. So also in the note in Williams' Saunders to *Lanyon* v. *Carne* [1667], 2 Wms. Saund. 168 b, it is said that with respect to a heriot due by the custom of a manor, as the property of it vests immediately in the lord on the death of the tenant, the lord may seize it in any place.

Elton, Q. C., in reply.

Lord ESHER, M. R. — This action is brought in a somewhat unusual form, but in effect the plaintiff's case is that the defendants, the executors of George Christy, a copyhold tenant of the plaintiff's manor, have, by selling two of the tenant's beasts, prevented the plaintiff, as lord of the manor, from seizing them as heriots, and that that gives the plaintiff a right of action against them for the value of the beasts. Mr. Justice WILLS, at the trial of the action before him without a jury, held that, with regard to one only of the two tenements as to which the claim was made, the lord of the manor was entitled to seize the tenant's best beast for a heriot. The defendants have appealed against that decision, and allege that he was not. The real question is whether, upon the death of the tenant of this particular copyhold tenement within the manor, the lord of the manor had the right to seize a beast of the tenant which at that time was not within the manor at all, but was outside it. It seems to me that Mr. Justice WILLS has based his judgment upon the ground that, although it was not proved that by the custom of the manor the lord had a right to seize a beast upon the death of the tenant of this particular tenement, yet there was proof from which he could infer that there was originally an agreement between the lord of the manor and the copyholder of the tenement that the copyholder and his successors should be liable to heriot, and, consequently, that the tenement was held, not by a customary heriot, but by heriot service, in which case the lord was entitled to seize his beast wherever it might be, whether within or without the manor.

The appellants have argued that the tenement, being a copyhold tenement, cannot be held by heriot service, but that if it can

be proved that a heriot was due by the custom of the manor, such heriot must be a customary heriot, and, being a customary heriot, only applies to beasts within the manor at the time of the death of the tenant, and not to those without, and therefore this beast could not have been seized. To that argument the answer of the respondent's counsel is that, although they could argue that the tenement is held by heriot service, and that the heriot is not a customary heriot, yet accepting the appellants' position that it is a customary heriot, they dispute the conclusion to which the appellants leap without authority, and, indeed, against authority, that, the heriot being customary, the property in the beast did not pass to the lord at the time of the death of the tenant, because at that time the beast was not on the manor. Assuming, they say, the heriot to be a customary heriot, the property in the beast passed to the lord on the death of the tenant just as it would pass on heriot service if it stood alone without there being any manor, and the lord had the right to seize a beast which was off the manor at the time of the death of the tenant. If that be so, even though Mr. Justice WILLS was wrong in his reasoning upon the question which he decided, his conclusion would be right.
I think that it is right. I have *great difficulty in seeing [*51] how the heriot claimed — inasmuch as it is claimed in respect of a copyhold tenement — can be proved at all if it be not proved by the custom of the manor. My present opinion is that it cannot be proved except by the custom of the manor. If there is evidence that the heriot has been payable for such a length of time that it is right to assume it was always payable from time immemorial — if the payment went on so long as to become a custom, then the heriot is a customary heriot, and is proved by the custom of the manor, and there is no necessity to go outside the custom. Here Mr. Justice WILLS held that as to this tenement a heriot has been paid so long that it is right to assume it has been paid from time immemorial, and it seems to me that the proper inference is that it is a part of the custom of this manor and that it is a customary heriot. I do not, therefore, for myself, agree with him in saying that it is not a customary heriot, but that the tenement is held by heriot service; and I think that the proper inference is that it is a customary heriot of this manor.

Then comes the question whether, the heriot being a customary heriot, the beast could be seized outside the manor. I think there

is authority to show that, whether the heriot is a customary heriot or due by heriot service, upon the happening of that which gives a right of succession to the tenement, the property in the best beast of the tenant, as soon as that is ascertained, passes at once to the lord of the manor. It is not necessary that he should actually seize it. If he fixes upon it by description, or declares his choice in any clear way that would identify the beast, then from the moment of the inheritance falling the beast becomes his beast, although he does not seize it; and by the common law if a beast be the property of one person and is, against his will, in the possession of some other person, to whom he has given no license, and with whom he has no relation, the owner has a right to take it wherever it is, and if the other person misappropriates it the owner has a right of action against that person.

The only remaining question is whether, assuming the heriot to be a customary heriot, the property in the beast passes so that the lord can seize it wherever it is. It is a question of authority, as it seems to me. We have the proposition laid down in distinct terms in *Parker* v. *Gage*, both in Holt's Reports and in Shower's King's Bench Reports. We have the same proposition in Watkins on Copyholds (vol. ii., p. 163, 4th ed. 1825), and we have it again equally clearly laid down in the note to *Lanyon* v. *Carne* in Williams' Saunders. It is impossible to decide the question contrary to these authorities, when there is no authority for the contrary proposition. I think, therefore, that Mr. Justice WILLS was in the result right in deciding that the lord of the manor had the right to seize the beast, although it was not within the manor, and that the appeal must be dismissed.

LOPES, L. J. — I think that the question which we have to decide is, whether the lord of the manor was justified in seizing this beast for a heriot outside his manor. It seems to me that there are two kinds of heriots, — customary heriots and heriots due by heriot service. Heriot service I understand to be founded on a reservation in a lease or a grant, and customary heriots upon the custom of a particular manor. During the course of the case, and in the judgment of Mr. Justice WILLS, the question has arisen whether or not heriot service can attach to copyhold tenure. For the purpose of this case I think it is unnecessary to decide it, but, speaking for myself, I am unable to see why it should not attach. If the receipt of such a payment is proved for a large number of

years, why should it not be presumed that the lord of the manor, when he granted out the lands of the manor to different persons, came to an arrangement with some of the villeins that a certain specified payment should be made? In course of time it may be that this payment became crystallised into a custom, but I cannot see why a presumption of the kind should not be made, and why the legal origin of it may not be attributed to heriot service, as Mr. Justice WILLS thought. But it is unnecessary for the purpose of the case to decide the question.

[*52] * It is now admitted by the appellants that the heriot is a customary heriot; and the question is whether, in the case of heriot custom, the lord can seize it outside the manor. To my mind there is abundant authority that he can. Many authorities have been cited. I will not attempt to deal with them all, but I will refer to Comyn's Digest, title "Copyhold," K. 25, as to heriot custom, and how it shall be recovered by seizure. It is there said that "by the death of the tenant the property of an heriot custom is vested in the lord immediately, and therefore the lord may seize an heriot custom, but not distrain for it, and he may seize in any place, but he cannot seize the beast of another." Then in Williams' Saunders Reports, in the note to *Lanyon* v. *Carne*, I find it said, with respect to a heriot due by the custom of a manor, that "as the property of it vests immediately in the lord on the death of the tenant, or on an alienation by him, the lord may seize it in any place, though he cannot distrain for it." There is also the case of *Parker* v. *Gage*, in Holt's Reports and in Shower's Reports, to the same effect. There is therefore abundance of authority upon the point, and I think therefore that the Court is justified in coming to the conclusion that the lord was in this case justified in seizing a beast outside the manor as and for heriot custom.

I have carefully looked at the different pleas that have been pleaded in cases in which the lord has had to justify the seizure of a heriot custom, and I do not find in any one of those pleas any statement that the seizure took place within the manor. I come therefore to the conclusion that the decision of Mr. Justice WILLS, although it may be that he did not arrive at it by the same reasoning, is correct, and ought to be affirmed, and that the appeal must be dismissed.

RIGBY, L. J. — The real question we have to decide in this case

is whether the lord of the manor became entitled to a heriot in respect of a copyhold hereditament held of his manor upon the death of a tenant. The tenant was at that time possessed of a beast which, as I understand, had never been upon the manor, and, at any rate, was not on it at the time of his death. At the commencement of the argument a very difficult question was raised by the appellants' counsel as to whether heriot service could attach upon a copyhold in a manor. If I had to decide that question I should not be prepared to say that it was possible. Heriot service, in my judgment, is due to a reservation in a grant, and I cannot see how it is possible to get back to such an origin of a heriot in the case of a copyhold. It is the custom of the manor which decides all the rights of a copyhold tenant of the manor. Apart from the custom of the manor, he is a tenant at will and has no rights at all. The custom must be proved by evidence that it has existed from time immemorial — from time which is outside legal memory — and there must be nothing to the contrary. That being so, the legal conclusion is that it is a custom. Now, I cannot see how it is possible to get behind the time of legal memory to find a grant or a reservation. When you get back to the time of legal memory you find that a custom has always existed, if the case be so, and because it is a custom, and for no other reason, it regulates the rights of the tenants of the manor. I do not think that we can go behind the time of legal memory and suggest a grant, because, in the first place, I do not think that there is any instance of such a presumption arising in law; and, secondly, I do not think that it is consistent with the relation of lord and copyhold tenant, whose tenancy is still a tenancy at will except so far as it has been made better by custom.

But then comes a further question. At first I thought that one of the parties denied the existence of a heriot custom; but it seems to be admitted on both sides that there is a custom which entitles the lord to a heriot in respect of one tenement, and it seems further that no objection can be taken to the custom on the ground that it does not extend to all the tenements of the manor, because there is also a custom of the manor to accept a composition for the payment of a heriot, which then upon the payment of a composition ceases to be payable. It being then an admitted fact that
[* 53] a legal customary heriot is payable in respect of this * tenement, it is suggested by the appellants that because the cus-

tom is a custom of a particular manor, it must, as regards all its incidental effects, be confined within the ambit of the manor; and — for this is the important point — that the lord could not go outside the manor to seize his beast. It is possible that there might be such a custom, but we have a clear and binding series of authorities in law that as a general rule a customary heriot vests the property in the beast in the lord upon the death of the tenant. Of course, if the tenant has more beasts than the lord is entitled to seize, the lord must choose the beast he wishes to have; but if the lord is entitled to one beast only, and there be no beast but one, no act of the lord is needed. The property in that beast vests in the lord by the custom upon the death of the tenant. In this case it is not disputed that the beast, the value of which is claimed, was the best beast of the tenant, and in accordance with the general rule that would vest in him at once. A custom must no doubt be limited in some way by the manor itself. You cannot have the custom of a manor extending to hereditaments outside the manor, but there is nothing illegal — in fact, it seems to be a general rule — in a custom which vests the best beast of a tenant wherever it be found, provided that it belongs to the tenant, in the lord of the manor.

I do not think that we need trouble about the form of the action. The case is perfectly simple. If the beast in question was seizable outside the manor, the plaintiff was entitled to it, or to the value of it. The verdict, therefore, for the plaintiff must be supported, although, so far as I am concerned, upon totally different grounds from those on which Mr. Justice WILLS based his decision. *Appeal dismissed.*

ENGLISH NOTES.

The above case exemplifies the survival in England of perhaps the oddest of manorial customs. Although the custom more frequently applies to copyhold tenements, a heriot may be due by custom upon the death of a free tenant holding an estate in fee simple. *Damerell* v. *Protheroe* (1847), 10 Q. B. 20, 16 L. J. Q. B. 170, 11 Jur. 331.

Where a copyhold tenement, held by heriot custom, becomes the property of several holders as tenants in common, the lord is entitled to a heriot from each of them; but if the several portions are reunited in one person, one heriot only is payable. *Garland* v. *Jekyll* (1824), 2 Bing. 273, 2 L. J. (O. S.) C. P. 227, 27 R. R. 630; *Holloway* v. *Berkeley* (1826), 6 B. & C. 2, 30 R. R. 228.

The right to take a heriot on the death of a tenant does not become barred by reason of neglect to seize a heriot when one became due on the death of a former tenant. *Zouche* (*Lord*) v. *Dalbiac* (1875), L. R. 10 Ex. 172, 44 L. J. Ex. 109, 33 L. T. 221, 23 W. R. 564.

The rights belonging to a manor are considered as one with it and pass by a grant of the manor, without any particular words, and even without express mention of appurtenances. Such are the rights to mines and minerals in the lord's waste. *Attorney-General* v. *Ewelme Hospital* (1853), 17 Beav. 366, 22 L. J. Ch. 846 An advowson or right of a similar nature, appendant to a manor, will pass in like manner at common law, by the grant of the manor. *Ib.*; and *Whistler's Case*, 10 Co. Rep. 63 a. But by the statute *De Prerogativâ Regis*, 17 Edw. II., c. 15, an advowson will not pass by the King's grant of a manor, unless expressly mentioned.

MARRIAGE.

No. 1. — DALRYMPLE *v.* DALRYMPLE.
(1811.)

No. 2. — REG. *v.* MILLIS.
(H. L. 1844.)

RULE.

ACCORDING to the canon law as existing before the Council of Trent, — which is the general basis of the law of marriage in Christian countries, so far as not affected by statute or custom having the force of law in the particular country, — marriage is effected by the consent *de præsenti* of a man and woman to their exclusive and permanent union as man and wife.

In England it has been decided by the House of Lords — on an equal division of opinion on the question put in the negative in favour of a prisoner indicted for bigamy — that the presence of a priest (before the Reformation) or (after the Reformation) of a person in holy orders was necessary in order to a valid marriage.

No. 1. — Dalrymple v. Dalrymple, 2 Hagg. Const. 54, 55.

Dalrymple v. Dalrymple.

2 Hagg. Const. 54–137.

Marriage. — Law of Scotland. — Lex loci actûs.

Marriage by contract without religious celebration, according to the law [54] of Scotland, held to be valid. Distinction, as to the state of one of the parties being an English officer on service in that country, not sustained.

This was a case of restitution of conjugal rights, brought by the wife against the husband, in which the chief point in discussion was, the validity of a Scotch marriage, *per verba de præsenti*, and without religious celebration: one of the parties being an English gentleman, not otherwise resident in Scotland than as quartered with his regiment in that country.

Judgment.

Sir WILLIAM SCOTT. — The facts of this case, which I shall enter upon without preface, are these: Mr. John William Henry Dalrymple is the son of a Scotch noble family; I find no direct evidence which fixes his birth in England, but he is proved to have been brought up from very early years in this country. At the age of nineteen, being a cornet in his majesty's dragoon guards, he went with his regiment to Scotland in the latter end of March, or beginning of April, 1804, and was quartered in and near Edinburgh during his residence in that country. Shortly after his arrival, he became acquainted with Miss Johanna Gordon, the daughter of a gentleman in a respectable condition of life. What her age was does not directly appear, she being described as of the age of twenty-one years and upwards; she was, however, young enough to excite a passion in his breast, and it appears that she made him a return of her affections: he visited frequently at her father's house in * Edinburgh, and at his seat in the [*55] country, at a place called Braid. A paper without date, marked No. 1, is produced by her; it contains a mutual promise of marriage, and is superscribed, "a sacreed promise." A second paper, No. 2, produced by her, dated May 28, 1804, contains a mutual declaration and acknowledgment of a marriage. A third paper, No. 10, produced by her, dated July 11, 1804, contains a renewed declaration of marriage made by him, and accompanied by a promise of acknowledging her, the moment he has it in his power; and an engagement on her part, that nothing but the

greatest necessity shall compel her to publish this marriage. These two latter papers were inclosed in an envelope, inscribed "Sacreed Promises and Engagements," and all the three papers are admitted, or proved in the cause, to be of the handwriting of the parties whose writing they purport to be.

It appears that Mr Dalrymple had strong reasons for supposing that his father and family would disapprove of this connection, and to a degree that might seriously affect his fortunes; he, therefore, in his letters to Miss Gordon, repeatedly enjoined this obligation of the strictest secrecy; and she observed it, even to the extent of making no communication of their mutual engagements to her father's family; though the attachment, and the intercourse founded upon it, did not pass unobserved by one of her sisters, and also by the servants, who suspected that there were secret ties, and that they were either already, or soon would be married. He wrote many letters to her, which are exhibited in the cause, expressive of the warmest and most devoted passion, and of unalterable fidelity to his engagements, in almost all of them [* 56] applying the * terms of husband and wife to himself and her. It appears that they were in the habit of having clandestine nocturnal interviews, both at Edinburgh and Braid, to which frequent allusions are made in these letters. One of the most remarkable of these nocturnal interviews, passed on the 6th of July at Edinburgh, where she was left alone with two or three servants, having declined to accompany her father and family (much to her father's dissatisfaction) to his country-house at Braid. There is proof enough to establish the fact, in my opinion, that he remained with her the whole of that night. He continued to write letters of a passionate and even conjugal import, and to pay nocturnal and clandestine visits during the whole of his stay in Scotland; but there was no cohabitation of a more visible kind, nor any habit and repute, as far as appears but what existed in the surmises of the servants and of the sister. His stay in that country was shortened by his father, who came down, alarmed, as it should seem, by the report of what was going on, and removed him to England on or about the 21st of July.

The correspondence appears to have slackened, though the language continued equally ardent, if I judge only from the number exhibited of the letters written after his return; though it is possible, and indeed very probable, there may be many more

which are not exhibited. No letters of Miss Gordon's, addressed to him, are produced; he has not produced them, and she has not called for their production. In England he continued till 1805, when he sailed for Malta. His last letter, written to her on the eve of his departure, reinforces his injunctions of secrecy, and conjures her to withhold all credit from reports that might reach her * of any transfer of his affections to another; it [* 57] likewise points out a channel for their future correspondence, through the instrumentality of Sir Rupert George, the First Commissioner of the Board of Transports. He continued abroad till May, 1808, with the exception of a month or two in the autumn of 1806, when he returned for a purpose unconnected with this history, unknown to his father, and, as it appears, to this lady. It is upon this occasion that the alteration of his affection first discloses itself in conversations with a Mr. Hawkins, a friend of his family, to whom he gives some account of the connection which he had formed with Miss Gordon in Scotland, complains of the consequences of it, in being tormented with letters from her, which he was resolved never to read in future; and having reason to fear she would write others to his father, he requested Mr. Hawkins to use all means of intercepting any letters which she might write either to the one or the other.

Mr. Hawkins executed this commission by intercepting many letters so addressed, though, in consequence of her extreme importunity, he forwarded two or three, as he believes, of those addressed to Mr. Dalrymple; and he at length wrote to her himself, about the end of 1806, or beginning of 1807, and strongly urged her to desist from troubling General Dalrymple with letters. This led to a correspondence between her and Mr. Hawkins; and it was not till the death of Mr. Dalrymple's father (which happened in the spring of the year 1807) that she then asserted her marriage rights, and furnished him with copies of these important papers, which she denominates, according to the style of the law of Scotland, her "Marriage Lines." She took no steps to enforce * her rights by any process of law. Upon the unlooked-for [* 58] return of Mr. Dalrymple, in the latter end of May, 1808, he immediately visited Mr. Hawkins, who communicated what had passed by letter between himself and Miss Gordon; and suffered him, though not without reluctance, to possess himself of two of her letters, which Mr. Darlymple has exhibited. Mr. Hawkins

however dismissed him with the most anxious advice to adhere to the connection he had formed; and by no means to attempt to involve any other female in the misery that must attend any new matrimonial connection. Within a very few days afterwards, Mr. Dalrymple marries Miss Laura Manners, in the most formal and regular manner. Miss Gordon, who had before heard some reports of no very definite nature, instantly, upon hearing authentic news of this event, takes measures for enforcing her rights; and being informed that he is amenable only to this jurisdiction, she immediately applies for its aid, to enforce the performance of what she considers as a marriage contract.

The cause has proceeded regularly on both sides, and has been instructed with a large mass of evidence, much of it replete with legal erudition, for which the Court has to acknowledge great obligations to the gentlemen who have been examined in Scotland. It has also been argued with great industry and ability by the counsel on both sides, and now stands for final judgment.

Being entertained in an English Court, it must be adjudi-
[*59] cated according to the principles of English law * applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland.

I am not aware that the case so brought here is exposed to any serious disadvantage, beyond that which it must unavoidably sustain in the inferior qualifications of the person who has to decide upon it, to the talents of the eminent men, to whose judgment it would have been submitted, in its more natural forum. The law-learning of Scotland has been copiously transmitted; the facts of the case are examinable on principles common to the law of both countries, and indeed to all systems of law. It is described as an advantage lost, that Miss Manners, the lady of the second marriage, is not here made a party to the suit; she might have been so in point of form, if she had chosen to intervene; in substance she is; for her marriage is distinctly pleaded and proved, and is as much therefore under the eye, and under the attention, and under the protection of the Court, as if she were formally a

party to the question respecting the validity of this marriage, which is in effect to decide upon the validity of her own. For I take it to be a position beyond the reach of all argument and contradiction, that if the Scotch marriage be legally good, the second or English marriage must be legally bad. Another advantage intimated to be lost is this, that the native forum * would have compelled the production of her letters to him, [* 60] for the purpose of seeing whether anything in them favoured his interpretation of the transaction. Surely, according to any mode of proceeding, there can be no need of a compulsory process to extract them from the person in whose possession they must be, if they exist at all. If they contain such matter as would favour such an interpretation, he must be eager to produce them, for they would constitute his defence; not being produced, the necessary conclusion is, either that they do not exist, or that they contain nothing which he could use with any advantage for such a purpose. The considerations that apply to the indiscretions of youth, to the habits of a military profession, and to the ignorance of the law of Scotland, arising from a foreign birth and education, are common to both, and, I might say, to all systems of law. They are circumstances which are not to be left entirely out of the consideration of the Court, in weighing the evidence for the establishment of the facts, but have no powerful effect upon the legal nature of the transaction when established.

The law which, in both countries, allows the minor to marry, attributes to him, in a way which cannot be legally averred against, upon the mere ground of youth and inexperience, a competent discretion to dispose of himself in marriage; he is arrived at years of discretion, *quoad hoc*, whatever he may be with respect to other transactions of life, and he cannot be heard to plead the indiscretion of minority. Still less can the habits of a particular profession exonerate a man from the general obligations of law. And with respect to any ignorance arising from foreign birth and education, * it is an indispensable rule of law, as [* 61] exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowl-

edge, and sense of the obligation, which the law would impose upon him by virtue of that engagement. According to the judgment of all the learned gentlemen who have been examined, the law of Scotland binds Mr. Dalrymple, though a minor, a soldier, and a foreigner, as effectively as it would do if he had been an adult, living in a civil capacity, and with an established domicil in that country.

The marriage, which is pleaded to be constituted, by virtue of some or all of the facts, of which I have just given the outline, and to which I shall have occasion more particularly to advert in the course of my judgment, has been in the argument described as a clandestine and irregular marriage. It is certainly a private transaction between the individuals, but it does not of course follow that it is to be considered as a clandestine transaction, in any ignominious meaning of the word; for it may be that the law of the country in which the transaction took place may contemplate private marriages, with as much countenance and favour as it does the most public. It depends likewise entirely upon the law of the country, whether it is justly to be styled an irregular marriage. In some countries one only form of contracting marriage is acknowledged, as in our own, with the exception [* 62] * of particular indulgences to persons of certain religious persuasions; saving those exceptions, all marriages not celebrated according to the prescribed form are mere nullities; there is and can be no such thing in this country as an irregular marriage. In some other countries, all modes of exchanging consent being equally legal, all marriages are on that account equally regular. In other countries, a form is recommended and sanctioned, but with a toleration and acknowledgment of other more private modes of effecting the same purpose, though under some discountenance of the law, on account of the non-conformity to the order that is established. What is the law of Scotland upon this point?

Marriage, being a contract, is of course consensual (as is much insisted on, I observe, by some of the learned advocates), for it is of the essence of all contracts, to be constituted by the consent of parties. *Consensus non concubitus facit matrimonium*, the maxim of the Roman civil law, is, in truth, the maxim of all law upon the subject; for the *concubitus* may take place, for the mere gratification of present appetite, without a view to anything further;

but a marriage must be something * more: it must be an [* 63] agreement of the parties looking to the *consortium vitæ;* an agreement indeed of parties capable of the *concubitus,* for though the *concubitus* itself will not constitute marriage, yet it is so far one of the essential duties, for which the parties stipulate, that the incapacity of either party to satisfy that duty nullifies the contract. Marriage, in its origin, is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind. It is the parent, not the child, of civil society, "Principium urbis et quasi seminarium reipublicæ." Cic. de Off. 1, 17. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilised countries acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded. It then becomes a religious, as well as a natural and civil contract; for it is a great mistake to suppose that, because it is the one, therefore it may not likewise be the other. Heaven itself is made a party to the contract, and the consent of the individuals, pledged to each other, is ratified and consecrated by a vow to God. It was natural enough that such a contract should, under the religious system which prevailed in Europe, fall under ecclesiastical notice and cognisance, with respect both to its theological and its legal constitution; though it is not * unworthy of remark that, amidst the manifold ritual [* 64] provisions made by the Divine Lawgiver of the Jews for various offices and transactions of life, there is no ceremony prescribed for the celebration of marriage. In the Christian church marriage was elevated in a later age to the dignity of a sacrament, in consequence of its divine institution, and of some expressions of high and mysterious import respecting it contained in the sacred writings. The law of the Church, the canon law (a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded in the wisdom of man), although, in conformity to the prevailing theological opinion, it reverenced marriage as a sacrament, still so far respected its natural and civil origin, as to consider, that where the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest. It had even in that state the character of a sacrament; for it is a misapprehen-

sion to suppose that this intervention was required as matter of necessity, even for that purpose, before the Council of Trent. It appears from the histories of that council, as well as from many other authorities, that this was the state of the earlier law, till that council passed its decree for the reformation of mar-

[*65] riage. The consent of two parties *expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name of *Sponsalia per verba de præsenti* improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonials of marriage, and therefore Brower justly observes, *Jus pontificium nimis laxo significatu, imo etymologiâ invitâ ipsas nuptias sponsalia appellavit.* The expression, however, was constantly used in succeeding times to signify clandestine marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; secondly, to mere engagements for a future marriage, which were termed *sponsalia per verba de futuro*, a distinction of *sponsalia* not at all known to the Roman civil law. Different rules, relative to their respective effects in point of legal consequence, applied to these three cases, — of regular marriages, of irregular marriages, and of mere promises or engagements. In the regular marriage everything was presumed to be complete and consummated both in substance and in ceremony. In the irregular marriage everything was presumed to be complete and consummated in substance but not in ceremony; and the ceremony was enjoined to be undergone as matter of order. In the promise, or *sponsalia de futuro*, nothing was presumed to be complete or consummate either in substance or ceremony.

Mutual consent would release the parties from their en-

[*66] gagement; and *one party, without the consent of the other, might contract a valid marriage, regularly or irregularly, with another person; but if the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection. I spare myself the trouble of citing from the text-books of the canon law the passages that support these assertions. Several of them have been cited in the course of this discussion, and they all lie open to

obvious reference in Brower and Swinburn, and other books that profess to treat upon these subjects. The reason of these rules is manifest enough. In proceedings under the canon law, though it is usual to plead consummation, it is not necessary to prove it, because it is always to be presumed in parties not shown to be disabled by original infirmity of body. In the case of a marriage *per verba de præsenti*, the parties there also deliberately accepted the relation of husband and wife, and consummation was presumed as naturally following the acceptance of that relation, unless controverted in like manner. But a promise *per verba de futuro* looked to a future time; the marriage which it contemplated might perhaps never take place. It was defeasible in various ways; * and, therefore, consummation was not to be [* 67] presumed; it must either have been proved or admitted. Till that was done, the relation of husband and wife was not contracted; it must be a promise *cum copula* that implied a present acceptance, and created a valid contract founded upon it.

Such was the state of the canon law, the known basis of the matrimonial law of Europe. At the Reformation, this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin; and on that account, as well as of the religious forms that were prescribed for its regular celebration, an holy estate, holy matrimony, but it likewise retained those rules of the canon law which had their foundation not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which had the cognisance of matrimonial causes, enforced these rules, and amongst others, that rule which held an irregular marriage, constituted *per verba de præsenti*, not followed by any consummation shown, valid to the full extent of voiding a subsequent regular marriage contracted with another person. A statute passed in the reign of Henry VIII. (32 Hen. VIII., cap. 38, s. 2) proves the fact by reciting, that "Many persons after long continuance in matrimony, without any allegation of either of the parties, or any other at their marriage, why the same matrimony should not be good, just, and * lawful, and after the same matri- [* 68] mony solemnised, and consummate by carnal knowledge, have by an unjust law of the Bishop of Rome, upon pretence of a

former contract made, and not consummate by carnal copulation, been divorced and separate," and then enacts, "that marriages solemnised in the face of the Church, and consummate with bodily knowledge, shall be deemed good, notwithstanding any pre-contract of matrimony, not consummate with bodily knowledge, which either or both the parties shall have made." But this statute was afterwards repealed, as having produced horrible mischiefs, which are enumerated in very declamatory language in the preamble of the statute 2 Edw. VI.; and Swinburn, speaking the prevailing opinion of his time, applauds the repeal as worthily and in good reason enacted. The same doctrine is recognised by the temporal Courts as the existing rule of the matrimonial law of this country, in *Bunting's Case*, 4 Coke, 29. "John Bunting, father of the plaintiff, and Agnes Adenshall, contracted marriage *per verba de præsenti*, and afterwards, on the 10th of December, 1555, the said Agnes took to husband Thomas Twede; and afterwards, on the 9th of July, Bunting libelled against her in the Court of Audience, *et decret. fuit quod prædict.* Agnes subiret matrimonium cum præfato Bunting, et insuper pronunciatum fuit dictum matrimonium fore nullum." Though the common law certainly had scruples in applying the civil rights of dower,

[*69] *and community of goods, and legitimacy in the cases of these looser species of marriage. In the later case of *Collins* and *Jesson*, 3 Anne, it was said by HOLT, Chief Justice, and agreed to by the whole Bench, that "if a contract be *per verba de præsenti*, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God, as if it had been *in facie ecclesiæ*." "But a contract *per verba de futuro*, which do not intimate an actual marriage, but refer to a future act, is releasable." 2 Salk. 437; Mod. 155. In *Wigmore's Case*, 2 Salk. 438, the same Judge said, "*A* contract *per verba de præsenti* is a marriage; so is a contract *de futuro;* if the contract be executed, and he take her, 't is a marriage, and they cannot punish for fornication." In the Ecclesiastical Court the stream ran uniformly in that course. One of the most remarkable is that furnished by the diligence of Dr. Swabey, on account of its striking resemblance to the present case — I mean *the case of Lord Fitzmaurice*, son of the Earl of Kerry, *coram Deleg.* in 1732. There were in that case, as in the present, three engagements in writing.

The first was dated June 23, 1724, and contained these words, "We swear we will marry one another." The second, dated July 11, 1724, was to this effect: "I take you for my wife, and swear never to marry any other woman." This last contract was repeated in December, of the same year. It was argued there, as here, that the iteration of the declaration proved that the parties did not depend upon their first declaration, and was in effect a disclaimer of it. But the Court, composed of a *full [*70] commission, paid no regard to the objection, and found for the marriage, and an application for a commission of review, founded upon new matter alleged, was refused by the CHANCELLOR. Things continued upon this footing till the Marriage Act, 26 Geo. II., c. 33, described by Mr. Justice BLACKSTONE, Book I. chap. 15, s. 3, "an innovation on our laws and constitution," swept away the whole subject of irregular marriages, together with all the learning belonging to it, by establishing the necessity of resorting to a public and regular form, without which the relation of husband and wife could not be contracted.

It is not for me to attempt to trace the descent of the matrimonial law of Scotland since the time of the Reformation. The thing is in itself highly probable, and we have the authority of Craig (lib. 2, dieg. 18, s. 17) for asserting that the canon law is its basis there, as it is everywhere else in Europe, "totam hanc questionem pendere a jure pontificio," though it is likely enough that in Craig's time, who wrote not long after the Reformation, the consistorial law might be very unsettled, as Mr. Cay in his deposition describes it to have been. It is, however, admitted by that learned gentleman, that it settled upon its former foundations, for he expressly says, that the canon law in these matters is a part of the law of the land; that the Courts and lawyers reverence the decretals and other books of the more ancient canon law; and I observe that in the depositions of most of the learned witnesses, and indeed in all the *factums* that I have seen upon these subjects, they are referred to as authorities. Several regulations, *both ecclesiastical and civil, canons and statutes, [*71] have prescribed modes of celebrating marriage. Mr. Cathcart, in particular, refers to them in his deposition. Some of these appear to have been made in times of great ferment, during the conflict between the Episcopal and Presbyterian parties, and are therefore, I presume, of transitory and questionable authority.

Mr. Cathcart infers that the whole of the Scotch statutes hold solemnisation by a clergyman, or, as he expresses it, some one assuming the functions of a clergyman, as necessary. It rather appears difficult to understand this consistently with the fact, that other marriages have always been held legal and valid. What the form of solemnisation by a clergyman is, I have not been accurately informed; prescribed ritual forms are not, I believe, admitted by the Church of Scotland for any office whatever. Whether the clergyman merely receives the declaration as a witness, or pronounces the parties, by virtue of his spiritual authority, to be man and wife, as in our form, does not distinctly appear. I observe that Mr. Gillies says in his deposition, "That to make marriage valid, it is not necessary that it should be celebrated *in facie ecclesiæ*, but *rebus integris* it can only be constituted by a consent adhibited in the presence of a clergyman, or in some mode equivalent to an actual celebration." So Lord Braxfield in a loose note, which is introduced, is made to say, "Private consent is not the consent the law looks to; it must be before a priest, or something equivalent." Now what are these equivalents? and how to be provided? Are they to be carved out by the private [*72] fancy and judgment of the individuals? If so, *though equivalent, they can hardly be deemed the regular forms, and yet appear to stand on a footing of equal authority. I observe, likewise, that a marriage before a magistrate is alluded to in some passages, as nearly equal to that before a minister, though certainly not a marriage *in facie ecclesiæ*, in any proper sense of that expression.

Sir Ilay Campbell states, in an opinion of his given to the English Chancery (Lib. Reg. A. 1780, f. 552), in a case furnished to me by Dr. Stoddart, "That marriages, irregularly performed without the intervention of a clergyman, are censurable, and formerly the parties were liable to be fined or rebuked in the face of the church, but this for a long time has not been practised." The regulations, therefore, whatever they may be, are not penally enforced; and it does not appear that they are enforced by any sense of reputation or of obligation imposed by general practice. The advocates who describe the modes of marriage by the terms "regular" and "irregular," seem, as far as I can collect, to attribute no very distinctive preference to the one over the other; at any rate, the distinction between them is not very strongly marked in

the existing usage of that country. Many of the marriages which take place between persons in higher classes of society are contracted in such irregular forms, if so to be denominated. They appear to create no scandal; to give no offence. The parties are not reprobated by public opinion, nor is legal censure actually applied. But taking it, that the distinction between the regular and irregular marriages was much stronger than I am enabled, by the present *evidence, to suppose, the question [*73] still remains to be examined, how far actual consummation is required, by the law of Scotland, in marriages which are so to be deemed irregular.

The libel is drawn in a form not calculated to extract, simply and directly, a distinct statement of what the law of Scotland may be upon this point; for it collects together all the points of which the party conceives she can avail herself, consummation included, as matters of fact and matters of law, and then alleges, that, by the law of Scotland, this aggregate constitutes a marriage; without providing for a possible case in which she might establish some of these matters and fail in establishing others, *e. g.*, if she failed in proof of a *copula*, but succeeded in establishing a solemn compact. If the law had been more distinctly understood here at the commencement of this suit, the libel would probably have been drawn with more accommodation to the possible state of facts that might ultimately call for the proper specific rule of law. The advocates of Scotland have, to a great degree, supplied the want of that distinctness in the libel, by bringing forward the distinctions in their answers, and applying what they conceive to be the law, applicable to the possible case, that may result from the evidence; most of them have stated what they conceive to be the law, first, in the case of a promise *de futuro;* secondly, of a promise *cum copula;* thirdly, of a solemn declaration or acknowledgment of marriage; and, fourthly, of such a declaration accompanied by a *copula.* It may be convenient to consider, first, whether the present case is a case of promise, or of present declaration and acknowledgment. *It will be convenient [*74] to do so in two respects: The first convenience attending it is, that the fact itself is determinable enough upon the face of written existing instruments. It is not to be gathered from the loose recollections of loose verbal declarations, not guarded either in the expressions of those who made them, or in the memory of

those who attest them. The second convenience resulting from this is, that a large portion of the inquiry into the other points of the case may, in a great degree, be rendered superfluous; for if these papers contain mere promises, then have I to consider only the law of promises, as referable to cases accompanied or unaccompanied by a *copula*, leaving out entirely the law that respects acknowledgment and declaration. On the other hand, if they are to be considered as acknowledgments, then the law of promises may be dismissed, except perhaps sometimes to be introduced incidentally for purposes of occasional illustration.

Whether they are to be considered as promises or declarations must be determined upon the contents of the instruments themselves, on such a view as the plain meaning of the words imports, and upon the information of their technical meaning as communicated by the Scotch lawyers; for it is possible that they may be subject to a technical construction different from their obvious meaning. This is the case in the marriage settlements of Scotland. The words of the *stipulatio sponsalitia* are present declaratory words; the parties mutually accept each other, but the engagements they enter into are always technically considered to be mere promises *de futuro*. Those who are conversant in [* 75] * the books of the canon law will recollect the extremely nice distinctions which that law and its commentators have made between expressions of a very similar import in their obvious meaning, as constituting contracts *de præsenti*, or only promises *de futuro*.

The first paper is without date, and is merely a promise. Mr. Dalrymple promises to marry Miss Gordon as soon as it is in his power, and she promises the same; it is subscribed by both their names; is indorsed "A sacreed promise," and is left in her possession. It is pleaded to be the first that was executed by them, and it is highly reasonable to presume that it was so, for no person, I think, would be content to accept such a paper as this, after having received the papers which follow, marked 2 and 10. The paper marked No. 2 is dated on the 28th of May, 1804, and contains these words, "I hereby declare Johanna Gordon is my lawful wife; and I hereby acknowledge John William Henry Dalrymple as my lawful husband." I see no great difference between the expression "declare" and "acknowledge;" the words properly enough belong to the parties by whom they are respec-

tively used, and are perhaps not improperly adapted to the decorums of such a transaction between the sexes. No. 10 is a reiterated declaration on the part of Mr. Dalrymple, accompanied with a promise "that he will acknowledge Miss Gordon as his lawful wife the moment he has it in his power." She makes no repeated declaration, but promises that "nothing but the greatest necessity (necessity which ———— situation alone can justify) shall ever *force her to declare this marriage." [*76] It is signed by him, and by her, describing herself J. Gordon, now J. Dalrymple, and it is dated July 11, 1804. Both the papers are inclosed in an envelope, on which is inscribed "Sacreed promises and engagements." There are promises and engagements that would satisfy these terms, independent of the words which contain the declaration of the marriage. At the same time it is to be observed that the words "promises and engagements" are not improperly applied to the marriage vow itself, which is prospective in its duties, which engages for the performance of future offices between the parties till death shall part them, and to which, in the words of our liturgy, it plights their troth, or in more modern language, pledges their good faith for that future performance. I feel some hesitation in acceding to the remark that the paper marked No. 2 is at all weakened or thrown loose by the mere engagement of secrecy, which seems to be the principal, if not the sole, object of the latter paper, though Mr. Dalrymple has thrown in a renewed declaration of his marriage; that reiterated declaration, though accompanied with a promise of secrecy, cannot, upon any view of the case, be considered as a disclaimer of the former. An engagement of secrecy is perfectly consistent with the most valid, and even with the most regular marriages. It frequently exists even in them from prudential reasons; from the same motives it almost always does in private or clandestine marriages. It is only an evidence against the existence of a marriage, when no such prudential reasons can be *assigned [*77] for it, and where everything arising from the very nature of marriage calls for its publication.

Such is the nature of these exhibits: first, a promise; secondly, that promise merged in the direct acknowledgment of the accomplished fact; thirdly, a renewed admission of the fact on his side, with a mutual engagement for secrecy till the proper time for disclosure should arrive.

In these papers, as set up by Miss Gordon, resides the constitution, as some of the gentlemen who have been examined call it, or as others of them term it, the evidences of the marriage; for it is matter of dispute between these learned persons, whether such papers, when free from all possible impeachment, are constituents, or merely evidences of marriage. It appears to be a distinction not very material in its effects; because if it is to be considered that such papers, so qualified, are only to be treated as evidences, yet if free from all possible impeachments, on the grounds on which the law allows them, as evidences to be impeached, they make full faith of the marriage, they sustain it as effectually as if, according to other ideas, they directly constituted it; they have then become *præsumptiones juris et de jure*, which establish the same conclusion, although in another way.

But these papers must be taken in conjunction with the letters which may control or confirm them. What is the effect of the letters? In almost all of them Mr. Dalrymple addresses Miss Gordon as his wife, and describes himself as her husband. In the first letter he insists upon it, that she shall draw upon him for any money she may stand in need of, "for it is her right," [* 78] and * "in accepting of it she will prove her acknowledgment of it." Her sister he calls his sister. This letter appears by the post-mark to have been written before No. 2, and therefore has been said to be entirely premature, and to give an interpretation to subsequent expressions of the like kind. But *non constat* that it might not be written long after the undated promise by which the parties entered into a solemn engagement to marry. Verbal declarations, similar in their imports to the contents of No. 2, might have passed, for it can hardly be conceived that such a paper could have passed, without many preliminary verbal declarations to the same effect. People do not write in that manner till after they have talked together in the same style. The post-mark on the letter No. 4 is May the 30th, and this letter refers to what passed on the night after the paper No. 2 bears date; in it he says, "You are my wife; to retract is impossible and ever shall be; I have proved my legal right to protect you, which I have most fully established: nothing in this world shall break those ties." The letter No. 5 has these expressions: "Remember you are mine that God Almighty may preserve my wife is the prayer of her husband." No. 6. "It grieves me to

suffer you five minutes from your husband; nothing can change my sentiments, independent even of those sacred ties which unite us. Nothing ever can or should (if 't were possible) annul them. Put that confidence in me which your duty requires. That God may ever preserve my wife, and inspire her with the purest love for her husband, is the first wish of her adoring ——." No. 8. "I have *received letters from town which say that [*79] Lord Stair has heard of our marriage." No. 12. "Whatever money you may want draw on me for without scruple." No. 13, dated May 29, 1805. "Situated as you are, nothing could strengthen the ties which unite us, therefore wish it not to be mentioned that you are my wife till it can be done without injury to ourselves. I insist upon a paper acknowledging yourself as my wife." No. 14, dated June 10, 1805. "Forward to me the paper I requested in my last, and acknowledge yourself my wife — that as we are not immortal I may leave you, in trust of a friend, the small remains of what was once a tolerable fortune; you can't refuse on any legal grounds; do, my dearest wife, forward it." In No. 15, dated June 28, 1805, he says: "I would not give up the title of your sister's brother for any consideration. Don't deny yourself what you require, as I should not wish my wife to appear in anything not consistent with her rank; I will arrange before my departure money-matters, so as to give you every opportunity of gratifying your taste, or any other fancy." In the letter marked 14 he asks her permission to go abroad on account of the distress of his affairs. "Will you allow me to endeavour by a short absence to rectify these things? In asking your consent, I humbly conjure you, dearest love, to pardon me. I solemnly assure you I will not be absent from you very long." In another part of this letter he points out the period of four months as the probable duration of his absence.

Now it is impossible to say that the exhibits Nos. 2 and 10 are at all weakened by the strong *conjugal expres- [*80] sions contained in these letters. Taken together, they, in their plain and obvious meaning, import a recognition of an existing marriage. What is their technical meaning? That information we must obtain from the learned persons who have been examined. Mr. Erskine, Mr. Hamilton, Mr. Cragie, Mr. Hume, and Mr. Ramsay are all clearly of opinion that they are "present declarations." Mr. Cay is equally clear that they "are contracts

de præsenti." Sir Ilay Campbell describes them as "very explicit mutual declarations of marriage between the parties." Mr. Clerk says that No. 2 is evidence of a very high nature to prove that "a marriage had been contracted by the parties; it is a full and explicit declaration of a contract *de præsenti.*" "No. 10," he says, "imports little more than No. 2; it is important evidence to the same effect." Mr. Cathcart and Mr. Gillies, who hold a *copula* in all cases necessary, do not distinctly say under which class of cases the present falls.

Upon this view I think myself entitled to lay aside, at least for the present, the rules of law that apply to promises. The main inquiry will thus be limited to two questions: whether, by the law of Scotland, a present declaration constitutes or evidences a marriage without a *copula;* and, secondly, whether, if it does not, the present evidence supplies sufficient proof that such a requisite has been complied with.

The determination of the first question must be taken from the authorities of that country, deciding for myself and for the parties intrusted to my care, as well as I can, upon their preponderance where they disagree, and feeling that hesitation of judg-
[* 81] ment * which ought to accompany any opinion of mine upon points, which divide the opinions of persons so much better instructed, in all the learning which applies to them.

The authorities to which I shall have occasion to refer are of three classes: first, the opinions of learned professors given in the present or similar cases; secondly, the opinions of eminent writers as delivered in books of great legal credit and weight; and, thirdly, the certified adjudication of the tribunals of Scotland upon these subjects. I need not say that the last class stands highest in point of authority; where private opinions, whether in books or writing, incline on one side, and public decisions on the other, it will be the undoubted duty of the Court, which has to weigh them, *stare decisis.*

Before I enter upon this examination I will premise an observation, from which I deduce a rule that ought, in some degree, to conduct my judgment; the observation I mean is this, that the canon law, as I before have described it to be, is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe. And whether that law remains entire, or has been varied, I take it to be a safe conclusion, that, in all instances

where it is not proved that the law of Scotland has resiled from it, the fair presumption is, that it continues the same. Show the variation, and the Court must follow it; but if none is shown, then must the Court lean upon the doctrine of the ancient general law; for I do not find that Scotland set out upon any original plan of deserting the ancient matrimonial law of Europe, and of forming an entire new code upon principles hitherto unknown * in the Christian world. It becomes of importance, [*82] therefore, to consider what is the ancient general law upon this subject, and on this point it is not necessary for me to restate, that by the ancient general law of Europe, a contract *per verba de præsenti*, or a promise *per verba de futuro cum copulâ*, constituted a valid marriage without the intervention of a priest, till the time of the Council of Trent, the decrees of which Council were never received as of authority in Scotland.

It appears from the case of *Younger*, cited by Sir Thomas Craig (Lib. 2, dieg. 18, s. 19), that, in his time, the practice upon a contract *de præsenti* was the same in Scotland as it continued to be in England till the period of the Marriage Act, viz., to compel the reluctant party to a public celebration as matter of order. This was soon discontinued in Scotland, on account of the apparent incongruity of compelling a man to marry against his will, but with a solemn profession of love and affection to the party who compelled him. But though they discarded the process of compulsion for some such reason as this, which is stated by Mr. Hume, they might still consistently retain the principle, that a present consent constituted a valid marriage. Whether it was retained, is the question I have to examine, assuming first (as I have done) that if the contrary is not shown, it must so be presumed.

The evidence of opinions on this point, taken in this and similar cases, and under similar authority, stands thus: Mr. Erskine, Mr. Cragie, Mr. Hamilton, Mr. Hume, and Mr. Ramsay, who * have been examined upon the question at present [*83] before the Court, are all clear and decided in their opinions, that a declaration *per verba de præsenti* without a *copula* does, by the law of Scotland, constitute a valid marriage. I will not enter into an examination of their authorities where they agree, *Oportet discentem credere*, though, where authorities differ, it is a rule which cannot be universally applied. Still less shall I pre-

sume to discuss their reasonings, except in a few instances, where, however desirous to follow, I find a real inability to accompany them to their conclusions. To the authorities above stated I must add the opinions of the learned persons examined upon the case of *Beamish* and *Beamish*, a case which came before this Court upon a similar question of a Scotch marriage of an Englishman with a Scotch woman in the year 1788, and in which the Court of Arches, to which it was appealed, upon the informations of law obtained from the learned advocates of Scotland, pronounced for the validity of the marriage. Mr. John Millar, Professor of Law at Glasgow, there said, "That, by the law of Scotland, the ceremony of being married by a clergyman was not necessary to constitute a valid marriage. The deliberate consent of parties, entering into an agreement to take one another for husband and wife, was sufficient to constitute a legal marriage, as valid in every respect as that which is celebrated in the presence of a clergyman. Consent must be expressed or understood to be given *per verba de præsenti;* for consent *de futuro*, that is, a promise of marriage, does not constitute actual marriage. By the [* 84] Scotch law, the deliberate * consent of parties constitutes marriage." Mr. John Orr, in his deposition, said, "By the laws of Scotland, a solemn acknowledgment of a marriage having happened between the parties, whether verbally or in writing, is sufficient to constitute a marriage, whether expressed in *verbis de præsenti*, or in an acknowledgment that the marriage took place at a former period. A promise followed by a *copula* would constitute a valid marriage; and a written instrument containing not a consent *de præsenti*, but only stating that the parties were married at a certain time, or even a solemn verbal acknowledgment to this effect, although no actual marriage had taken place, is sufficient to constitute a marriage by the law of Scotland." Mr. Hume said, "Marriage is constituted by consent of parties to take or stand to each other in the relation of husband and wife. The mode or form of consent is not material, but it must be *de præsenti.*" Mr. Erskine and Mr. Robertson agreed in saying, "That a deliberate acknowledgment of the parties that they were married, though not containing a contract *per verba de præsenti*, is sufficient evidence of a marriage, without the necessity of proving the actual celebration." Mr. Clerk, Mr. Gillis, and Mr. Cathcart, who are examined in the present case on the part of Mr.

Dalrymple, are equally clear in their opinions on the other side of the question. Mr. Cay inclines to think a *copula* necessary, "although well aware that a different opinion prevails among lawyers on this point."

Sir Ilay Campbell's opinion upon this important point, which the Court was particularly eager to *learn, is, through [*85] some inaccuracy of the examiner, transmitted in such a manner as to leave it rather a matter of question which of the two opinions he favours; for in the former part of the deposition he is made to say, that "by the general principles of the law of Scotland, marriage is perfected by the mutual consent of parties accepting each other as husband and wife." In words so express and unqualified, pointing to nothing beyond the mutual acceptance of the parties, as perfecting a marriage without reference to any future act as necessary to be done, I thought I had received a judgment of high authority in favour of the ancient rule, that consent without a *concubitus* constitutes a marriage; but in a latter part of the deposition he lays it down that this acknowledgment *per verba de præsenti* must be attended with personal intercourse, prior or subsequent; if so, it throws a doubt upon the precise meaning of the former position, which had declared a marriage perfected by mere mutual acceptance. "Without such intercourse," Sir Ilay Campbell says, "they would resolve into mere *stipulatio sponsalitia*, where the words are *de præsenti*, but the effect future." And here I have to lament the difficulty I find in following so highly respectable a guide to the conclusion, on account of a distinction that strongly impresses itself upon my apprehension. In the *stipulatio sponsalitia* the words *de præsenti* are qualified by the future words that follow, and which imply something more is to be done, — a public marriage to take place; but in the case supposed of a clear present declaration, no such qualifying expressions occur — nothing pointing to future acts as the fulfilment of a *present engagement. I find the greater difficulty in ascer- [*86] taining the decided judgment of this very eminent person, from considering an opinion of his given into the English Court of Chancery (Lib. Reg. A. 1780, F. 552), upon a requisition from that Court, and on which that Court acted in the case of the Scotch marriage. In that case, the case of the marriage of Thomas Thomasson and Catharine Grierson, the opinion, dated August 18, 1781, and remaining on record in Chancery, states a present con-

tract to be sufficient to validate a marriage, without any mention of a *copula*, antecedent or subsequent; the known accuracy of his judgment would never have allowed him to omit this, if it had been considered by him at that time a necessary ingredient in the validity. I might, perhaps, without much impropriety, be permitted to add another legal opinion of equal authority, — the opinion of a person, whose death is justly lamented as one of the greatest misfortunes that have recently visited that country. I need not mention the name of the Lord President BLAIR, upon whose deliberate advice and judgment this present suit has been asserted in argument, and without contradiction, to have been brought into this Court.

Upon this state of opinions, what is the duty of the Court? How am I to decide between conflicting authorities? For to decide I am bound. Far removed from me be the presumption of weighing their comparative credit; it is not for me to construct a scale of personal weight amongst living authorities, with [* 87] most of whom I * am acquainted no otherwise than by the degree of eminence which situation, and office, and public practice, and reputation, may have conferred upon them. In such a case I am under the necessity of quitting the proper legal rule of estimating *pondere, non numero;* I am compelled to attend a little to the numerical majority (though I admit this to be a sort of *rusticum judicium*), and finding that much the greater number of learned persons recognise a rule consonant to that which, in ancient times, governed the subject universally, I think I am not qualified to say, that as far as the weight of opinion goes, it is proved that the law of Scotland has innovated upon the ancient general rule of the marriage law of Europe. It appears to me, that the common mode of expression used in Scotland, which is constantly recurring, is no insignificant proof of the contrary doctrine. It is always expressed, Promise *cum copulâ;* the *copula* is in the ordinary phrase, a constant adjunct to the promise, never to the *contract de præsenti*, strongly marking the known distinction between the two cases, that the latter by itself worked its own effect, and that the other would be of no avail, unless accompanied with its constant and express associate.

I come now to the text authorities of the Scotch writers. The first to whom I shall refer is Craig (Jus Feudale, lib. 2, dieg. 18, ss. 17, 19). *It* does not appear to me that he is of great authority

either one way or the other: he admits generally that the question of marriage is not *hujus instituti propria, sed judicis ecclesiastici*, and the case * of *Younger*, which he cites from the [*88] Court of the Commissaries, is a case not of a declaration *de præsenti*, but of a promise *cum copulâ;* unless, therefore, it is previously established, that a promise *cum copulâ* converts itself in all respects, and in all its bearings, into a contract *de præsenti* without a *copula* (which certainly it does in the canon law, and is so recognised in the majority of the opinions upon the law of Scotland), it is no direct authority; and the conclusion is still more weakened, by observing, that, in that case, a judicial sentence of the Commissaries had been actually obtained, and that the point determined by the common law was a mere question of succession upon legitimation, which may depend upon many considerations extrinsic to the original validity of the marriage.

A more pertinent authority, and of higher consideration, is Lord Stair, an ancestor, I presume, of one of the present parties — a person whose learned labours have at all times engaged the reverence of Scotch jurisprudence. He treats of this very question, stating it as a question, and determines it thus (Stair's Institut. lib. 1, tit. 4, § 6): "It is not every consent to the married state that makes matrimony, but consent *de præsenti*, not a promise *de futuro matrimonio.*" The marriage consists not in "the promise but in the present consent, whereby they accept each other as husband and wife, whether by words expressly, or tacitly by marital cohabitation, or acknowledgment, or by natural commixtion where there hath been a promise preceding, for therein is presumed a conjugal consent *de præsenti*, but * the consent [*89] must specially relate to that conjunction of bodies as being then in the consenter's capacity, otherwise it is void." I shall decline entering into the distinctions and refinements which have attempted to convert the obviously plain meaning of this passage into one of very different import. It does appear to me to establish the opinion of this very learned person to be, that without a commixtion of bodies immediately following (though in all cases to be looked to as possible, and at some time or other to take place), a present valid marriage is constituted by a contract *de præsenti*.

Sir George Mackinsie (Institut. book 1, tit. 6, § 3), Lord Advocate under King Charles and James II., whose authority carries

with it a fair proportion of weight, says, "Consent *de præsenti* is that in which marriage doth consist. Consent *de futuro* is a promise; this is not marriage, for either party may *Resile rebus integris;*" manifestly intimating that this could not be done under the consent *de præsenti.*

Another authority of more modern date, but entitled to the greatest respect, is Mr. Erskine, a writer of institutional law; by him it is expressly laid down (B. 1, tit. 6, § 5) that "marriage consists in the present consent, whether that be by words expressly, or tacitly, by marital cohabitation, or by acknowledgment. Marriage may without doubt be perfected by the consent of parties declared by writing, provided the writing be so conceived as to import a present consent." Nothing upon the direct [* 90] meaning of these words can be more * clear, than that he held bodily conjunction not necessary in a present contract. The very note of the anonymous editor, to whom, as an anonymous editor, no authority can be allowed, whatever may be the weight that really belongs to it, admits this; for he says, "From the later decisions of the Court, there is reason to doubt, if it can now be held as law, that the private declarations of parties, even in writing, are *per se* equivalent to actual celebration of marriage;" admitting, by that mode of expression, that such was the doctrine of the text and of the times when it was composed. Mr. Clerk says, "he considers the doctrine to be incorrect," thereby likewise admitting it to be the doctrine contained in these words.

I am not enabled to say how far Mr. Hutcheson's book can be considered as a work of authority. It, however, carries with it most respectable credentials, if it be true, what has been asserted in the argument, that it has been sanctioned by the approbation of several of the Judges of Scotland, and particularly of Sir Ilay Campbell, who refers to it in his deposition as a book of credit, and under whose patronage it is published, and to whose perusal it is said to have been submitted previously to its publication. His statement of the law of Scotland is full and explicit in favour of the doctrine, that private mutual declarations require no bodily consummation to constitute a marriage. He says that the ancient principle to this effect has been happily retained in the law of Scotland, speaking with similar feelings of attachment to it, which are observable in our Swinburn, when he talks of the [* 91] Repealing Statute of Edward VI. as being worthily * and

for good reasons enacted, though a regard to domestic security has induced us to extinguish it entirely in this part of the island by the legislative provisions of later times. Mr. Hutcheson mentions it as a fact, that in the case of *M'Adam* against *Walker*, none of the Judges, who dissented from the judgment, disputed that doctrine of the law. His testimony to such a fact is equivalent to that of any person of unimpeached credit — even to that of Lord Stair or Mr. Erskine; he has asserted it in the face of his profession and the public, and at the hazard of being contradicted, if he has stated it untruly, by the united voice of the whole bench and bar of his country.

In support of the opposite opinion, no ancient writer of authority has been cited. The only writer named is of very modern date, Lord Kaimes, a man of an ingenious and inquisitive turn of mind, and of elegant attainments, but whose disposition, as he admits, did not lead him to err on the side of excessive deference to authority and establishment. The very title of his book is sufficient to excite caution; "Elucidations respecting the law of Scotland" may seem to imply rather proposed improvements than expositions of the existing law. He says, in his preface, that "he brings into the work the sceptical spirit, wishing and hoping to excite it in others, and confesses that he had perhaps indulged it too much." But supposing that it is liable to no objection of this kind, the whole of his chapter on these subjects, so far as this question is concerned, relates entirely to the effect of a promise *de futuro cum copulâ*, which has no application to the present case, unless it is assumed, that this amounts to the same thing identically in * law, to all intents and purposes, as a con- [* 92] tract *de præsenti*. I must add that his extreme inaccuracy, in what he ventures to state with respect both to the ancient canon law and to the modern English law, tends not a little to shake the credit of his representations of all law whatever. In this chapter (p. 32) he asserts that by the present law of England, a mutual promise of marriage *de futuro* is a good foundation to compel a refractory party to complete the marriage, by process in the Spiritual Court. I mean no disrespect to the memory of that ingenious person when I say, that it is an extraordinary fact that it should have been a secret to any man of legal education in any part of this island, that the law of England has been directly the reverse for more than half a century.

No other reference to any known writer of eminence is produced; it is easy, therefore, to strike the balance upon this class of authorities; they are all in one scale, a very ponderous mass on one side, and totally unresisted on the other.

I come, thirdly, to the last and highest class of authorities, that of cases decided in the Scotch tribunals. — Many of these have been alluded to in the learned expositions which have been quoted, but such of them (and they are not few in number) as apply to the cases of promises *de futuro cum copulâ* I dismiss for the present, observing only, that if a promise of this kind be equivalent to a contract *de præsenti nudis finibus*, the result of those cases appears to me strongly to incline to the conclusion deduced from the two former classes of authority.

[* 93] * With regard to decided cases, I must observe generally, that very few are to be found, in any administration of law in any country, upon acknowledged and settled rules. Such rules are not controverted by litigation, they are therefore not evidenced by direct decision: they are found in the maxims and rules of books of text-law. It would be difficult, for instance, to find an English case in which it was directly decided, that the heir takes the real, and the executor the personal estate; yet though nothing can be more certain, it is only incidentally, and *obiter*, that such a matter can force itself upon any recorded observation of a Court; equally difficult would it be to find a litigated case in the canon law, establishing the doctrine, that a contract *per verba de præsenti* is a present marriage, though none is more deeply radicated in that law.

The case of *Cochrane* v. *Edmonston*, before the Court of Session in the year 1804, was a case of contract *de præsenti*, and of this I shall take the account given by Mr. Clerk. The Court there held, "that a written acknowledgment *de præsenti* was sufficient to constitute a marriage. The interlocutor of the Lord Ordinary, which the Court adhered to, rests upon the consent of parties to constitute a marriage *de præsenti* without referring to the *copula.*" Mr. Clerk says, "he cannot suppose the Court overlooked the very material circumstance of the *copula*," which did exist in that case, and which he says "would have been sufficient with a bare promise to bind the man to marriage." — I find great difficulty in acceding to this observation, particularly when it is stated

[* 94] that the Court adhered to the interlocutor, * which expressed

the directly contrary doctrine, and even if it had not so done, it appears to me to be an inaccuracy too striking to attribute to that Court, that they should have declared consent *de præsenti* sufficient, without express mention of the *copula*, if they had thought it a necessary ingredient in the validity of the marriage. What Mr. Clerk says of his disposition to advise an appeal, in particular cases, is not necessary to be noticed in the present consideration, which regards only actual decisions, and not private opinions, however respectable. He admits expressly, that on the evidence of the report, he thinks it at least highly probable, that some such doctrine as that held by Mr. Erskine, was laid down in that case by the Judges.

The next case which I shall mention is that of *Taylor* and *Kello*, which occurred in 1786. This was an action of declarator of marriage instituted by Patrick Taylor against Agnes Kello, and was grounded on a written acknowledgment in the following words: "I hereby declare you, Patrick Taylor, in Birkenshaw, my just and lawful husband, and remain your affectionate wife, Agnes Kello." Kello delivered this written declaration to Taylor, and received from him another *mutatis mutandis* in the same terms, which she afterwards destroyed. There was no sufficient evidence to support the *concubitus*, but the Report states, that the Court, in its decision, held this to be out of the question. The Commissaries "found the mutual obligations relevant to infer marriage between the parties, and found them married persons accordingly." This sentence was affirmed by the Court of Session, though that Court was *much divided upon the occasion, some of [*95] the Judges considering the declaration as merely intended to signify a willingness to enter into a regular marriage; but a majority of the Court thought, in conformity to the judgment of the Commissaries, that the marriage was sufficiently established. This sentence was reversed by the House of Lords, but upon the express grounds that neither of the parties understood the papers respectively signed by them to contain a final agreement to consider themselves as married persons; on the contrary it was agreed that the writing was to be delivered up whenever it was demanded: the whole subsequent conduct of the parties proving this sort of agreement.

It appears then that this was not considered by the House of Lords an irrevocable contract, such as that of marriage is in its

own nature, from which the parties cannot resile even by joint consent, much less on the demand of one party only. This case, I think, goes strongly to affirm the doctrine, that an irrevocable contract *de præsenti* does of itself constitute a legally valid marriage. Mr. Cathcart admits, in his deposition, that this sentence of the Commissaries, confirmed by the Court of Session, would have been a decision in favour of the doctrine, that a contract *de præsenti* constitutes a marriage, if it had not been reversed by the House of Lords. But as it was clearly reversed upon other grounds, the authority of the two Courts stands entire in favour of the doctrine. Mr. Gillies thinks the reversal hostile to the doctrine, but he has not favoured the Court with the grounds on which he entertains this opinion. Mr. Clerk contents himself with saying, that the doctrine is not recognised; most
[*96] *assuredly it is not disclaimed; on the contrary, the presumption is, that if the contract had been considered irrevocable, the House of Lords would have attributed to it a very different effect.

In the case of *Inglis* against *Robertson*, which was decided in the same year, the Commissaries sustained a marriage upon a contract *de præsenti*, and this sentence was affirmed by the Court of Session upon appeal, and afterwards by the House of Lords. The accounts vary with respect to the proof of *concubitus* in this case, which renders it doubtful whether the decision was grounded on the acknowledgment only, or referred likewise to the *copula*. If it had no such reference, then it is a case directly in point; but if it had, it certainly cannot be insisted upon as authority upon the present question.

The case of *Ritchie* and *Wallace*, which was before the Court of Session in 1792, is not reported in any of the books, but is quoted by Mr. Hamilton, who was of counsel in the cause. It was the case of a written declaration of an existing marriage, but accompanied with a promise that it should be celebrated in the church at some future and convenient time. This very circumstance of a provision for a future public celebration might of itself have raised the question, in the minds of some Judges, whether these acknowledgments could be considered as relating to a matrimonial contract already formed and perfected in the contemplation of the parties themselves; and this is sufficient to account for the diversity of the opinion of the Judges upon the case, without resorting to any

supposed difference of opinion on the general principle of law now controverted. The woman was *pregnant by the [*97] man when she received this written declaration from him, but, as I understand the case, nothing rested in judgment upon this fact; for Mr. Hamilton says, the woman founded on the written acknowledgment as a declaration *de præsenti* constituting a marriage, which conclusion of law was controverted by the man; but the Court, by a majority of six Judges to three, found the acknowledgment libelled, relevant to infer the marriage.

The case of *M'Adam* against *Walker* (13th of November, 1806), which underwent very full discussion, is by all parties admitted to be a direct decision upon the point, though it was certainly attended with some difference of opinion amongst the Judges by whom it was decided. In that case Elizabeth Walker had cohabited with Mr. M'Adam, and borne him two daughters. In the presence of several of his servants, whom he had called into the room for the purpose of witnessing the transaction, he desired Elizabeth Walker to stand up and give him her hand; and she having done so, he said, "This is my lawful wife, and these my lawful children." On the same day, without having been alone with Walker during the interval, he put a period to his existence. The Court held the children to be legitimate. It appears clearly that, in this case, there had been a *copula* antecedent, though none could have taken place subsequent to the declaration. It could not therefore have been upon the ground of want of *copula* that Sir Ilay Campbell, who holds a prior *copula* as good as a subsequent one, joined the minority in resisting that judgment. It is stated by Mr. Hutcheson, as a matter of fact, that "none of the Judges disputed *the law," but there were [*98] other grounds of dissent arising out of the circumstances of the case, unconnected with the legal question. "The Judges entertained doubts of the sanity of Mr. M'Adam at the time of the marriage; they considered also, that when he made the declaration he had formed the resolution of suicide, and therefore did not mean to live with the woman as his wife." It is said that this decision of the Court of Session is appealed from, and therefore cannot be held conclusive upon the point. At any rate it expresses the judgment of that Court upon the principle, and the appeal, whatever the ground of it may be, does not shake the respect which I owe to that authority whilst it exists unshaken.

I might here call in aid the numerous cases where promise *cum copulâ* has been admitted to constitute a marriage, if the rule of the canon law, transfused into the law of Scotland, be sound, that *copula* converts a promise *de futuro* into a contract *de præsenti*. If it does not, if *copula* is required in a contract *de præsenti*, what intelligible difference is there between the two — between a promise *de futuro* and a contract *de præsenti?* — None whatever. They stand exactly upon the same footing. — A proposition, I will venture to say, never heard of in the world, except where positive regulation has so placed them, till these recent controversies respecting the state of the marriage law of Scotland.

I might also advert to the marriages at Gretna Green, where the blacksmith supplies the place of the priest or the magistrate.

[* 99] The validity of these marriages has been affirmed in England upon the * certificates of Scotch law, without reference to any act of consummation, for such I think was clearly the exposition of the law as contained in the opinion of Sir Ilay Campbell, upon which the English Court of Chancery founded its decision in the case of *Grierson* and *Grierson*.

What are the cases which have been produced in contradiction to this doctrine? — As far as I can judge, none, — except cases similar to those which have been already stated, where the Superior Court have overruled the decisions of the Court below, and pronounced against the marriage, upon grounds which leave the principle perfectly untouched. — The case of *McLauchlan contra Dobson*, in December, 1796, was a case of contract *per verba de præsenti* where there was no *copula*, in which the Commissaries declared for the validity of the marriage, and the interlocutor was altered by the Court of Session. But upon what grounds was that sentence reversed? Mr. Hutcheson states, that "the Court did not think there was sufficient evidence of a real *de præsenti* matrimonial consent." Mr. Hume says, "the conduct of the parties had been variable and contradictory;" and Sir Ilay Campbell says, "there were circumstances tending to show that the parties did not truly mean to live together." The dicta of Lord Justice Clerk McQueen have been quoted and much relied upon; but I must observe, that they come before the Court in a way that does not entitle them to much judicial weight; they are stated by Mr. Clerk to be found in notes of the handwriting of Mr. Henry Erskine, who is not himself examined for the purpose of authenti-

cating them, although interrogatories are addressed to other
* persons with respect to other legal authorities, for which [* 100]
they are much less answerable. They are taken very briefly, without any context, nor is it stated in what manner, whether in the form of discussion or decision, they fell from that learned Judge. He is, however, made to say, "The case of *McLauchlan* against *Dobson* is new, but the law is old and settled. Two facts admitted *hinc inde*, no celebration, no *concubitus*, nor promise of marriage followed by *copula*; contract as to land not binding till regularly executed, unless where *res non sunt integræ*." This proposition that, "contract as to land not binding till regularly executed," proves little, because it may refer to rules that are confined to agreements respecting that species of property, and even with regard to that species of property the contract may be sufficiently executed by the signing of articles or deeds, though there is no entry upon the land. "A promise without *copula locus pœnitentiæ* — even verbal consent *de præsenti* admits *pœnitentia*," — that is the matter to be proved. "Form of contracts contains express obligation to celebrate; till that done either party may resile." — The reason is that these same forms contain words which qualify the present engagement by giving them a mere promissory effect. "Private consent is not the *consensus* the law looks to. It must be before a priest or something equivalent; they must take the oath of God to each other;" this may be done in private to each other, as it actually was done in the case of *Lord Fitzmaurice*: "a present consent not followed by anything may be mutually given up, but if so, it cannot be a marriage." To be sure if the propositions contained * in these [* 101]
dicta are correct, if it be true that a contract *de præsenti* may be mutually given up, then certainly it cannot constitute a marriage; but that is the very question which is now to be determined upon the comparative weight of authorities; I admit the authority of Lord Braxfield, deliberately and directly applied to any proposition to which his mind was addressed, to be entitled to the highest respect; but I have already adverted to the loose manner in which these dicta are attributable to him, and it is certainly a pretty strong circumstance against giving full effect to these dicta so introduced, without context and without authentication, that Lord Braxfield, as Lord Ordinary, refused the Bill of Advocation in the case of *Taylor* and *Kello* complaining of the

sentence of the Consistorial Court, which found "mutual obligations relevant to infer a marriage."

The other case that has been mentioned, is that of *McInnes* against *More*, which came before the House of Lords upon appeal in the year 1782. The facts therein were, that the man, at the woman's desire, had signed the acknowledgment not for the purpose of making a marriage, but merely as a colour to serve another and different purpose mutually concerted between them, namely, that of preventing the disgrace arising from the pregnancy of the woman. The Commissaries and the Court of Session had found the facts relevant to infer a marriage, but the House of Lords, considering the transaction as a mere blind upon the world, and that no alteration of the *status personarum* was ever intended by the parties themselves, reversed the sentence, and pronounced against the marriage.

[*102] *I am not aware of any other decided cases which have been produced against the proposition, that a contract *de præsenti* (be it in the way of declaration or acknowledgment) constitutes, or, if you will, evidences a marriage. It strikes me, upon viewing these cases, that such of them as are decided in the affirmative, have been adjudged directly upon this principle, and that where they have been otherwise determined, it turns out that they have rested upon specialties, upon circumstances which take them out of the common principle, and produce a determination that they do not come within it. If they do not go directly to the extent of affirming the principle, they at least imply a recognition of it, a sort of tacit assent and submission to its authority, an acknowledgment of its being so deeply intrenched in the law, as not to be assailable in any general and direct mode of attack. The exceptions prove the rule to a certain degree. It was proved in all those cases where there was a judgment apparently contradictory, that in truth they were not real matrimonial contracts *de præsenti*. The effect was not attributed to them, because they were not considered as such contracts. I cannot but think, that when case upon case came before the House of Lords, in which that principle was constantly brought before their eyes, they would have reprobated it as vicious if they had deemed it so, instead of resorting to circumstances to prove that the principle could not be applied to them. I may, without impropriety, add, that the LORD CHANCELLORS of England have always, as I am

credibly informed, in stating their understanding of Scotch law upon such subjects to the House of Lords, particularly Lord *Thurlow, been anxious to hold out that law to be [*103] strictly conformable to the canonical principles, and have scrupulously guarded the expressions of the public judgments of the House, against the possible imputation of admitting any contrary doctrine.

Upon the whole view of the evidence applying to this point, looking first to the rule of the general matrimonial law of Europe; to the principle which I venture to assume, that such continues to be the rule of Scotch matrimonial law, where it is not shown that that law has actually resiled from it; to the opinions of eminent professors of that law; to the authority of text writers; and to the still higher authority of decided cases (even without calling in aid all those cases which apply a similar rule to a promise *cum copulâ*), — I think that being compelled to pronounce a judgment upon this point, I am bound to say, that I entertain as confident an opinion as it becomes me to do, that the rule of the law of Scotland remains unshaken; that the contract *de præsenti* does not require consummation in order to become "very matrimony;" that it does, *ipso facto et ipso jure*, constitute the relation of man and wife. There are learned and ingenious persons in that country, who appear to think this rule too lax, and to wish to bring it somewhat nearer to the rule which England has adopted; but on the best judgment which I can form upon the subject, it is an attempt against the general stream of the law, which seems to run in a direction totally different, and is not to be diverted from its course by efforts so applied. If it be fit that the law of Scotland should receive an alteration, of which that country itself is the *best judge, it is fit that it should receive [*104] that alteration in a different mode than that of mere interpretation.

When I speak of a contract, I mean of course one that is attended with such qualifications as the law of Scotland requires for such a contract, and which in truth appear to me to be very little more than what all law requires for all contracts of every description, and without which an apparent contract upon any subject is, in truth, no contract at all; for having been led, by the manner in which these qualifications are sometimes described, to suppose at first, that they were of a peculiar and characteristic

nature, I really cannot, upon consideration, discover in them anything more than the ordinary qualifications requisite in all contracts. It is said that the marriage contract must not be extorted by force or fraud. Is it not the general law of contracts, that they are vitiated by proof of either? In the present case, menace and terror are pleaded in Mr. Dalrymple's allegation as to the execution of the first contract No. 2, for as to the promise No. I, he admits that it was given merely at the entreaties and instigation of the lady (an admission not very consistent with the suggestion of the terror afterwards applied), but he asserts that he executed this contract, "being absent from his regiment, without leave, alone with her, and unknown to her father, and urged by her threats of calling him in." — What was to be the effect of calling in the father, which produced so powerful an impression of terror in his mind, he does not explain; still less does he attempt to prove the fact, for he has not read the only evidence that could apply to it, the sworn answers of the lady to
[* 105] * this statement of a transaction passing secretly between themselves, and in which answers it is positively denied. This averment of menace and terror is perfectly inconsistent with everything that follows; with the reiterated declaration contained in No. 10, and with the letters which he continued to write in the same style for a year afterwards. Could the paper No. 10 have been executed by a man smarting under the atrocious injury of having been compelled by menaces to execute one of the like import? Could these letters, breathing sentiments of unalterable fondness, have been addressed to the person by whom he had been so treated? Nothing can be apparently more unfounded than this suggestion of menace and terror. It is said that it must be a deliberate contract. It is, I presume, implied in all contracts, that the parties have taken that time for consideration which they thought necessary, be that time more or less, for nowhere is there assigned a particular *tempus deliberandi* for the marriage contract, any more than for any other contract.

It is said that it must be serious: so surely must be all contracts; they must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever; at the same time it is to be presumed, that serious expressions, applied to contracts of so serious a nature as the disposal of a man or woman for life, have

a serious import. It is not to be presumed *a priori*, that a man is sporting with such dangerous playthings as marriage engagements. Again it is said that the *animus contrahentium* must be regarded: Is that peculiar to the marriage contract? It is in the intention of the *parties that the substance of [*106] every species of contract subsists, and what is beyond or adverse to their intent does not belong to the contract. But then that intention is to be collected (primarily at least) from the words in which it is expressed; and in some systems of law, as in our own, it is pretty exclusively so to be collected. You are not to travel out of the intention expressed by the words, to substitute an intention totally different and possibly inconsistent with the words. By the matrimonial law of Scotland a latitude is allowed, which to us (if we had any right to exercise a judgment on the institutions of other countries with which they are well satisfied) might appear somewhat hazardous, of substituting another serious intention than that which the words express, to be proved by evidence extrinsic, and totally, as we phrase it, *dehors* the instrument. This latitude is indulged in Scotland to a very great degree indeed, according to Mr. Erskine. In all other countries a solemn marriage in *facie Ecclesiæ facit fidem;* the parties are concluded to mean seriously, and deliberately, and intentionally, what they have avowed in the presence of God and man, under all the sanctions of religion and of law; — not so in Scotland, where all this may pass, as Mr. Erskine relates, and yet the parties are at liberty to show, that by virtue of a private understanding between themselves, all this is mere imposition and mockery, without being entitled to any effect whatever.

But be the law so, still it lies upon the party, who impeaches the intention expressed by the words, to answer two demands which the law, I conceive, must be presumed to make upon him; first, he must assign and prove some other intention; and *secondly, he must also prove that the intention so alleged [*107] by him, was fully understood by the other party to the contract, at the time it was entered into; for surely it cannot be represented as the law of any civilised country, that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention, reserved in his own breast, to avoid a contract which was differently understood by the party with whom he contracted.

I presume, therefore, that what is said by Mr. Cragie can have no such meaning, "that if there is reason to conclude, from the expressions used, that both or either of the parties did not understand that they were truly man and wife, it would enter into the question whether married or not," because this would open a door to frauds, which the justice, and humanity, and policy of all law must be anxious to keep shut. In the present case no other *animus* is set up and endeavoured to be substituted, but the *animus* of avoiding danger, on which I have already observed. The assignment of that intent does almost necessarily exclude any other, and indeed no other is assigned; and as to any plea that it was differently understood by Miss Gordon, the other party in this cause, no such is offered, much less is any proof to that effect produced, unless it can be extracted from the letters.

Do they qualify the express contracts, and show a different intention, or understanding? It has been argued that they contain some expressions which point to apprehensions, entertained by Miss Gordon, that Mr. Dalrymple would resile from the [* 108] obligations of the contract, and others that are * intended to calm those apprehensions by promises of eternal fidelity, both which it is said are inconsistent with the supposition that they had knowingly constituted themselves husband and wife, and created obligations *de præsenti*, from which neither of them could resile.

In the first place, is there this real inconsistence? Do the records of this Court furnish no such instance as that of the desertion of a wife by her husband? And is such an occurrence so entirely out of all reasonable apprehension in a case like the present? Here is a young gentleman, a soldier, likely to be removed into a country in which very different ideas of marriage prevail, amongst friends who would discountenance this connection, and amongst numerous objects which might divert his affections, and induce him to repent of the step he had taken in a season of very early youth, and in a fit of transient fondness: That a wife left in that country exposed to the chances of a change in his affections, — to the effect of a long separation, — to the disapprobation of his friends, — to the impressions likely to be made by other objects upon a young and unsettled mind, should anticipate some degree of danger is surely not unnatural; equally natural is it, that he should endeavour to remove them by these

renewed professions of constancy. But supposing that Miss Gordon really did entertain doubts with respect to the validity of her marriage, what could be the effect of such doubts? Surely not to annul the marriage, if it were otherwise unimpeached. We are, at this moment, inquiring with all the assistance of the learned professors of law in that country, amongst whom there is great discordance of * opinion, what is the effect of [*109] such contracts. That private persons, compelled to the necessity of a secret marriage, might entertain doubts whether they had satisfied the demands of a law which has been rendered so doubtful, will not affect the real sufficiency of the measures they had taken. Mr. Dalrymple might himself entertain honest doubts upon this point; but if he felt no doubt of his own meaning, if it was his intention to bind himself so far as by law he could, that is enough to sustain the contract; for it is not his uninformed opinion of law, but his real intention that is to be regarded. A public marriage was impracticable; he does all that he can to effect a marriage, which was clandestine, not only at the time, but which was intended so to continue. The language is clear and unambiguous in the expression of intent. No other intention is assigned: and it is not such expressions as these, arising naturally out of the feelings which must accompany such a transaction, that can at all affect its validity.

The same observations apply to the expressions contained in the later letters written to Mr. Hawkins. In one of them she says, "My idea is, that he is not aware how binding his engagements are with me," and possibly he might not. Still if he meant at the time to contract so far by law as he could, no doubts which accompanied the transaction, and still less any which followed it, can at all alter its real nature and effect. Miss Gordon had likewise her later hours of doubt, and even of despondency; "you will never see me Mrs. Dalrymple," she says, in the spring of 1807, to her sister; and when it is considered what difficulties she had to * encounter, at what an immense [*110] distance she then stood from the legal establishment of her claims, having lost her hold upon his affections, it cannot be matter of great surprise if, in the view of a prospect so remote and cloudy, some expression of dismay and even of despair should occasionally betray the discomposure of her mind. As to what she observes upon the alternative suggested by some friend, of a

large sum of money in lieu of her rights (a proposition which she indignantly rejects), it seems to point rather to a corrupt purchase of her silence, than to any idea existing in her mind of a claim of damages, by way of a legal *solamen*, for the breach of a mere promissory contract.

The declarations, therefore, not being impeached by any of those disqualifications by which, in the law of Scotland, a contradictor is permitted to redargue and overcome the presumption arising from the production of such instruments, they become, in this stage of the matter, *præsumptiones juris et de jure* that found an instant conclusion of marriage, if I am right in the position that carnal copulation is not absolutely required to its completion. The fact that these papers were left in her single possession is insignificant, for it has well been observed by Dr. Burnaby, that it is not mutuality of possession, but mutuality of intention, that is requisite. It is much more natural that they should be left in the possession of the lady, she being the party whose safety is the more special object of protection, but there is no proof here, that Mr. Dalrymple himself is not possessed of a similar document. He anxiously requested to have one, and the non-production [* 111] of it by him * furnishes no conclusive proof that he did not obtain his request. If he did not, it may have been an act of imprudence that he confided the proofs of his marriage entirely to the honour of the lady; but if he did, it is perfectly clear that she has not betrayed the trust.

But I will now suppose that this principal position is wrong; that it is either extracted from erroneous authorities, or erroneously extracted from authorities that are correct. I will proceed then to inquire what proof there is of carnal copulation having taken place between the parties; and, upon this point, I shall content myself with such evidence as the general law requires for establishing such a fact; for I find no reference to any authority to prove that the law of Scotland is more rigid in its demand, where the fact is to be established in support of a marriage, than for any other purpose. It may have happened that the fact of carnal copulation has been established by a pregnancy, or some other evidence of as satisfactory a kind, in the few cases which have been transmitted to us, but I find no such exclusive rule as that which has been ingeniously contended for by Dr. Edwards; and I take it as an incontrovertible position, that the circum-

stances, which would be sufficient to prove intercourse in any other case, would be equally sufficient in this case. I do not charge myself in so doing, with going farther than the Scotch Courts would do, and would be bound to do, attending to the established rules of evidence.

In the first place I think it is most strongly to be inferred from the paper, No. 2, that some intercourse of a conjugal nature passed between these *parties. Miss Gordon therein [*112] says, "I hereby promise that nothing but the greatest necessity (necessity which —— situation alone can justify) shall ever force me to declare this marriage." Now what other possible explanation can be given of this passage, or how can it be otherwise understood than as referring to the consequences which might follow from such an intercourse? I confess that I find myself at a loss to know how the blank can be otherwise filled up than by a supposition of consequences which would speak for themselves, and compel a disclosure.

I observe that Mr. Dalrymple denies, in his allegation, that any intercourse took place after the date of the written declarations, which leaves it still open to the possibility of intercourse before that time, though he certainly was not called upon to negative a preceding intercourse, in consequence of any assertion in the libel which he was bound to combat. It will, I think, be proper to consider the state of mind and conduct of the parties relatively to each other at this time. Preliminary verbal declarations of mutual attachment must at least have passed (as I have already observed) before the promise contained in No. 1 was written, at whatever time that paper was written. In the first letter, which bears the post-mark of the 27th of May, whether relying on this paper if it then existed, or on declarations which had verbally passed between them, he thinks himself entitled to address her as his wife in the most endearing terms. On the following day, the 28th, the instrument which has been produced is signed, by which they mutually acknowledge each other as husband and wife. Letters continue to pass between them *daily, and sometimes more than once in a day, expressive [*113] of the most ardent and eager affection on his part, which can leave no room for the slightest doubt that he was, at that time, most devotedly attached to her person, and desirous of the pleasures connected with the enjoyment of it, in some way or

other; for to what other motive can be ascribed such a series and style of letters from a young man, writing voluntarily, without any appearance of idle pleasantry, and with every character of a sincere pursuit, whether honourable or otherwise. What was the state of mind and conduct of the lady during this period of time? It is not to be presumed, from the contents of his letters, that she was either indifferent or repulsive.

The imputation indeed, which has been thrown upon her, is of a very different kind; that she was an acute and active female, who with a knowledge of the law of the country, which Mr. Dalrymple did not possess, was endeavouring *quâcunque viâ datâ*, to engage him in a marriage. To this marriage she has inflexibly adhered, and now stands upon it before this Court; so that whatever might be the real state of her affections towards this gentleman (which can be known only by herself), this at least must be granted, that she was most sincerely desirous of this marriage connection, which marriage connection, both of them perfectly well knew, could not be publicly and regularly obtained. — Taking then into consideration these dispositions of the parties, his desire to obtain the enjoyment of her person on the one hand, and her solicitude to obtain a marriage on the other, which after the delivery of such instruments she knew might at all [* 114] *events be effectually and honourably obtained by the mere surrender of her person, what is the probable consequence? In this part of the island the same circumstances would not induce the probability of a private surrender, because a public ceremony being here indispensably required, no young woman, acting with a regard to virtue, and character, and common prudence, would surrender her person in a way which would not only not constitute a marriage, but would, in all probability, defeat all expectation of such an event.

In Scotland the case is very different, because, in that country, if there are circumstances which require the marriage to be kept secret, the woman, after such private declarations past, carries her virgin honours to the private nuptial bed, with as much purity of mind and of person, with as little violation of delicacy, and with as little loss of reputation, as if the matter was graced with all the sanctities of religion. It is in vain to talk of criminality, and of grossness, and of gross ideas. In such a case there are no other ideas excited than such as belong to matrimonial intercourse.

It is the " bed undefiled " according to the notions of that country; it is the actual ceremony as well as the substance of the marriage; it is the conversion of the lover into the husband: *transit in matrimonium*, if it was not *matrimonium* before. A most forcible presumption therefore arises that parties so situated would, for the purpose of a secret marriage, resort to such a mode of effecting it, if opportunities offered; it must almost, I think, be presumed, that Mr. Dalrymple was in that state of incapacity to enter into such a contract, which * Lord Stair alludes to, if [* 115] he took no advantage of such opportunities; for nothing but the want of opportunity can repel such a presumption.

Now how does the evidence stand with respect to the opportunity of effecting such a purpose? The connection lasted during the whole of Mr. Dalrymple's stay in Scotland, and was carried on, not only by letters couched in the most passionate terms, but as admitted (and indeed it could not be denied), by nocturnal private visits, frequently repeated, both at Edinburgh, and at Braid, the country-seat of Mr. Gordon, in the neighbourhood of that city. Upon this part of the case six witnesses have been examined, who lived as servants in the family of Mr. Gordon. Grizell Lyall, whose principal business it was to attend on Miss Charlotte Gordon, one of the sisters, but who occasionally waited on Miss Gordon, says, " that Captain Dalrymple used to visit in Mr. Gordon's family in the spring of 1804; that before the family left Edinburgh she admitted Captain Dalrymple into the house by the front door, by the special order of Miss Gordon, in the evenings; that Miss Gordon's directions to her were, that when she rung her bell once, to come up to her in her bed-room, or the dressing-room off it, when she got orders to open the street door to let in Captain Dalrymple; or when she (Miss Gordon) rung her bell twice, that she should thereupon, without coming up to her, open the street door for the same purpose; that agreeably to these directions she frequently let Captain Dalrymple into the house about nine, ten, or eleven o'clock at night, without his ever ringing the bell, or using the knocker; that the first time he came * in this way, she showed him up stairs to the [* 116] dressing-room off the young ladies' bed-room, where Miss Gordon then was, but that afterwards, upon her opening the door, he went straight up stairs, without speaking, or being shown up; but how long he continued up stairs, she does not know, as she

never saw him go out of the house; that the dressing-room above alluded to was on the floor above the drawing-room, and adjoining to the bed-room, where the three young ladies slept; and next to the ladies' bed-chamber was another room, in which there was a bedstead, with a bed and blankets, but no curtains or sheets to the bed, and it was considered as a lumber room, the key of which was kept by Miss Gordon." — She says that she recollects, and it is a fact in which she is confirmed by another witness, Robertson, "that the family removed from Edinburgh to Braid that year, 1804, on the evening before a King's Fast" (the King's Fast Day for that year was on the 7th of June), "and on a Wednesday as she thinks, as the Fast Days are generally held on a Thursday; that at this time Miss Charlotte was at North Berwick, on a visit to Lady Dalrymple; that Mr. Gordon and Miss Mary went to Braid in the evening, but Miss Gordon remained in town, as she Lyall also did, and Mr. Robertson, the butler, and one or two more of the servants."

It appears from the testimony of other witnesses, that Mr. Gordon, her father, appeared much dissatisfied that this lady did not accompany himself and her sister to Braid, but chose to stay in town upon that occasion. There are passages in Mr. Dalrymple's letters which point to the necessity of her [*117] *continuance in town, as affording more convenient opportunities for their meeting. Lyall states, "that she recollects admitting Captain Dalrymple that evening, as she thinks, sometime between ten and twelve o'clock, and he went up stairs to Miss Gordon without speaking; that on the next morning she went up as usual to Miss Gordon's bed-room about nine o'clock, and informed her of the hour; and having immediately gone down stairs, Miss Gordon rung her bell some time after, and on the deponent going up to her, she met her, either at the bed-room door or at the top of the stairs, and desired her to look if the street door was locked or unlocked; and the deponent having examined, informed her that it was unlocked, and immediately after went into the dressing-room; and, after being a very short time in it, she heard the street door shut with more than ordinary force, which having attracted her notice, she opened the window of the dressing-room which is to the street, and on looking out, she observed Captain Dalrymple walking eastwards from Mr. Gordon's house; that from this she suspected that Captain

Dalrymple was the person who had gone out of the house just before; that nobody could have come in by the said door without being admitted by some person within, as the door did not open from without, and she heard of no person having been let into the house on this occasion; that having gone down stairs after this, Mr. Robertson, the butler, observed to her, that there had been company up stairs last night; but she did not mention to him any thing of her having let in Captain Dalrymple
*the night before, or of her suspicions of his having just [*118]
before gone out of the house, at least she is not certain,
but she recollects that he desired her to remember the particular day on which this happened." — Now from this account given by Lyall, the counsel have attempted to raise a doubt, whether it was Mr. Dalrymple who went out, for it is said that he would have cautiously avoided making a noise for fear of exciting attention. But the account Lyall gives is exactly confirmed by Robertson, who deposes, "that on the 7th of June, which was the King's Fast, as he was employed about ten o'clock in the morning in laying up some china in his pantry, which is immediately off the lobby, he observed Captain Dalrymple come down stairs, and passing through the lobby to the front door, unlock it, and go out and shut the door after him." Some observations have been made with respect to Robertson's conduct, and he has been called a forward witness, because he made a memorandum of this circumstance at the time it occurred; but I think his conduct by no means unnatural. Here was a circumstance of mysterious intercourse that attracted the attention of several of the servants, and it is not at all surprising that this man, who held a superior situation amongst them in Mr. Gordon's family, and who appears to be an intelligent, well educated, and observing person, as many of the lower order of persons in that country are, should think it right, in the zeal he felt for the honour of his master's family, to make a record of such an occurrence. In so doing, I do not think that he has done anything more than is consistent with
the character of a very *honest and understanding servant, [*119]
who might foresee that such a record might, one day or
other, have its use. The witness Lyall goes on to say, "that Miss Gordon and herself went to Braid that day (being the King's Fast) before dinner, and that on that evening or a night or two after she was desired by Miss Gordon to open the window of the

breakfasting parlour to let Captain Dalrymple in, and she did so accordingly, and found Captain Dalrymple at the outside of the window when she came to open it, and this she thinks might be between ten and twelve o'clock, and she showed him up stairs, when they were met by Miss Gordon at the door of her bed-chamber, when they two went into said chamber, and she returned down stairs; that she does not know how long Captain Dalrymple remained there with Miss Gordon, or when he went away;" she states that "Miss Charlotte returned from her visit at North Berwick a few days after Miss Gordon and the deponent went to Braid; that at Braid Miss Gordon and Miss Charlotte slept in one room, and Miss Mary in another; that within Miss Gordon and Miss Charlotte's bed-chamber there was a dressing-room, the key of which Miss Gordon kept; and she recollects one day getting the key of it from Miss Gordon to bring her a muff and tippet out of it, and upon going in she was surprised to find in it a feather-bed lying upon the floor, without either blankets or sheets upon it, so far as she recollects: that it struck her the more, as she had frequently been in that room before without seeing any bed in it; and as Miss Gordon kept the key, she imagined she must [* 120] * have put it there herself; that she found this bed had been taken from the bed-chamber in which Miss Mary slept, it being a double bedded room; that when she observed the said bed in the dressing-room, it was during the time that Captain Dalrymple was paying his evening visits at Braid; that upon none of the occasions that she let Captain Dalrymple into Braid House did she see him leave it, nor did she know when he departed." Three other witnesses, Robertson and the two gardeners, have been examined upon this part of the case, and they all prove that Mr. Dalrymple was seen going into the house in the night, or coming out of it in the morning.

It is proved likewise that Porteous, one of the servants, was alarmed very much, that the window of the room where he kept his plate was found open in the morning, and that it must have been opened by somebody on the inside. It is proved that nothing was missing, not an article of plate was touched, and that Mr. Dalrymple was seen by the two gardeners very early in the morning, coming away from the house, and in the vicinity of the house, going towards Edinburgh; and as to what was suggested, that he might have been in the out-houses all night, I think it

is not a very natural presumption, that a gentleman who was privately and habitually admitted into the house at such late hours as eleven or twelve o'clock at night would have been ejected afterwards for the purpose of having so uncomfortable a situation for repose, as the gentlemen suppose, in some of the stables or hovels belonging to the house. — There is another witness of the name of Brown, Mr. Dalrymple's own servant, whose evidence is strongly corroborative * of the nature of those [* 121] visits. This man is produced as a witness by Mr. Dalrymple himself, and he states that he was in the habit of privately conveying notes from his master to Miss Gordon, which were to be concealed from her father. — He says to the second interrogatory, " that he often accompanied his master to Mr. Gordon's house at Edinburgh, but he cannot set forth the days upon which it was he so attended him there, except that it was between the 10th of May, and the 18th of July, 1804," subsequently therefore to the execution of the last paper. This witness further states, " that on the night of the 18th of July, which was the last time Mr. Dalrymple was in or near Edinburgh in the said year 1804, he, by the orders of his master, waited with the curricle at the house of Charles Gordon, Esq., till about twelve o'clock, when Mr. Dalrymple came out of the said house, and got into the curricle, and rode away therein about a mile on the road towards Edinburgh, and then desired him to stop, and having told him to go and put up his horses in Edinburgh, and to meet him again on the same spot at six o'clock the next morning with the curricle, Mr. Dalrymple then got out, and walked back towards the said Mr. Gordon's house, and on the next morning at six o'clock he met his master at the appointed spot, and brought him in his said curricle to Haddington, from whence he went in a chaise to the house of a Mr. Nisbet in the neighbourhood of that town, where Mr. Dalrymple's father was then staying; that he does believe that Mr. Dalrymple did, on the night of the said 18th of July, go back to, * and remain in the said Mr. Gordon's [* 122] country-house: " and I think it is impossible for anybody who has seen this man's evidence and the evidence of the other witnesses, not to suppose that he did go there, and did take his repose for the night in that house. Now it is said, and truly said, in this case, that the witness Lyall, upon her cross examination, says, " she does not think that they could have been in bed

together, so far as she could judge;" what means she took to form her judgment does not appear; the view taken by her might be very cursory: she is an unmarried woman, and might be mistaken with respect to appearances, or the appearances might be calculated for the purposes of deception, in a connection which was intended to be, to a great degree, secret and clandestine. But the question is not what inference Lyall draws, but what inference the Court ought to draw from the fact proved by her evidence, that Mr. Dalrymple passed the whole of the night in Miss Gordon's room under all the circumstances described, with passions, motives, and opportunities all concurring between persons connected by ties of so sacred a nature.

Lady Johnstone, one of her sisters, has been relied upon as a strong witness to negative any sexual intercourse; and I confess it does appear to me rather an extraordinary thing, that that lady's observations and surmises should have stopped short where they did, considering the circumstances which might naturally have led her to observe more and to suspect more: she certainly was kept in the dark, or at least in a twilight state. It rather appears from the letters, that there were some quarrels and disa-
[*123] greements between *Mr. Dalrymple and the gentleman who afterwards married this lady, and who was then paying his addresses to her; how far that might occasion concealment from her I cannot say. The father, for reasons of propriety and delicacy respecting himself and family, was to be kept in ignorance, and therefore it might be proper that only half a revelation should be made to the sister. She certainly states that upon her return to Braid, in the middle of June, she slept with her sister, and never missed her from her bed, and never heard any noise in the sister's dressing-room which led her to suppose that Mr. Dalrymple was there. I am far from saying that this evidence of Lady Johnstone's is without weight. In truth, it is the strongest adverse evidence that is produced on this point. But she admits, "that from what she had herself observed, she had no doubt but that Mr. Dalrymple had made his addresses to her sister in the way of marriage; that when the deponent used to ask her said sister about it, she used to laugh it off." From which it appears that Miss Gordon did not communicate freely with her upon the subject. She says, "that never till after the proceedings in this cause had commenced had she heard that they

had exchanged written acknowledgments of their being lawful husband and wife, and had consummated their marriage; but, on the contrary, always, till very lately, conceived that they had merely entered into a written promise with each other, so as to have a tie upon each other, that neither of them should marry another person without the consent of the other of them." That is the interpretation this lady gives to the paper No. 10, *though that paper purports a great deal more, and she [*124] says, "that although she did suspect that Mr. Dalrymple had at some time or times been in her sister's dressing-room, yet she never did imagine that they had consummated a marriage between them." But since it is clearly proved by the other witnesses that Mr. Dalrymple was in the habit of going privately to Miss Gordon's bed-room at night, and going out clandestinely in the morning, I cannot think that the ignorance of this witness respecting a circumstance with regard to which she was to be kept in ignorance, can at all invalidate the facts spoken to by the other witnesses, or the conclusion that ought to be deduced from them.

With respect to the letters written at such a time as this, I am not disposed to scan with severe criticism the love-letters of a very young gentleman, but they certainly abound with expressions which, connected with all the circumstances I have adverted to, cannot be interpreted otherwise than as referring to such an intercourse. I exclude all grossness, because, considered as a conjugal intercourse, it carries with it no mixture of grossness but what may be pardonable in a very young man, alluding to the raptures of his honey-moon, when addressing the partner of his stolen pleasures. I will state some passages, however, which appear to point at circumstances of this nature: — "My dearest sweet wife — You are, I dare say, happy at Queen's Ferry, while your poor husband is in this most horrible place, tired to death, thinking only on what he felt last night, for the height of human happiness was his." It is said that this has reference only to the happiness which he enjoyed in her *society, for an expres- [*125] sion immediately follows, in which he extols the happiness of being in the society of the person beloved; and it may be so, but it must mean society in a qualified sense of the word, private and clandestine society; society which commenced at the hour of midnight, and which he did not quit till an early hour

(and then secretly) in the morning. That society is meant only in the tamest sense of the word, is an interpretation which I think cannot very well be given to such expressions as these, used upon such an occasion. In the letter marked No. 6, he says, " Put off the journey to Braid, if possible, till next week, as the town suits so much better for all parties. I must consult L. on that point to-morrow, as I well know how *a-propos* plans come into her pretty head; there appears to me only one difficulty, which is where to meet, as there is only one room, but we must obviate that if possible." In the next letter, No. 7, he says, " But I will be with you at eleven to-morrow night; meet me as usual. — P. S. Arrange everything with L. about the other room."

There are several other expressions contained in these letters which manifestly point to the fact of sexual intercourse passing between them. These I am unwilling to dwell upon with any particular detail of observation, because they have been already stated in the arguments of counsel, and are of a nature that does not incline me to repeat them without absolute necessity; I refer to the letters themselves, particularly to No. 4 and No. 6. But it is said, there are passages in these letters which show that no such intercourse could have passed between them; one in [* 126] particular in No. 4 is much * dwelt upon, in which he says, " Have you forgiven me for what I attempted last night? believe me, the thought of your cutting me has made me very unhappy." From which it is inferred that he had made an attempt to consummate his marriage, and had been repulsed. Now this expression is certainly very capable of other interpretations: It might allude to an attempt made by him to repeat his pleasures improperly, or at a time when personal or other circumstances might have rendered it unseasonable. In the very same letter he exacts it as a right. He says, " You will pardon it; although it was my right, yet I make a determination not too often to exert it; what a night shall I pass without any of those heavenly comforts I so sweetly experienced yesterday! "

In a correspondence of this kind, passing between parties of this description, and alluding to very private transactions, some degree of obscurity must be expected. Here is a young man heated with passion, writing every day, and frequently twice in a day, making allusions to what passed in secrecy between himself and the lady of his affections; surely it cannot be matter of aston-

ishment, that many passages are to be found difficult of exact interpretation, and which it is impossible for any but the parties themselves fully to explain. What attempt was made does not appear; this I think does most distinctly appear, that he did at this time insist upon his rights, and upon enjoying those privileges which he considered to be legally his own. Wherever these obscure and ill-understood expressions occur, they must be received with such explanations as will render them consistent with the main body * and substance of the whole case. Another [* 127] passage in the letter No. 5, which is dated on the 30th of May, has been relied upon as showing that Mr. Dalrymple did not consider himself married at that time. In that letter he says, "I am truly wretched, I know not what I write, how can you use me so? but (on Sunday, on my soul (Torn.)) you shall, you must become my wife, it is my right," and therefore it is argued that she had not yet become his wife. The only interpretation I can assign to this passage, which appears to have been written when he was in a state of great agitation, is, that on Sunday she was to submit to what he had described as the rights of a husband. It is not to be understood that a public marriage was to be executed between them on that day, because it is clear, from the whole course and nature of the transaction, that no such ceremony was ever intended: It appears from all the facts of the case, that it was to be a private marriage, that it was so to continue, and therefore no celebration could have been intended to take place on that approaching Sunday.

In a case so important to the parties, and relating to transactions of a nature so secret, I have ventured to exercise a right not possessed by the advocates, of looking into the sworn answers of the parties upon this point: and I find Miss Gordon swears positively that intercourse frequently passed between them subsequently to the written declaration or acknowledgment of marriage. Mr. Dalrymple swears as confidently that it did not so take place, but he admits that it did on some one * night of the [* 128] month of May, prior to the signature of the paper marked No. 1; the date of which, however, he does not assign, any more than he does that of the night in which this intercourse did take place. Now consider the effects of this admission. It certainly does often happen that men are sated by enjoyment; that they relinquish with indifference, upon possession, pleasures which

they have eagerly pursued. But it is a thing quite incredible that a man, so sated and cloyed, should afterwards bind himself by voluntary engagements to the very same party who had worn out his attachment. Not less inconsistent is this supposition with the other actual evidence in the case, for all these letters, breathing all these ardours, are of a subsequent date, and prove that these sentiments clung to his heart as closely and as warmly as ever during the whole continuance of his residence in Scotland. I ask if it is to be understood, that with such feelings he would relinquish the pleasures which he had been admitted to enjoy, and which he appears to value so highly, or that she would deny him those pleasures for the consolidation of her marriage, which she had allowed him, according to his own account, gratuitously and without any such inducement.

On this part of the case I feel firm. It is not a point of foreign law on which it becomes me to be diffident; it is a matter of fact examinable upon common principles; and I think I should act in opposition to all moral probabilities, to all natural operations of human passions and actions, and to all the fair result of the evidence, if I did not hold that consummation was fully proved. If this is proved, then is there, according to the common [* 129] * consent of all legal speculation on the subject, an end of all doubt in the case, unless something has since occurred to deprive the party of the benefit of a judicial declaration of her marriage.

What has happened that can have such an effect? Certainly the mere fact of a second marriage, however regular, can have no such effect. The first marriage, if it be a marriage upheld by the law of the country, can have no competitor in any second marriage, which can by legal possibility take place; for there can be no second marriage of living parties in any country which disallows ploygamy. There may be a ceremony, but there can be no second marriage — it is a mere nullity.

It is said that, by the law of Scotland, if the wife of the first private marriage chooses to lie by, and to suffer another woman to be trepanned into a marriage with her husband, she may be barred *personali exceptione* from asserting her own marriage. Certainly no such principle ever found its way into the law of England; no connivance would affect the validity of her own marriage; even an active concurrence, on her part, in seducing an innocent

woman into a fraudulent marriage with her own husband, though it might possibly subject her to punishment for a criminal conspiracy, would have no such effect. But it is proper, that I should attend to the rule of the law of Scotland upon this subject. There is no proof, I think, upon the exhibition of Scotch law, which has been furnished to the Court, that such a principle was ever admitted authoritatively; for though in the gross case of *Campbell* v. *Cochrane*, in the year 1747, the Court of Session did hold this doctrine, yet it * was afterwards [* 130] retracted and abandoned, on the part of the second wife, before the House of Lords, which, most assuredly, it would not have been, if any hope had been entertained of upholding it as the genuine law of Scotland, because the second wife could never have been advised to consent to the admission of evidence, which very nearly overthrew the rights of her own marriage. Under the correct application of the principles of that law, I conceive the doctrine of a *medium impedimentum* to be no other than this, that on the *factum* of a marriage, questioned upon the ground of the want of a serious purpose and mutual understanding between the parties, or indeed on any other ground, it is a most important circumstance, in opposition to the real existence of such serious purpose and understanding, or of the existence of a marriage, that the wife did not assert her rights, when called upon so to do, but suffered them to be transferred to another woman, without any reclamation on her part. This doctrine of the effect of a mid-impediment in such a case is consonant to reason and justice, and to the fair representations of Scotch law given by the learned advocates, particularly by Mr. Cay, in his answer to the third additional interrogatory, and Mr. Hamilton, in his answer to the first further additional interrogatory; but surely no conduct on the part of the wife, however criminal in this respect, can have the effect of shaking *ab initio* an undoubted marriage.

Suppose, however, the law to be otherwise, how is it applicable to the conduct of the party in the present case? Here is a marriage, which at the earnest request of this gentleman, and on account of his most important interests (in which interests * her own were as seriously involved) was not only to be [* 131] secret at the time of contracting, but was to remain a profound secret till he should think proper to make a disclosure; it is a marriage in which she has stood firm in every way consistent

with that obligation of secrecy, not only during the whole of his stay in Scotland, but ever since, even up to the present moment. She corresponded with him as her husband till he left England, not disclosing her marriage even to her own family on account of his injunctions of secrecy. Just before he quitted this country, he renewed in his letters those injunctions, but pointed out to her a mode of communicating with him by letter, through the assistance of Sir Rupert George, the first Commissioner of the Transport Board. In the same letter, written on the eve of his departure for the Continent, he cautions her against giving any belief "to a variety of reports which might be circulated about him during his absence, for if she did, they would make her eternally miserable. I shall not explain," he says, "to what I am alluding, but I know things have been said, and the moment I am gone will be repeated, which have no foundation whatever, and are only meant for the ruin of us both: once more, therefore, I entreat you, if you value your peace or happiness, believe no report about me whatever."

No doubt, I think, can be entertained, that the reports to which he, in this mysterious language, adverts, must respect some matrimonial connections, which had become the subjects of public gossip, and might reach her ear. Nothing, however, less than certain knowledge was to satisfy her, according to his [*132] own injunction, and nothing *could, I think, be more calculated to lull all suspicion asleep on her part. It appears, however, that it had not that complete effect, for Mr. Hawkins says, that upon the return of Mr. Dalrymple, in the month of August, 1806, when he came to England privately, without the knowledge of his father, or of this lady, he then, for the first time, "communicated to him many circumstances respecting a connection, he stated he had had, with a Miss Johanna Gordon at Edinburgh, and expressed his fears that she would be writing and troubling his father upon that subject, as well as tormenting him, the said John William Henry Dalrymple, with letters, to avoid which, he begged him not to forward any of her letters to him who was then about to go to the Continent, and in order to enable him to know her handwriting, and to distinguish her letters from any others, he then cut off the superscription from one of her letters to him, which he then gave to the deponent for that purpose, and at the same time swore, that if he did

forward any of her letters, he never would read them; and he also desired and entreated him to prevent any of Miss Gordon's letters from falling into the hands of General Dalrymple, and that he went off again to the Continent in the month of September." Mr. Hawkins further says, "that he did find means to prevent several of Miss Gordon's letters addressed to General Dalrymple from being received by him, but having found considerable risk and difficulty therein, and in order to put a stop to her writing any more letters to General Dalrymple, he the deponent did himself write and address a letter to * her at Edin- [* 133] burgh, wherein he stated that the letters which she had sent to General Dalrymple had fallen into his hands to peruse or to answer, as the General was himself precluded from taking any notice of letters from the precarious state he was in, or to that effect, and urged the propriety of her desisting from sending any more letters to General Dalrymple; and the deponent having, in his said letter, mentioned that he was in the confidence of, and in correspondence with Mr. Dalrymple, she soon afterwards commenced a correspondence with him respecting Mr. Dalrymple, and also sent many letters, addressed to Mr. Dalrymple, to him, in order to get them forwarded; but the deponent having been particularly desired by Mr. Dalrymple not to forward any such letters to him, did not send all, but thinks he did send one or two, in consequence of her continued importunities;" he says, "that it was some time in the latter end of the year 1806, or the beginning of the year 1807, that the correspondence between Miss Gordon and himself first commenced; and that after the death of General Dalrymple, which he believes happened in or about the spring of the year 1807, she, in her correspondence with him, expressly asserted and declared to him her marriage with Mr. Dalrymple."

It appears then that Miss Gordon knew nothing of Mr. Hawkins, except from the account he had given of himself, that he was the confidential agent of Mr. Dalrymple, and therefore she might naturally have felt some hesitation about laying the whole of her case before * him, especially as General Dalrymple [* 134] was alive, till whose death the marriage was to remain a profound secret; but upon that event taking place, which happened at no great distance of time, Miss Gordon instantly asserted to Mr. Hawkins her marriage with Mr. Dalrymple, and he, wishing to be furnished with the particulars, wrote to her for the pur-

pose of obtaining them, which she thereupon communicated, and at the same time sent him a copy of the original papers, which, in the language of the law of Scotland, she called her marriage lines. — She mentioned likewise some bills which had been left unpaid by her asserted husband, upon which he wrote to Mr. Dalrymple, and he says, "that he has no doubt Mr. Dalrymple received the letters, because he replied thereto from Berlin or Vienna, and caused the bills to be regularly discharged." He says, "that in the latter end of May, in the year 1808, Mr. Dalrymple returned again to England." — I ought to have mentioned that it appears clearly, that Miss Gordon had been sending letters to Mr. Hawkins, expressive of her uneasiness on account of the reports which had prevailed of a marriage about to be entered into by Mr. Dalrymple. She says, in a letter to Mr. Hawkins, "I shall have no hesitation in putting my papers into the hands of a man of business, and establishing my rights, as it is a very unpleasant thing to hear different reports every day; the last one is, that Mr. Dalrymple had ordered a new carriage on his marriage with a nobleman's daughter."

This description cannot apply to the marriage which [* 135] has since taken place with Miss Manners, but * is merely some vague report which it seems had got into common discourse and circulation. On the 9th of May, she writes to know whether any accounts had been received from Mr. Dalrymple, and says, "Any real friend of Mr. Dalrymple's ought to caution him against forming any new engagement;" and she protests most strongly against his entering into a matrimonial connection with another woman. — In the end of that very month of May, Mr. Dalrymple came home, having been at different places on the continent; he went down to Mr. Hawkins' house at Findon, where having met him, they conversed together upon Mr. Dalrymple's affairs, and particularly upon his marriage with Miss Gordon; and on that occasion, Mr. Hawkins having at this time no doubt left upon his mind of the marriage, and fearing, from the manner and conduct of Mr. Dalrymple, that he had it in contemplation to marry Miss Manners, the sister of the Duchess of St. Albans, he cautioned him in the most anxious manner against taking such a step, and in the strongest language which he was able to express, described the mischiefs which would result from such a measure, both to himself and the lady, and the difficulties in which their

respective families might be involved, owing to Mr. Dalrymple's previous marriage.

Mr. Hawkins thought, at the time, that those admonitions had had the good effect of deterring him from the intention of marrying Miss Manners, though he mentions a circumstance which bears a very different complexion, viz., that Mr. Dalrymple took from him, almost by force, some of Miss Gordon's letters, and particularly those annexed to the allegation. *He [*136] says, "that Mr. Dalrymple took them under pretence of showing them to Lord Stair, and seemed by his manner and expressions to consider that he had thereby possessed himself of the means of showing that Johanna Dalrymple was not his wife." It was about the end of the month of May that Mr. Hawkins and Mr. Dalrymple held this conversation at Findon, and upon the 2nd of the following month Mr. Dalrymple was married to Miss Manners, before it was possible that Miss Gordon could know the fact of his arrival in England. Upon her knowledge of the marriage, she immediately proceeds to call in the aid of the law. I profess I do not see what a woman could with propriety have done more to establish her marriage rights; Mr. Dalrymple was all the time abroad, and the place of his residence perfectly unknown to her; no process could operate upon him from the Courts, either of Scotland or England, nor was he amenable in any manner whatever to the laws of either country.

She did all she could do under the obligations of secrecy, which he had imposed upon her by entering her private protest against his forming any new connection; she appears to me to have satisfied the whole demands of that duty, which such circumstances imposed upon her; and I must say, that if an innocent lady has been betrayed into a marriage, which conveys to her neither the character nor rights of a wife, I cannot, upon any evidence which has been produced, think that the conduct of Miss Gordon is chargeable, either legally or morally, with having contributed to so disastrous an event.

*Little now remains for me but to pronounce the formal [*137] sentence of the Court, and it is impossible to conceal from my own observation the distress which that sentence may eventually inflict upon one, or perhaps more individuals; but the Court must discharge its public duty, however painful to the feelings of others, and possibly to its own; and I think I discharge that duty

in pronouncing, that Miss Gordon is the legal wife of John William Henry Dalrymple, Esq., and that he, in obedience to the law, is bound to receive her home in that character, and to treat her with conjugal affection, and to certify to this Court that he has so done, by the first session of the next term.

From this decree an appeal was alleged and prosecuted to the Court of Arches. In the course of those proceedings an intervention was given for Laura Dalrymple — described as wife of John William Henry Dalrymple, Esq., the appellant in the cause. On the 3rd session of Mich. Term, viz., 18th of November, 1811, an allegation was asserted on her behalf, and the Judge assigned to hear, on the admission thereof, on the by-day. On that day, viz., 4th of December, her Proctor prayed the assignation to be continued, which was opposed; and the Judge concluded the cause, and assigned the same for sentence on the next court day. On the first Sess. Hil. Ter., viz., January, 1812, her Proctor alleged the cause to have been appealed; and the appeal was accordingly prosecuted to the High Court of Delegates, where the grievance complained of was, "that the Judge of the Court of Arches had rejected the prayer of the said Laura Dalrymple, for time to be allowed for the admission of an allegation on her behalf." Time was allowed by the Court of Delegates. And the cause being there retained, her allegation was given in, and opposed, and ultimately rejected. The cause was afterwards heard upon the merits; and on the 19th of January, 1814, the sentence of the Consistory Court was affirmed.

Reg. v. Millis.

10 Cl. & Fin. 534–907 (s. c. 8 Jur. 717).

[534] *Common Law. — Marriage.*

A. (in the kingdom of Ireland), accompanied by B., went to the house of C., a regularly placed minister of the Presbyterians of the parish where such minister resided, and then entered into a present contract of marriage with the said B.; the said minister performing a religious ceremony between them, according to the rights of the Presbyterian Church. A. and B. lived together for some time as man and wife; A. afterwards married another person, in a parish church in England. *Qu.* Whether the first contract was sufficiently a marriage to support an indictment against A. for bigamy?

The Lord Chancellor, Lord Cottenham, and Lord Abinger held that it was not; Lord Brougham, Lord Denman, and Lord Campbell held that it

was. The Lords being thus divided, the rule "semper præsumitur pro negante" applied, and judgment was given for the defendant in error.

At the Spring Assizes of 1842 for the county of Antrim, holden at Carrickfergus, on, &c., the defendant in error, Millis, was indicted for bigamy, under the statute of 10 Geo. IV., c. 34. The defendant in error was arraigned upon this indictment, and pleaded not guilty, and thereupon issue was joined. The jury found the following special verdict: —

"That about thirteen years ago, to wit, in the month of January, 1829, George Millis, accompanied by Hester Graham (spinster), and three other persons, went to the house of the Rev. John Johnstone, of Banbridge, in the county of Down, the said Rev. John Johnstone then and there being the placed and regular minister * of the congregation of Protestant dissenters com- [* 535] monly called Presbyterians, at Tullylish, near to Banbridge aforesaid; and that the said prisoner and the said Hester Graham then and there entered into a contract of present marriage, in presence of the said Rev. John Johnstone and the said other persons, and the said Rev. John Johnstone then and there performed a religious ceremony of marriage between the said prisoner and Hester Graham, according to the usual form of the Presbyterian Church in Ireland; and that after the said contract and ceremony, the prisoner and the said Hester for two years cohabited and lived together as man and wife, the said Hester being after the period of said ceremony known by the name of Millis. And the jurors aforesaid, upon their oath aforesaid, further say that the said George Millis was, at the time of the said contract and ceremony, a member of the Established Church of England and Ireland, and that the said Hester was not a Roman Catholic, but the jurors aforesaid do not find whether she, the said Hester, was a member of the said Established Church or a Protestant dissenter. And the jurors aforesaid, upon their oath aforesaid, further find, that afterwards, upon the 24th day of December, 1836, and while the aforesaid Hester was still living, the said George Millis was married to one Jane Kennedy, then spinster, in the parish of Stoke, in the county of Devon, in England, according to the forms of the said Established Church, by the then officiating minister of the said parish, he being then and there a priest in holy orders; but whether," &c.

The indictment and special verdict were afterwards removed by *certiorari* into the Court of Queen's Bench in Ireland, and the case was argued there in Easter Term, 1842.

[* 536] * The Judges of the said Court afterwards delivered their judgments *seriatim* on the said case: Mr. Justice PERRIN was in favour of the validity of the first marriage, even as a marriage *per verba de præsenti*, and consequently of the conviction; Mr. Justice CRAMPTON thought it a valid marriage, but only so as being celebrated by a Presbyterian clergyman; Mr. Justice BURTON thought the marriage invalid in every way, and with that opinion Lord Chief Justice PENNEFATHER entirely concurred.

Afterwards, and for the purpose of obtaining the judgment of this House, Mr. Justice PERRIN in form withdrew his judgment; and thereupon the said Court adjudged that the said George Millis, the now defendant in error, was not guilty of the felony in the indictment charged against him, and he was thereupon acquitted.

This writ of error was then brought.

The Attorney-General and Solicitor-General addressed the House for the plaintiff in error; Mr. Pemberton and Mr. Kindersley for the defendant in error.

[* 653] * Questions were then put to the Judges, who required time to consider them.

Lord Chief Justice TINDAL: My Lords, the first question which your Lordships have proposed to Her Majesty's Judges is the following: "A. and B. entered into a present contract of marriage *per verba de præsenti* in Ireland, in the house and in the presence of a placed and regular minister of the congregation of the Protestant dissenters called Presbyterians; A. was a member of the Established Church of England and Ireland; B. was not a Roman Catholic, but was either a member of the Established Church or a Protestant dissenter; a religious ceremony of marriage was performed on the occasion by the said minister between the parties, according to the usual form of the Presbyterian Church in Ireland; A. and B., after the said contract and ceremony, cohabited and lived together for two years as man and wife; A. afterwards, and while B. was living, married C. in England: Did A., by the marriage in England, commit the crime of bigamy?"

To explain the grounds of our answer to this question, it is

convenient to consider, in the first instance, separately, the general and abstract question, what were the nature and obligatory force of a contract of marriage *per verba de præsenti*, by the English common law, previous to the passing of the Marriage Act (1753), 26 Geo. II. (c. 33)? and then to consider the same question with reference to the particular conditions and circumstances with which it has been submitted for our opinion.

The abstract question was involved in much obscurity, [654] even at the time of the debates upon the bill which became law in 1753, and has become involved in still deeper obscurity since the Act has made the question nearly obsolete.

In this state of the question, it is only after considerable fluctuation and doubt in the minds of some of my brethren that they have acceded to the opinion * which was formed by [* 655] the majority of the Judges upon hearing the argument at your Lordships' bar, and that I am now authorised to offer to your Lordships as our unanimous opinion, that by the law of England, as it existed at the time of the passing of the Marriage Act, a contract of marriage *per verba de præsenti* was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the Spiritual Court, the power of compelling the solemnisation of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders.

It appears that at various periods of our history there have been decisions as to the nature and description of the religious solemnities necessary for the completion of a perfect marriage, which cannot be reconciled together; but there is found no authority to contravene the general position, that at all times, by the common law of England, it was essential to the constitution of a full and complete marriage, that there must be some religious solemnity; that both modes of obligation should exist together, the civil and the religious; that, besides the civil contract, that is, the contract *per verba de præsenti*, which has always remained the same, there has at all times been also a religious ceremony, which has not always remained the same, but has varied from time to time, according to the variation of the laws of the church: with respect to which ceremony it is to be observed, that whatever at any time has been held by the law of the church to be a sufficient

religious ceremony of marriage, the same has at all
[*656] *times satisfied the common law of England in that respect. If, for example, in early times, as appears to have been the case, from the Saxon laws cited in the course of the argument, the presence of a mass-priest was required by the church; and if, at another time, the celebration in a church, and with previous publication of banns, has been declared necessary by the ecclesiastical law; and, lastly, if, since the time of the Reformation, the church held a deacon competent to officiate at a regular marriage ceremony, — with each of these modes of solemnisation the Courts of common law have given themselves no concern, but have altogether acquiesced therein, leaving such matters to the sole jurisdiction of the Spiritual Court. So that, where the church has held, as it often has done, down to the time of passing the Marriage Act, that a marriage celebrated by a minister in holy orders, but not in a church, or by such minister in a church, but without publication of banns and without license, to be irregular, and to render the parties liable to ecclesiastical censures, but sufficient nevertheless to constitute the religious part of the obligation, and that the marriage was valid notwithstanding such irregularity, the law of the land has followed the Spiritual Court in that respect, and held such marriage to be valid. But it will not be found (which is the main consideration to be attended to), in any period of our history, either that the Church of England has held the religious celebration sufficient to constitute a valid marriage, unless it was performed in the presence of an ordained minister, or that the common law has held a marriage complete without such celebration.

My Lords, in endeavouring to show the grounds upon
[*657] which we hold that such is the common law *of this realm, I shall first consider the decisions which have taken place in our Courts of common law. I shall next advert to certain statutes passed by the Legislature at various periods, tending to throw light upon the obscure subject now under discussion, and which appear to confirm the opinion we have formed; and, lastly, shall call attention to the doctrine of the King's ecclesiastical law, as established and administered in this country; by which alone, and not by the general canon law of Europe, still less by the civil, are the marriages of the Queen's subjects regulated and governed.

With respect to the decisions of the Courts of law and the other common-law authorities, if no case can be referred to directly and distinctly laying it down as law, in so many words, that a contract *per verba de præsenti* alone, and without the intervention of a minister in orders, is not sufficient to create a valid and complete marriage, yet such conclusion is necessary from many of the decided cases, and is inconsistent with none; nor in fact could the difficulty to be determined in any of the cases ever have existed, except upon the supposition that some religious ceremony was necessary to the contract: thus leading to the conclusion above laid down, that by the law of England the contract *per verba de præsenti* alone did not constitute a full and complete marriage.

* The earliest case referred to in the argument is the [* 658] note from Lord Hale's manuscripts, to be found in Coke, Littleton, 33 a, n. 10. That case is, that A. contracts *per verba de præsenti* with B. and has issue by her, and afterwards marries C. *in facie ecclesiæ;* B. recovers A. for her husband by sentence of the Ordinary; and for not performing the sentence he is excommunicated, and afterwards enfeoffs D. and then marries B. *in facie ecclesiæ*, and dies. B. brings dower against D., and recovers, because the feoffment was *per fraudem mediate* between the sentence and the solemn marriage, "sed reversatur coram Rege et Concilio quia prædictus A. non fuit seisitus, during the espousals between him and B. *Nota*, neither the contract nor the sentence was a marriage."

The Curia Regis et Concilii, before which the reversal took place, appears, according to the researches of antiquarians, to have been, in the time of Edward I., a tribunal of appeal in cases of difficulty, and to have consisted at that time of the Chancellor, the Treasurer and Barons of the Exchequer, the Judges of either Bench, and other functionaries; which Court of the Concilium Regis was perfectly distinct from the Commune Concilium Regni, the probable original of the English Parliament.

Lord HALE speaks largely of this Court in his Treatise on the Jurisdiction of the House of Lords; and various references to and extracts from its proceedings are to be found in the learned Introduction to the "Rotuli Litterarum Clausarum," lately published by the Record Commissioners. The judgment, therefore, of such a Court of error is of the highest * weight. [* 659]

Lord HALE'S observation on the case is, "that the sentence was not a marriage;" in making which observation he is probably alluding to a question which, about the time he was making his collection of notes, was a matter of contest in Westminster Hall; viz., whether the man and woman were not complete husband and wife by the sentence of the Spiritual Court, without any other solemnity: as it appears in *Payne's Case*, 1 Siderf. 13, that Mr. Attorney-General Noy had affirmed such to be the law, whilst TWISDEN, Justice, denied it, saying that the marriage must be solemnised before they were complete husband and wife.

The result, however, of the case above referred to is, that in the judgment of the Court of Error there was no complete marriage until after the actual solemnisation of the marriage under the sentence of the Court; and, upon the ground that the husband enfeoffed D. before such solemnisation, there was no seisin in him during the marriage, and therefore no dower. But the object at present is, to learn from the case whether, in the opinion of the Court, the contract *per verba de præsenti* did alone constitute a marriage; and, both from the judgment of the Court below and of the Court of Error, the conclusion appears inevitable, that each Court thought such contract alone did not constitute marriage: for the case sets out with stating that "A. contracts with B. *per verba de præsenti;*" and if this contract had alone constituted marriage, then was there seisin in the husband during the marriage and before the feoffment to D., and the reason given by each of the Courts for their respective judgments would have
[* 660] * failed. Observe, also, the difference of language employed in the statement of the facts of the case: the contract *per verba de præsenti;* the subsequent statement that A. married B.; the contract; and the subsequent reason by the Court of Error, that there was no seisin during the espousals. Can the expressions of contract on the one hand, and of marriage and espousals on the other, possibly be considered as synonymous, and referring to the same obligation? And this agrees expressly with HALE'S inference from the case, "that the contract is not a marriage."

Foxcroft's Case, 1 Rolle's Abridg. 359, which appears to have been in the same year, is next in order: "R. being infirm, and in his bed, was married to A. by the Bishop of London, privately, in no church or chapel, nor with the celebration of any mass, the

said A. being then pregnant by the said R.; and afterwards, within twelve weeks after the marriage, the said A. is delivered of a son, and adjudged a bastard, and so the land escheated to the lord, by the death of R. without heir." Now it is to be observed that this case must have been decided upon the usual plea of bastardy in a real action; the writ must have been sent in the usual form by the Court of law to the Ordinary; the certificate also returned by him in the usual form. Bracton, in book 5, c. 19, gives various instances of the proceedings in cases of bastardy, with the greatest possible minuteness; and amongst others, that in sect. 11 probably would be the form applicable to this particular case; viz., "an pater suus desponsavit matrem suam;" and it could not have been until after the certificate of the Ordinary, affirming or denying the marriage, that the judgment of the
*Court could be given. Let it be conceded that the [*661]
Ordinary certified in this instance the marriage to be void,
which, according to the ecclesiastical law, as then in force in England, he ought to have found good, but irregular only, and exposing the parties to ecclesiastical censures; and let it be further conceded that the Court of common law acted upon such finding, and gave judgment against the demandant, as indeed it could not do otherwise; still the weight of this authority on the question before us remains the same. Was a contract *per verba de præsenti*, without anything more, held at that time to be a complete marriage? is the question. If it was, the Ordinary must have returned that R. had married A.; for no doubt has been or can be raised, that when the Bishop of London married the two parties, as stated in the case, he married them *per verba de præsenti*. If, therefore, the contract *per verba de præsenti* had by the law of England then made a marriage, the parties were actually married; but if the Ordinary finds the marriage bad, even where the ceremony was performed by a bishop, because celebrated at an improper place, the inference appears irresistible that some religious ceremony was necessary, and that words of present contract alone did not at that time, by the law of England, constitute a marriage.

Del Heith's Case, 34 Edward I., is precisely the same in its leading facts, and in the conclusion at which the Court of common law arrives, that a contract *per verba de præsenti*, even before the parish priest, was not sufficient; but the concluding words of the record are too strong to be passed over in silence: "Quæsitum fuit

si aliqua sponsalia in facie ecclesiæ inter eos celebrata
[* 662] fuerunt postquam prædictus * Johannes convaluit de
prædicta infirmitate. Dicunt quod non. Et quia convictum est per assisam istam quod prædictus Johannes Del Heith nunquam desponsavit prædictam Katherinam in facie ecclesiæ per quod sequitur quod prædictus W. filius Johannis nihil juris clamare potest in prædictis tenementis sed in misericordia pro falso clamore."

The conclusion to be drawn from the comparison of two cases to be found in 1st Rolle's Abridgment, p. 360, leads to the same inference, that the contract *per verba de præsenti* was not a complete marriage in the time of Henry VI. The first is at F. placitum 1: "A man who hath a wife takes another wife, and hath issue by her; this issue is bastard by both laws (that is, the common law and the ecclesiastical law), for the second marriage is void." On the same page he lays it down, in G. placitum 1, a divorce *causâ præcontractus* bastardises the issue: the same case, in the Year Book, 18th Hen. VI., p. 34, being cited for both positions. But if the contract alone makes the marriage, if it is itself *ipsum matrimonium*, where is the necessity for a divorce in the second case to bastardise the issue, which it is admitted is not necessary in the former case? They cannot be reconciled together, except upon the supposition that "having a wife" and "taking a wife," that is "actual marriage," was at that time held to be one thing, and "a contract of marriage" another, falling short of the marriage itself. The authority of Perkins, sect. 306 (whose statements, from his citation of the Year Books, may be placed conveniently amongst the decisions of the Courts of law), is to the same effect: "If a man seised of land in fee make a contract of matrimony with I. S., and he die before the
marriage is solemnised between them, she shall not have
[* 663] * dower, for she never was his wife." Perkins, indeed,
goes on to say, in the same section, "And it hath been holden in the time of King Henry III., that if a woman had been married in a chamber, that she should not have dower by the common law; but the law is contrary at this day." But, whatever is his opinion of the alteration of the law as to the case of the private marriage (by which he probably meant the ecclesiastical law as to the solemnities requisite, which in fact had been altered), still it has no relation to his first position, which is full,

complete, and express to the very point now under consideration. His observation amounts to no more than this, that in Henry III.'s time a marriage was held void which in his day (the reign of Queen Elizabeth) would be held irregular only; and, further, the observation is strong, that Perkins must have meant a different thing by the two phrases, "contract of matrimony" and "marrying in the chamber;" and what other difference can be suggested, except that the one was a contract by words only, the other a contract accompanied by a religious ceremony?

Again, the doctrine laid down by Perkins, title Feoffments, placitum 194 (for which he cites the Year Book 38 Edw. III., pl. 12), shows the diversity at that time between a contract and a marriage: "If a contract of marriage be between a man and a woman, yet one of them may enfeoff the other, for yet they are not one person in law; inasmuch as if the woman dieth before the marriage solemnised betwixt them, the man unto whom she was contracted shall not have the goods of the wife as her husband, but the wife thereof may make a will without the agreement of him unto whom she was contracted," &c.; and at the close of the next placitum he says, "But *after the [*664] marriage celebrated between a man and a woman the man cannot enfeoff his wife, for then they are as one person in law." Bracton, in book 2, c. 9, entitled "Si vir uxori donationem facere possit constante matrimonio," may be thought to leave the matter in some doubt whether such gifts would be good even after the contract, as he says, "Matrimonium autem accipi possit sive sit publice contractum vel fides data quod separari non possunt; et re vera donationes inter virum et uxorem constante matrimonio valere non debent." Now, even if it is considered that by the "fides data" Bracton understood a contract *per verba de præsenti*, without any solemnity, it is enough to say he could not be writing as a common lawyer (in fact he was a civilian) when he is found to differ from the authority of the Year Books.

The case of *Bunting* v. *Lepingwell*, Moore, 27 & 28 Eliz., is of great weight, and of immediate bearing upon the point in question. Taking the facts from the two reporters, Moore, 169; 4 Co. Rep. 29 a, it appears that Bunting and Agnes Addisall contracted matrimony between them *per verba de præsenti tempore*, and afterwards Agnes took to husband Thomas Twede, and cohabited with him; and afterwards Bunting sued Agnes in the Court of

Audience, and proved the contract, and the sentence was pronounced, "Quod prædicta Agnes subiret matrimonium cum præfato Bunting, et insuper pronuntiatum decretum et declaratum fuit dictum matrimonium fore nullum," &c., which marriage between Bunting and Agnes took place according to the sentence, and they had issue one Charles Bunting; and whether Charles Bunting was son and heir, was the question for the jury [* 665] in an * action of trespass brought by him; and the Court held him legitimate, and no bastard. The argument before the Court turned principally on the invalidity of the sentence of the Spiritual Court, by reason of Twede, the husband *de facto*, not being made a party to the proceedings by which his marriage was declared null; the Court, however, holding itself bound to give credit to the Spiritual Court that the proceedings were regular. But the bearing of the case upon the point now under discussion is, whether it establishes a distinction between the contract to marry and "*ipsum matrimonium*," and such seems the necessary inference. This was a trial before the Judges of the common law, who called for the assistance of civil lawyers to argue the case before them, but who must be supposed to know themselves what was the common law; and if the contract *per verba de præsenti* between Bunting and Agnes had been what the common law had then recognised as an actual marriage, the second marriage would have been held void without any controversy; no doubt would have existed, and no civilian would have been consulted, any more than if it had been a marriage celebrated *in facie ecclesiæ*. It is also not unworthy of remark, that the sentence of the Spiritual Court, "Quod prædicta Agnes subiret matrimonium cum præfato Bunting," proves that not even by the ecclesiastical law, as administered in England, was such contract held to constitute a complete marriage without the intervention of the religious ceremony.

The case of *Wild* v. *Chamberlayne*, 2 Shower, p. 300, is so far of importance, as it affords direct proof that in the opinion of Chief Justice PEMBERTON, on the trial of an issue [* 666] * "marriage or no marriage," words of contract *de præsenti tempore*, repeated after a person in orders, was a good marriage; for it was only by importunity of counsel a case was to be made thereof. If such a contract, alone and unaccompanied by a religious ceremony, had been a marriage, surely the case

would have been decided on a shorter ground, and the objections, that the parson was an ejected minister, and that the ring was not used at the ceremony, according to the ritual of the Church of England, would never have been urged.

In the case of *Haydon* v. *Gould*, 1 Salk. 119, Haydon and his wife were Sabbatarians, and married by one of their ministers in a Sabbatarian congregation, using the form of the common-prayer, except the ring; but the minister was a mere layman, and not in orders; and after administration granted to Haydon, and subsequently repealed, the Court of Delegates affirmed the sentence of repeal. The reason given is, "That Haydon, demanding a right due to him as husband by the ecclesiastical law, must prove himself a husband according to that law, to entitle himself in this case." In this case, the book adds, it is urged that this marriage was not a mere nullity, because by the law of nature it was sufficient; and though the positive law ordains it shall be by a priest, yet that makes such a marriage as this irregular only, but not void; but the Court ruled *ut supra;* the reporter adding, that the constant form of pleading marriage is, "per presbyterum sacris ordinibus constitutum." Perhaps the more correct expression might have been, "per ministrum sacris ordinibus constitutum;" for, undoubtedly, after the Reformation, a marriage might *be as well solemnised by a deacon as a priest. But [*667] what is the whole result of the case but this, that by the English ecclesiastical law a contract of marriage *per verba de præsenti* was not alone sufficient (for such contract there was in fact); but that by the same law, to make the marriage complete, there must be the presence and intervention of the priest? And when it is asked, as it was at your Lordships' bar, what had the priest to do, or what had he to say? the answer must be, that he married them, and in doing so he used such form of words as were customary at the time of his performing the ceremony. The form of words of present contract found in the ritual of the Church of England as established by the authority of Parliament in the 2 & 3 Edw. VI., c. 1, was not then for the first time made, but in part altered and in part retained from the former rituals which had been handed down from the greatest antiquity; just as it was declared by the Council of Trent (Session 24, c. 1), when it prescribes certain words to be used by the parish priest when performing the office of matrimony; viz., "Ego vos in matri-

monium conjungo, in nomine Patris et Filii et Spiritus Sancti." The decree also adds, "Vel aliis utatur verbis, juxta receptum uniuscujusque provinciæ ritum."

The only remaining decision of a Court of common law, to which it may be necessary to refer, is the case of *The Queen* v. *Fielding*, upon an indictment for bigamy, 14 State Trials, 1327. The evidence given of the first marriage was, that the parties made a contract *per verba de præsenti* in English, in the presence of and following the words of a priest in orders, though he was a priest in the orders of the Church of Rome; and Mr. Justice
[* 668] * POWELL, in summing up the case to the jury, more than once adverts to the fact that the marriage was by a priest. "If you believe Mrs. Villars," he says, "there was a marriage by a priest." There is no reason to infer from this direction to the jury, that if the first marriage in this case had been merely a contract *per verba de præsenti*, in the persence of a layman, the offence of bigamy must have been committed; but the inference to be drawn from the summing up of the Judge is directly the reverse.

My Lords, this being the state of the decided cases from the earliest time to the time of Queen Anne, the principal direct authority adduced on the part of the Crown is the *dictum* of Lord HOLT, in *Jesson* v. *Collins*, 2 Salk. 437, "that a contract *per verba de præsenti* was a marriage, and this is not releasable;" and the decisions which have subsequently taken place. That case came before the Court upon a motion for a prohibition, upon a suggestion that the contract was in fact *per verba de futuro*, for which the party had remedy at common law, and the case was disposed of by the Court, and the prohibition refused, upon the ground that the Spiritual Courts have jurisdiction of all matrimonial causes whatsoever, and that there was no reason to prohibit them, because this may be a future contract for breach of which an action at law will lie. This appears distinctly from the reports of the same case in 6 Modern, 155; and Holt's Reports, 457. This being the state of the case, HOLT, Ch. J., in speaking to it before the Court, used the expression above referred to. It is obvious, in the first place, it was unnecessary to the case before the Court; for, whether present words or future words, the
[* 669] prohibition * must equally be refused. The observation, therefore, is not entitled to the same weight and author-

ity as if it had been the very point of the case before the Court. If by the terms "*ipsum matrimonium*," Lord HOLT intended to lay down the position that it was so held by the common law of the land, notwithstanding the unbounded respect which all who have succeeded him have ever felt and still feel for his learning and ability, we cannot accede to his opinion. If, however, the observation was intended with reference to the civil law or the canon law of Europe, then it is perfectly correct; and that such was the intention of Lord HOLT we think abundantly clear from *Wigmore's Case*, which follows the former in the same page of Salkeld, and which was decided three years later than the first. In that case the husband was an Anabaptist, and had a license from the bishop to marry, but married this woman according to the forms of his own religion; *et per* HOLT, Ch. J., "By the canon law, a contract *per verba de præsenti* is a marriage."

In Holt's Reports the expression is precisely the same, "by the canon law;" and Lord Chief Justice HOLT is there made further to say, "In the case of a dissenter married to a woman by a minister of the congregation who was not in orders, it is said that this marriage was not a nullity, because by the law of nature the contract is binding and sufficient; for though the positive law of man ordains that marriages shall be made by a priest, that law only makes this marriage irregular, and not expressly void; but marriages ought to be solemnised according to the rites of the Church of England to entitle the privileges attending legal marriage, as dower, thirds," &c. It cannot be supposed that Lord HOLT would limit the observation * to the canon [* 670] law, as undoubtedly he did in *Wigmore's Case*, if it had been maintainable in the larger and unqualified extent supposed to have been stated by him in the case of *Jesson* v. *Collins;* and if the latter statement agrees with all the authorities, and the former is not, as we conceive, supported by or consistent with them, we are bound to infer, either that there is some error in the reporter, or that he really meant the proposition to be limited to its more restrained sense.

This *dictum* of Lord Chief Justice HOLT is of the more importance because it appears to have been the origin of all the subsequent opinions expressed by different Judges to the same effect. When Sir WILLIAM SCOTT lays it down as the law recognised by the temporal Courts of this kingdom, he cites this *dictum* of Lord

Chief Justice HOLT, which he observes (as he is justified in doing by the report in 6 Modern) was agreed to by the whole Bench. When GIBBS, Ch. J., makes the same observation, he expressly relies on the authority of Sir WILLIAM SCOTT. *Lautour* v. *Teesdale*, 8 Taunt. 830 (17 R. R. 518). When Lord KENYON makes a similar observation, probably on the same authority, observe how carefully he guards himself: "I think," he says, "though I do not speak meaning to be bound, that even an agreement between the parties *per verba de præsenti* is *ipsum matrimonium.*" *Reed* v. *Passer and Others*, 1 Peake, 303 (3 R. R. 696). When Lord ELLENBOROUGH lays down the same doctrine in *Rex* v. *The Inhabitants of Brampton*, 10 East, 282 (10 R. R. 299), he is giving judgment in a case of a marriage *per verba de præsenti* celebrated by a priest (though whether Roman Catholic or Protestant, he says, does not appear); and when he refers to the [* 671] * authority of HOLT, Ch. J., it is clear he considered Lord HOLT to have been speaking of a marriage through the intervention of a priest. It is therefore of very great importance to estimate justly the weight of Lord HOLT'S observation, when contrasted with the large field of authorities which has been opened; upon which authorities I have been longer occupied, because the question whereon we are called to answer depends upon the common law of England, of which the ecclesiastical law forms a part.

It will be improper, however, to close the discussion of this part of the case without adverting to an argument urged at your Lordships' bar, upon which some reliance appears to have been placed; namely, the state of the marriages of Quakers (all doubt as to which marriages is now set at rest by the statute passed in 1835) and of Jews.

The argument in substance was this: that as the persons professing the opinions of those respective persuasions celebrated their marriages according to their own peculiar rites, which necessarily excluded the intervention of a person in holy orders, according to the sense which those words are asserted to convey; and as their marriages have been held legal with respect (as it is argued) to all the consequences attending marriage, such as legitimacy, administration, and other civil rights; so the validity of such marriages can only be grounded upon the assumption that a contract of marriage *per verba de præsenti* did by law constitute a marriage itself.

Since the passing of the Marriage Act it has generally been supposed that the exception contained therein as to the marriages of Quakers and Jews amounted to a tacit acknowledgment by the Legislature that a marriage, solemnised with the religious * ceremonies which they were respectively known to adopt, [* 672] ought to be considered sufficient; but before the passing of that Act, when the question was left perfectly open, we find no case in which it has been held that a marriage between Quakers was a legal marriage on the ground that it was a marriage by a contract *per verba de præsenti;* but, on the contrary, the inference is strong, that they were never considered legal. The Legislature, in the statute 6 & 7 Will. III., c. 6, s. 63, enacts, that all Quakers and Jews, and any other persons who should cohabit and live together as man and wife, should pay the duty thereby imposed on marriages, and that upon every pretended marriage made by them they should give five days' notice; with an express provision in the 64th section, that nothing in the Act contained should be construed "to make good or effectual in law any such marriage or pretended marriage, but that they should be of the same force and virtue, and no other, as if the Act had not been made." And the case before Lord HALE, to which so much weight was attributed, as conveying his opinion that the marriage was good, appears rather to show his opinion to have been the reverse. He declared "that he was not willing, on his own opinion, to make their children bastards; and gave directions to the jury to find it special:" a declaration which plainly intimates that the inclination of his own mind was that the marriage was not good. We cannot, therefore, think that the case of the Quakers, although certainly one which it is difficult altogether to dispose of, amounts to such a difficulty as to induce us to alter the opinion founded on the authority of the decided cases.

And as to the case of the Jews, it is well known that in early times they stood in a very peculiar and * excepted [* 673] condition. For many centuries they were treated, not as natural-born subjects, but as foreigners, and scarcely recognised as participating in the civil rights of other subjects of the Crown. The ceremony of marriage by their own peculiar forms might therefore be regarded as constituting a legal marriage. without affording any argument as to the nature of a contract of marriage *per verba de præsenti* between other subjects. But even in the

case of a Jewish marriage it was more than a mere contract; it was a religious ceremony of marriage; and the case of *Lindo* v. *Belisario* (1 Hagg. Cons. Rep. 216) is so far from being an authority that a mere contract was a good marriage, that the marriage was held void precisely because part of the religious ceremony held necessary by the Jewish law was found to have been omitted.

I proceed now to refer to certain statutes passed by the Legislature at different times; from various enactments and expressions in which statutes the inference appears to follow, that a mere contract *per verba de præsenti* could not at those several times have been generally held to constitute complete marriage.

[The statutes referred to are 32 Hen. VIII., c. 38; 2 & 3 Edw. VI., c. 23; 12 Chas. II., c. 33; 7 & 8 Will. III., c. 35; 10 Anne, c. 19, s. 179. The Act of 1753 (Lord Hardwicke's Act) was also referred to as drawing that the contract *per verba de præsenti* was not considered by the Legislature to have constituted *ipsum matrimonium.*]

[678] I proceed, in the last place, to endeavour to show that the law by which the Spiritual Courts of this kingdom have from the earliest time been governed and regulated is not the general canon law of Europe, imported as a body of law into this kingdom, and governing those Courts *proprio vigore*, but, instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesisatical constitutions of our archbishops and bishops, and by the Legislature of the realm, and which has been known from early times by the distinguishing title of the King's Ecclesiastical Law. And if it shall appear, upon reference to this law, that there is no incontrovertible authority to be found therein, that marriage was held to be complete before actual celebration by a priest, the absence of such direct authority in the affirmative is sufficient to justify us in drawing the conclusion already formed, that the contract alone is not by the law of England the actual marriage. The result, however, of a somewhat hasty consideration of the authorities upon this

[* 679] * question (for the due research into which we were anxious to have obtained a longer time) appears to us to be, that no such rule obtained in the Spiritual Courts in this kingdom.

It would scarcely have been necessary to have entered upon this part of the discussion, had it not been for the observations made

by Sir WILLIAM SCOTT, in the case of *Dalrymple* v. *Dalrymple* (p. 11, *ante*). That very learned Judge, after laying down in his deservedly celebrated judgment in that case, that marriage is a contract of natural law and of civil law also, proceeds to observe, "that when the natural and civil contract was formed, the law of the church, the canon law, considered it had the full essence of matrimony without the intervention of the priest;" which canon law is then stated by that eminent Judge to be "the known basis of the matrimonial law of Europe." The observation upon which so much reliance has been placed by the counsel for the Crown then follows, "that the same doctrine is recognised by the temporal Courts as the existing rule of the matrimonial law of this country," although certainly the observation is in some degree qualified by the expression, "that the common law had scruples in applying the civil rights of dower and community of goods, and legitimacy, in the cases of these looser species of marriage."

In the opinion we have given, that we do not conceive it to be part of the law of the Temporal Courts that "when the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest," it is only proper to state, in the first place, that the entertaining, as we do, a different view of this subject from that eminent Judge, does not in any * manner whatever break in upon the authority of [* 680] the decision in the case of *Dalrymple* v. *Dalrymple*.

The doctrine of the Temporal Courts in England had no bearing at all upon a question which was to be decided solely by the law of Scotland; which country, it is well known, differs materially from ours in many of its legal institutions, and in none more pointedly than those which relate to marriage and legitimacy. The opinion of that eminent person, so far as regards England, was uncalled for and extrajudicial; and upon that ground the question before us must be considered as unfettered by the weight of such great authority, and open to the most free discussion.

But that the canon law of Europe does not, and never did, as a body of laws, form part of the law of England, has been long settled and established law. Lord HALE defines the extent to which it is limited very accurately. "The rule," he says, "by which they proceed is the canon law, but not in its full latitude, and only so far as it stands uncorrected either by contrary Acts of Parliament or the common law and custom of England; for there

are divers canons made in ancient times, and decretals of the popes, that never were admitted here in England." Hale's Hist. of Comm. Law, c. 2.

Indeed the authorities are so numerous, and at the same time so express, that it is not by the Roman canon law that [*681] our Judges in the Spiritual Courts * decide questions within their jurisdiction, but by the King's ecclesiastical law, that it is sufficient to refer to two as an example of the rest. In *Caudrey's Case*, 5 Co. Rep. 1, which is entitled "Of the King's Ecclesiastical Law," in reporting the third resolution of the Judges, Lord COKE says, "As in temporal causes the King, by the mouth of the Judges in his Courts of justice, doth judge and determine the same by the temporal laws of England, so in cases ecclesiastical and spiritual, as, namely" (amongst others enumerated), "rights of matrimony, the same are to be determined and decided by ecclesiastical Judges according to the King's ecclesiastical law of this realm;" and a little further he adds, "So, albeit the Kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved, and allowed here, by and with a general consent, are aptly and rightly called 'The King's Ecclesiastical Laws of England.'" In the next place, Sir John Davies, in "*Le Case de Commendams*," shows how the canon law was first introduced into England, and fixes the time of such introduction about the year 1290, and lays it down thus: "Those canons which were received, allowed, and used in England, were made by such allowance and usage part of the King's ecclesiastical laws of England; whereby the interpretation, dispensation, or execution of those canons, having become laws of England, belong solely to the King of England and his magistrates within his dominions:" and he adds, "Yet all the ecclesiastical laws of England were not derived and adopted from the Court of Rome; for long before the canon law was authorised and pub- [*682] lished" (which * was after the Norman Conquest, as before shown), "the ancient Kings of England, viz., Edgar, Athelstan, Alfred, Edward the Confessor, and others, did, with the advice of their clergy within the realm, make divers ordinances for the government of the Church of England; and after the Conquest divers provincial synods were held, and many constitutions were made in both the kingdoms of England and Ireland; all which are part of our ecclesiastical laws of this day."

We therefore can see no possible ground of objection to the inquiry, whether before the introduction of the canon law any law existed upon the subject of marriage differing from that of the canon law, and not afterwards superseded thereby; and when we find, in the collection of ancient laws and institutes of England published by the Commissioners of Public Records, amongst the laws of Edmund, one which directs that at the nuptials there shall be a mass-priest by law, who shall, "with God's blessing, bind the union to all prosperity," we can see no more ground to doubt the existence of this law (which does not now make its appearance for the first time, but was published by Wilkin (see Wilkins' Concilia, 367) in the last century) than any other document of antiquity which has been received as genuine without hesitation.

The council held at Winchester in the time of Archbishop Lanfranc, in the year 1076 (Johnst. Ecc. Law, A. D. 1076, s. 5), contains a direct and express authority with a nullifying clause, that a marriage without the benediction of the priest should not be a legitimate marriage, and that other marriages should be deemed fornication. Numerous councils follow, in which are decrees to prevent and * punish clandestine marriages, [* 683] but in no one of which is there any repeal, express or implied, of the rule laid down by the first; viz., that the presence of the priest is necessary to constitute a legitimate marriage; but the time of the marriage by the priest, the place where it is to be celebrated, and other regulations, are prescribed, in order to meet the evil which was then existing. That the marriage, though called clandestine, was still a marriage celebrated by a priest, and so assumed to be, is placed beyond all doubt by the 11th Constitution of Archbishop Stratford, established by the Council of London (Johnst. Ecc. Law, A. D. 1343, s. 11; 2 Wilkins' Concilia, 706): "De celebrantibus matrimonia clandestina in ecclesiis oratoriis vel capellis." That Constitution recites in effect, that people left their own places of residence, where the impediments to their marriage were notorious and their parish priests not disposed to solemnise their marriage, and betook themselves to populous places where they were unknown, in order that "aliquoties in ecclesiis aliquando in capellis seu oratoriis matrimonia inter ipsos de facto solemnizari procurent." What is this but a plain assumption that the marriage so celebrated, was celebrated

by a priest? for surely none others but persons in holy orders could celebrate them in churches, chapels, or oratories.

The authority of John De Burgo, a dignitary of the Church of England, was much relied on, as a direct proof that a contract *per verba de præsenti* was sufficient to constitute complete matrimony, without the presence or intervention of a priest. The materials of his work, bearing the quaint title of "Pupilla Oculi," were compiled in 1385, and the work itself printed at Paris; [* 684] but afterwards, in the year 1400, * an edition was printed in London, "Omnibus presbyteris precipue Anglicanis summe necessaria." The work contains, amongst other things, a treatise on the Administration of the Seven Sacraments; and under the head "De sacramento matrimoniali" occurs the passage relied on by the Crown. The author lays it down, "Of the minister of this sacrament it is to be observed, that no other minister is to be required distinct from the parties contracting; for they themselves for the most part minister this sacrament to themselves, either the one to the other, or each to themselves." And a little further he adds, "Scotus says, that to the conferring of this sacrament there is not required the ministry of a priest, and that the sacerdotal benediction which the priest is wont to make or utter upon married people, or other prayers uttered by him, are not the form of the sacrament nor of its essence, but something sacramental pertaining to the adorning of the sacrament." From this passage it is clear that, whether absolutely necessary or not, it was at least usual and customary at that time to make the contract before the priest. It appears further, from the first words of the following chapter, "De matrimonio clandestino," that such course was ordered by the church: "Inhibitum est contrahere nuptias occulte, sed publice, coram sacerdote, sunt nuptiæ in Domino contrahendæ." If, therefore, in the passage above cited, the author intends to express thus much only, and no more, viz., that by the contract *per verba de præsenti*, made privately between themselves, that mysterious sacrament of which he is speaking has been taken by them which makes the contract indissoluble and capable of being enforced by either against the other *in facie ecclesiæ*, such doctrine is admitted to be consistent with [* 685] the * ecclesiastical law received in England; but if it is supposed to mean more, if it is held up as an authority that the marriage is complete for all civil purposes of legitimacy,

dower, and other civil rights, then, before we accede to the proposition, it is the safer course to discover, if possible, whether the doctrine of the text writer is or is not consistent with the recognised laws and constitutions of the Church of England then in force, and with the course and practice of Ecclesiastical Courts of England at that time; and in case of a discrepancy between them, to reject the authority of the text writer, and to adhere to that of the recognised law and the practice of the Courts; for there is no surer evidence of the law in any particular case than the course and practice of the Courts in which such law is administered. We should treat the best of our text writers, Sir William Blackstone, for example, precisely in the same way.

Now, at the time of the publication of John de Burgo, and of the other work, entitled "*Manipulus Curatorum*," cited for the same purpose, there stood, unrepealed by any subsequent constitution of the church, both the constitution of Lanfranc, before stated, and the subsequent constitutions of the church against clandestine marriages: the former directly declaring the presence of the priest at the marriage to be necessary to give it validity; the latter implying such necessity. I ask whether the Courts of Ecclesiastical Law of England would take the law, if the very point in controversy was brought before them, from the text writers of the day, or from the constitutions of the church? I doubt not, however learned or in whatever estimation the text writers might be, it would be from the law of the church; and as to the course * and practice of the Courts of Ecclesiastical Law [* 686] in respect to a matrimonial suit to enforce marriage upon a contract *per verba de præsenti*, the prayer upon the libel has been not to pronounce that the parties are already actually and completely married, but that it may be pronounced "for the validity, full force, and strength of the said contract of marriage, to all effects and intents in law whatsoever; and that the defendant may be compelled to solemnise the said marriage in the face of the church" (Clerk's Instructor, 326): just as in *Bunting's Case*, before cited, the decree was not that Agnes was married, but that Agnes "matrimonium subiret."

And when reference is made to Oughton (vol. i. 283), the same appears more distinctly to be the form of proceedings; and it would be most singular, if the contract *per verba de præsenti* was considered by the Court as an actual complete marriage,

that a provision should be made for the Court to inhibit the party, "*pendente lite*, from contracting matrimony, or procuring matrimony to be solemnised." If the Court held the first marriage to be entirely complete, surely the statute of James, which had then been passed more than a century, and which made the second solemnisation a felony, would have been a surer protection than the inhibition of the Court. But the necessary inference is, that the Court could not have so held the effect of the contract; and it follows, therefore, that the authority of the passages above cited cannot be safely relied on, against the Constitutions of the church and the practice of the Spiritual Court.

We now pass to the consideration of the particular cir-
[* 687] cumstances involved in the first question proposed * by your Lordships, which supposes this marriage to have taken place in the house and in the presence of a placed and regular minister of the congregation of Protestant dissenters called Presbyterians.

As we have already stated our opinion, that to make the marriage a complete marriage, it must be solemnised in the presence of a minister in holy orders, it is only necessary to look back to the time when that law first obtained in England to enable us to answer that question without difficulty.

At the early period when such law arose, and down to a comparatively recent period, the expression priest, curate, minister, deacon, and person in holy orders, which are the words met with in the different constitutions and councils and authorities bearing on the subject, could point to those persons only who had received episcopal ordination; there were no others known at all; all but they were laymen: and unless some Act of the Legislature has interposed its authority, and given the Protestant dissenting minister in Ireland the same power for this purpose as the persons in holy orders did before possess, we think the entering into the contract in his presence cannot, in the legal sense of the word, be held to be entering into it in the presence of a person "in holy orders." Now no statute has been brought forward, except the 21st & 22nd Geo. III., c. 25 (Irish); but the operation of that statute is limited to matrimonial contracts or marriages between Protestant dissenters, and solemnised by Protestant dissenting ministers or teachers; and as your Lordships' question goes on to state that one of the contracting parties in this case is not a

Protestant dissenter, but a member of the Established Church of England and Ireland, it follows that the case does not fall within that statute, and * that it must be decided as if [* 688] that statute had never been passed.

The two subsequent conditions or circumstances contained in your Lordships' question can obviously make no difference. The form of the religious ceremony cannot, upon any principle or upon any authority, compensate for the want of the presence of the proper minister, assuming such presence to be necessary; nor can the circumstance of subsequent cohabitation carry the validity of the marriage higher than the original force of its obligation.

The main and principal point, however, of your Lordships' first question still remains to be answered; viz., whether, after such a contract entered into between A. and B., whether A., by marrying C. in England whilst B. is still living, commits the crime of bigamy?

And after the full discussion of the general question, and our opinion already declared, that the first contract does not amount to a marriage by the common law, it is hardly necessary to say that we hold the offence of bigamy has not been committed. Indeed, independently altogether of the answer we have given to that abstract question, and admitting, for the sake of argument, that the law had held a contract *per verba de præsenti* to be a marriage, yet, looking to the statute upon which this indictment is framed, we should have thought, upon the just interpretation of the words of that statute, the offence of bigamy could not be made out by evidence of such a marriage as this. The words are, "If any person, being married, shall marry any other person during the life of the first husband or wife;" words which are almost the very same as those in the original statute of James I. Now the words "being married," in the first clause, * and the words "marry any other person," in the second, [* 689] must of necessity point at and denote marriage of the same kind and obligation. If, therefore, a marriage *per verba de præsenti*, without any ceremony, is good for the first marriage, it is good also for the second; but it never could be supposed that the Legislature intended to visit with capital punishment (for the offence would be capital if the plea of clergy could be counter-pleaded) the man who had in each instance entered into a contract *per verba de præsenti*, and nothing more. Waiving,

however, that consideration, it is enough to state to your Lordships, as the answer to the first question, that in our opinion A. did not, under the circumstances therein stated, commit the crime of bigamy.

My Lords, we have so fully and pointedly answered the second question proposed by your Lordships, in stating the grounds of our first answer, that it is unnecessary to trouble you with any further observation thereon except that as the statute of 58 Geo. III., c. 81, has enacted that no suit shall be had to compel the celebration of such a contract in any Ecclesiastical Court in Ireland, we think this question also should be answered in the negative.

In conclusion, I would only observe, that, although I am authorised to state that our opinion on the questions proposed to us is unanimous, yet I ought to add that my learned brethren are not to be held responsible for the reasoning upon which I have endeavoured to establish the validity of that opinion.

Lord BROUGHAM, in rising to move that the opinions of the learned Judges be printed, proceeded (*more suo*) to make observations: —

[* 694] * The LORD CHANCELLOR. — Will my noble and learned friend allow me to suggest, whether the prudent course would not be, that we should for the present abstain from making any observation upon the case, and consider what course we should take? [After some further observations by the learned Lord (BROUGHAM), the LORD CHANCELLOR moved that the further consideration of the case should be adjourned, and this was done.

On the final consideration the Lords present, Lord BROUGHAM, Lord ABINGER, Lord CAMPBELL, Lord DENMAN, the LORD CHANCELLOR (Lord LYNDHURST), and Lord COTTENHAM, gave their reasoned opinion *seriatim*. The opinions of Lord BROUGHAM, Lord CAMPBELL, and Lord DENMAN were in favour of the Crown (the plaintiff in error). Those of Lord ABINGER, the LORD CHANCELLOR, and Lord COTTENHAM were in favour of the defendant in error. To print the whole of these opinions, would render the report too long for the present work. In order to present the principal arguments on either side, it will suffice to set forth the opinions of Lord CAMPBELL and the LORD CHANCELLOR.]

[746] Lord CAMPBELL. — After the most anxious consideration of the opinion delivered by the learned Judges in

this case, I am unable to concur in it, and I cannot advise your Lordships to act upon it. I need not express my high respect for the individuals now administering justice in the Courts of common law in Westminster Hall, or the reverence with which I must regard whatever is laid down by Lord Chief Justice TINDAL; a Judge who, for learning and ability, is not [* 747] inferior to the most distinguished of his predecessors.

I certainly much regret that, upon a subject of such infinite importance and such great difficulty, the time had not been allowed to the Judges which they themselves stated they considered necessary for duly examining and weighing the conflicting authorities and arguments brought forward at your Lordships' bar. When you avail yourselves of your privilege of consulting the Judges on any question of law which you have to consider, you generally have the advantage of knowing the reasons by which they are swayed; for they either deliver their opinions *seriatim*, each expressing his own reasons; or the Judge highest in rank, who delivers their unanimous opinion, expresses reasons in which they have all concurred. On this occasion the reasons are the reasons of the CHIEF JUSTICE alone, and we are left entirely in the dark as to the process by which the others arrived at the conclusion that the first marriage entered into by the prisoner with Hester Graham, before a Presbyterian minister, — which both parties intended and believed to be a present valid marriage, and under which they cohabited together for years as man and wife, without any doubt as to its validity, — was null and void. In the Courts below, upon questions of great magnitude, it has not been unusual for the different Judges of the Court to give their opinions with their reasons separately, even when they agree in the judgment; of which we have a memorable instance in the case of *Stockdale* v. *Hansard*, 9 Ad. & E. 1; and I think your Lordships will not have the full benefit of consulting the Judges unless they deliver their opinions separately, or are understood * to concur in the reasons assigned by [* 748] the Judge who delivers their unanimous opinion. It is possible that for the same opinion contradictory reasons might be given, and that the weight to be ascribed to it may be much lessened by those who join in it combating and overthrowing the arguments of each other. In the present case we have particularly to lament that we are informed of the reasoning only of one Judge,

as he states that "it was only after considerable fluctuation and doubt in the minds of some of his brethren that they had acceded to the opinion which was formed by the majority." I should have been much gratified and edified by being informed of the course of this fluctuation; what the doubts were which weighed in the minds of those learned persons, and by what train of reasoning those doubts were dispelled.

Now it is most essential that your Lordships should bear in mind the facts found by the special verdict. If George Millis had merely entered into a contract *per verba de præsenti* to marry Hester Graham, the parties not considering the engagement a present marriage, and intending that before they lived together as man and wife it should be solemnised by a subsequent ceremony, I should have agreed with the Judges that the man would not have committed bigamy by afterwards marrying another woman. Betrothment is not matrimony. Were a priest in orders accidentally present at such a betrothment, and the parties, instead of intimating before him that they intended to be then married, expressed their intention that it was only an absolute engagement that they should afterwards become man and wife; by whatsoever form of words that engagement might be expressed, this would not have been *ipsum matrimonium.* But the jurors, by [* 749] the special verdict, say, "that in January, 1829, * George Millis, accompanied by Hester Graham, spinster, and three other persons, went to the house of the Rev. John Johnstone, of Banbridge, in the county of Down, the said Rev. John Johnstone then and there being the placed and regular minister of the congregation of Protestant dissenters commonly called Presbyterians; and that the said G. Millis and H. Graham then and there entered into a contract of present marriage, in the presence of the said Rev. John Johnstone and the said other persons, and the said Rev. John Johnstone then and there performed a religious ceremony of marriage between the said G. Millis and H. Graham, according to the usual form of the Presbyterian Church in Ireland; and that after the said contract and ceremony the prisoner and the said Hester for two years cohabited and lived together as man and wife, the said Hester being after the said ceremony known by the name of Millis." Now this was not a mere betrothment; this was not a mere executory contract *per verba de præsenti* for a marriage thereafter to be solemnised;

this was, as it was meant to be, *ipsum matrimonium*. Here we have not only *pactum*, not merely *sponsalia*, but *nuptiæ per verba de præsenti*. I rely upon the distinction between a contract *per verba de præsenti* for a marriage to be afterwards solemnised, and *nuptiæ per verba de præsenti* without any contemplation of a future ceremony as necessary to complete the relation of man and wife; a distinction (I speak it with the most profound respect) which I think the learned Judges have not sufficiently kept in view. The use of the expression "contract of marriage" is equivocal, and may mean the actual formation of the relation of husband and wife; but it may mean only an irrevocable engagement to be afterwards carried into effect, the parties not meaning then to become husband and *wife, and their engagement [*750] therefore, though words in the present tense are used, not amounting to *nuptiæ*.

This distinction may be illustrated by the decisions respecting leases. The general rule is, that a contract to let land *per verba de præsenti* is *ipsa locatio;* the term is instantly created, and the interest vests in the lessee without the execution of a formal instrument of demise; but if it appears to have been the intention of the parties that, till a formal instrument of demise was executed, the relation of landlord and tenant for the stipulated term should not be constituted between them, the instrument containing words of contract *per verba de præsenti* is considered only an executory agreement, the specific performance of which may be enforced in a Court of equity, and a subsequent lease to another would be good at law till set aside on the ground of the precontract; but where the contract to let *per verba de præsenti* is intended by the parties to operate immediately, it is *ipsa locatio*, however informal it may be, and a subsequent lease to another is merely void. In the present case it is clear that the parties contemplated no further ceremony completely to constitute the conjugal relation between them, and that they at the time of the ceremony intended to become, and believed that they had become, husband and wife.

The only objection that can be taken to the validity of this marriage is, that there was not present at it a priest or deacon episcopally ordained, or a person believed by the parties to be a priest or deacon episcopally ordained; and the question arises, whether by the common law of England, which is allowed to be

the common law of Ireland, there could not be a valid mar-
[* 751] riage without the presence of a priest or deacon * so or-
dained, or believed by the parties to be so ordained. The condition contended for as indispensable to the validity of marriage, is the presence of a person believed by the parties to be in priest's or deacon's orders. It is not considered essential that he should pronounce a benediction, or join in any religious ceremony; and though he never was episcopally ordained either as priest or deacon, his presence is sufficient, if the parties believe that he is in priest's or deacon's orders: while a marriage celebrated by a clergyman who is actually in Presbyterian orders, and who is believed by the parties to be entitled by the law of God and the law of the land to marry them effectually, is a nullity. Such is the common law contended for by the counsel for the prisoner; but surely the *onus* lies on those who maintain that such is the common law, to make out their proposition by decided cases and text writers of authority.

I must be allowed to point out to your Lordships the extreme improbability of the common law of England requiring the presence of a priest to the validity of marriage. I think it is quite clear that by the general law prevailing in the western church prior to the Council of Trent, — although a marriage, to be regular, ought to have been *in facie ecclesiæ*, — for a marriage to be valid, so that the parties would not be considered as living together in fornication, and their issue would be legitimate, the presence of a priest was quite unnecessary. Marriage, as a sacrament, was considered a matter of ecclesiastical jurisdiction; the validity of marriage was decided in the Ecclesiastial Courts; from those Courts there was an appeal to Rome as a common forum. The proceedings in the divorce suit between Henry VIII. and
Catharine of Arragon afford the most recent and the most
[* 752] striking * instance of the law of marriage in England being considered as governed by the law of marriage prevailing in other Christian countries.

Now, that by the general marriage law of Europe, before the Reformation and before the Council of Trent, there might be a valid marriage without the presence of a priest, is clearly demonstrated by the canonists cited at the bar. I will confine myself to two authorities as quite sufficient for this purpose. In the work of John de Burgh (a canonist of the highest reputation), entitled

No. 2. — Reg. v. Millis, 10 Cl. & Fin. 752, 753.

"*Pupilla Oculi*," there is a chapter "*De sacramento matrimonii*," in which we find this doctrine expressly laid down: "De ministro hujus sacramenti notandum est quod non requiritur alius minister distinctus ab ipsis contrahentibus; ipsimet enim ut plurimum sibi ipsis ministrant hoc sacramentum, vel mutuo vel uterque sibi. Patet etiam quod ad collationem hujus sacramenti non requiritur ministerium sacerdotis, et quod illa benedictio sacramentalis, quanquam solet presbyter facere sive perferre super conjuges, sive aliæ orationes ab ipso probatæ, non sunt forma sacramenti, nec de ejus essentia, sed quoddam sacramentale ad ornatum pertinens sacramenti." He afterwards goes on to state that marriage ought to be solemnised openly before a priest, but intimates that a clandestine marriage, where no priest is present, is binding and valid in law. Fernando Walter, now a professor in the University of Bonn, in his "Treatise on the Canon Law," a work highly esteemed on the continent of Europe, speaking of the decree of the Council of Trent on this subject, says: "The provision is new that both parties must declare their intention before their proper parochial minister and at least two witnesses: this form is declared so essential that without it the marriage is *altogether void; but yet the object is only to [*753] secure a trustworthy witness in order to the precise ascertainment of the marriage, wherefore the persons mentioned need not have been expressly invited to be present. Nay, even the opposition of the parochial minister does not prevent the validity of the marriage, if he has merely heard the declaration. He goes on to explain the difference between a regular marriage before a priest and a clandestine marriage without a priest, but considering them equally effectual: he says, "Marriage is a contract which ought, according to the ancient usage, to be confirmed by the priestly benediction; and properly this ought to be given by the proper parochial minister, or some one authorised by him according to the rules of the church. Other ceremonies are also to be observed. None of all this, however, is essential to the validity of the marriage." The decree of the Council of Trent respecting the solemnisation of marriage, requires the presence of the parish priest or some other priest specially appointed by him or the bishop; but, even under this decree, the priest is present merely as a witness; it is not necessary that he should perform any religious service, or in any way join in the solemnity. This

view of the subject is illustrated by the case of *Lord and Lady Herbert*, 3 Phill. 58, 2 Hagg. Cons. Rep. 263. They were married in Sicily, where the decree of the Council of Trent is received. They got the parish priest to attend at the house of the lady, and two of her servants were called up. In the presence of these witnesses she said, "I take you for my husband;" and he said, "I take you for my wife." Nothing more passed, and this was held to be a valid marriage in Sicily, and therefore all the [* 754] world * over. It thus appears quite certain that, according to the doctrine of the Roman Catholic Church, no religious ceremony was or is necessary to the constitution of a valid marriage. Although marriage is considered a sacrament, this sacrament, like baptism, might be administered, under certain circumstances, without the intervention of a priest; the parties being liable to be censured for the irregularity of dispensing with the conjugal benediction and neglecting to make the proper offering to the church. There is not a trace in any ecclesiastical writer of the law of marriage in England being different from the law of marriage in other Christian countries. I earnestly entreat your Lordships to bear in mind that I by no means say every contract of marriage using words *de præsenti* was *ipsum matrimonium;* on the contrary, in England, and I believe in the rest of Europe, an absolute engagement to become man and wife at a future time did not amount to present marriage; but if the parties had wished and intended to enter into present marriage without the presence of a priest, they might have done so, subject to church censures for irregularly contracting the relation of man and wife, — not for living together in sin; — and I will use the freedom to make an observation upon what has fallen from my noble and learned friend who last addressed your Lordships, who would infer that the parties who have contracted *per verba de præsenti* were not man and wife till the marriage was celebrated, because Lord HOLT says that the parties might be liable to censure if they lived together before the celebration of marriage. Now, I believe it is not disputed that in Scotland there may be a valid marriage *per verba de præsenti* without the intervention of a priest; and I can state of my own knowledge, — being [* 755] the son * of a minister of the Church of Scotland, and having myself been present at such proceedings, — that the parties who have been living together as man and wife after

an irregular marriage are considered as liable to church censure, and are not admitted to the communion of the church until they have been censured, and have expressed their regret for not having complied with the rules of the church; but that the marriage is *ipsum matrimonium* has never been doubted.

The LORD CHANCELLOR. — Suppose there is a contract *per verba de præsenti*, and nothing further, — no cohabitation; would the church under such circumstances interfere by its censures?

Lord CAMPBELL. — That case has not come within my observation. The cases to which I refer, and which are not at all unfrequent, are those of a runaway or what is called a half-mark marriage, where the parties contract *per verba de præsenti*, and where they live together as man and wife, and are unquestionably man and wife, and where the children would be legitimate if the parents died without any further ceremony; that was decided by your Lordships' House in the case of *MacAdam* v. *Walker*, 1 Dow, 148 (14 R. R. 36), where the man shot himself the instant he declared that the woman he had married was his wife. In those cases still the church considers the marriage as irregular, and summons the parties before the kirk session, and rebukes them for not having observed the rules of the church. . . .

But to show that there was a peculiar law in England [756] on this subject, even in the time of the Anglo-Saxons, there is cited to us a supposed law of King Edmund, directing "that at the nuptials there shall be a mass-priest, who shall, with God's blessing, bind their union to all prosperity." Setting aside the grave doubts which have been entertained of the genuineness of this document, does it show, that while a mass-priest is directed to be present at nuptials, nuptials without the presence of a mass-priest would be void, and that this ever after was the law of England? Then is a marriage void that is celebrated by a deacon? for he is not a mass-priest, and his presence would as little satisfy the law as that of the verger or the sexton.

There were then cited to us numerous decrees of provincial councils on the subject of marriage, the great object of which was to discourage clandestine marriages, and to require that all marriages should be celebrated in the face of the church; but there is no reason to suppose that the prelates who presided at these councils, many of whom were foreigners, intended to introduce any law touching the essentials of marriage different from what

prevailed in the rest of Christendom; they were only in the nature of bye-laws, to be observed in a particular diocese or province, to prevent as much as possible all clandestine marriages, either with or without the intervention of a priest. I believe there is only one of these constitutions, that of Archbishop Lanfranc [* 757] in the year 1076, * which professes to nullify a clandestine marriage by declaring that a marriage without the benediction of the priest should not be a legitimate marriage, and that other marriages should be deemed fornication. But this denunciation goes further than the law is supposed ever to have gone; for the blessing of the priest was not essential to the validity of the marriage if he was present, and the denunciation may rather be taken to be *in terrorem* than as making or declaring the law.

The different decrees against clandestine marriages seem to me to have no cogency to show that there was in England any peculiarity respecting the law of marriage as held by the Ecclesiastical Courts. These decrees, if they were supposed to apply to the validity of the marriage, are contrary to the plainest propositions of canonists, both foreign and native, and to the universal practice of Christendom. The existence of such a peculiarity seems wholly inconsistent with the procedure by which that law was administered. The Church of Rome, in every country under its jurisdiction, was most anxious that marriages should be publicly celebrated in the presence of a priest; first, for the laudable object of preventing imprudent unions by which the peace of families might be disturbed; and, secondly, for the excusable object of collecting fees from the faithful. It was proved before your Lordships' Committee on the Law of Marriage in Ireland, that a principal part of the emoluments of the Roman Catholic clergy in Ireland now arises from fees on marriages, and that for this reason they are celebrated at the times, in the places, and under the circumstances when it may be expected that the contributions will be most bountiful. But till the Council of [* 758] Trent, when marriages were absolutely required to * be before the parish priest, or some other person duly authorised by the bishop or the parish priest to officiate, — and all other marriages were declared to be null, — the doctrine of the Church of Rome certainly was that there might be a valid marriage without the intervention of a priest; and if that was so, it was hardly

possible that any different law should prevail in any State subject to her jurisdiction.

In England the common-law Judges professed, with respect to marriage, to be governed by the Ecclesiastical Courts; those Courts alone took direct cognisance of the validity of marriage; and when the question arose incidentally before the common-law Judges, they referred themselves to the bishop as the ecclesiastical Judge, and were governed by the certificate which he returned. Upon some occasions the validity of marriage arose as a question before the common-law Judges when they could not consult the bishop. On such occasions they would have regard to the ecclesiastical law, and decide accordingly; but the bishop would not on any occasion disregard the general ecclesiastical law, and be guided by any different rules laid down by the Courts of common law.

Let us now see whether there are any common-law decisions to the effect that there cannot be a valid marriage without the presence of a priest. I must again remind your Lordships that this is the question, and not whether a mere executory contract to marry constitutes marriage. There has been cited to us from Lord HALE's Manuscripts the note of a case (Co. Litt. 33 a, *n.* 10) supposed to have been decided in the reign of Edward I., the statement of which is so scanty and obscure that I think no weight can safely be given to it as an exposition * of the [*759] law in that reign. We are not told how A. contracted with B., or that any ceremony or form intended as spousals passed between them. It is said that A. married C., from which it may be inferred that he did not intend that his contract with B. should operate as a present marriage, and that his contract with her, although *per verba de præsenti*, was only meant to be executory. However, in the Court in which the action was originally brought, it was held that B. was dowable of the lands in question, which could only be on the ground that A. and B. were husband and wife from the time of the contract, for the marriage could not possibly date from the sentence of the Ordinary. The judgment was reversed "*coram Rege et Concilio.*" This is suggested at the bar to have been on a writ of error in Parliament. There can be no doubt that one of the King's Councils at that time consisted of the Chancellor, the Treasurer, the Barons of the Exchequer, the Judges of either bench, with the King's Serjeant and the King's Attorney-General, and that they assisted in deciding cases brought

before Parliament; but I am not aware that a writ of error in Parliament was ever said to be *coram Rege et Concilio.* On the contrary, my Lords, this was the style of the Star Chamber, and I conceive that the case must be considered as an instance of the irregular interference by the King and his Privy Council with the ordinary administration of justice; the reversal of the judgment may have been out of favour to D., to whom the feoffment was made by A. after he was excommunicated. Lord HALE adds, "Neither the contract nor the sentence was a marriage." The sentence could not be a marriage, no more could the contract, if it was intended not as *nuptiæ,* but only as an engagement to marry.

[*760] *Then come the two cases of *Foxcroft* and *Del Heith,* and I must express my astonishment that any reliance should be placed upon them in support of the proposition that marriage without a priest is void. If they prove anything, they prove that marriage by a priest is void unless celebrated *in facie ecclesiæ.* Foxcroft was married in a private chamber by the Bishop of London, and the only objection taken to the validity of the marriage was, that it did not take place in a church or chapel and that it was without the celebration of mass. *Del Heith's* case is precisely the same in its leading facts; there was not a mere contract *per verba de præsenti,* but *nuptiæ* were actually celebrated. Del Heith was solemnly married to the woman by his parish priest; and because the marriage was in a private chamber, and not *in facie ecclesiæ,* the son born after the marriage was adjudged a bastard. Can these cases have been decided according to the law of England as it stood in the reign of Edward I.? Was a marriage solemnised by a priest in orders or by a bishop in a private chamber absolutely void? If so, when was the law introduced by which it was made void? It is not pretended that in the time of the Anglo-Saxons more was required than a benediction by a mass-priest, which might as well be given in a private chamber as in a church or chapel. If in the reign of Edward I. all marriages were void except such as were celebrated in the face of the church, when and by what authority did private marriages by a priest in orders become valid? Could an ecclesiastical canon, sanctioned by the Pope, without the consent of the King and Parliament, effect the change? If it could, where is any such canon to be found?

I had always thought that these two cases had been allowed to have been decided contrary to law, and I have no doubt that they were so. They may now be * cited quite as much [*761] to show that a marriage is void by the canon law if privately solemnised by a bishop, as that an actual marriage is void without the presence of a priest. They prove a great deal too much, or they prove nothing at all. But I cannot dismiss them without this observation, which they fully illustrate, that you cannot safely take the law upon such a subject from two or three cases, supposed to have been decided in very remote times, which may be misreported, and which may be the result of haste, violence, or corruption. I should cite *Foxcroft's* (1 Roll. Abr. 359) and *Del Heith's* (Rogers Eccl. Law, 584) cases to show that the law upon such a question may best be learned from text writers of authority, calmly and deliberately and impartially speaking the general opinion of the legal profession at the time when they were published. In no writer, lay or ecclesiastical, is it said that a marriage privately solemnised by a priest is void, or that a marriage is void, there being no priest present. It is laid down that a second marriage by a man already married is void, while a marriage after a contract *per verba de præsenti* is only voidable. This shows that the mere executory contract, although indissoluble, is not marriage; but does not show that there might not have been a complete marriage without a priest, had the parties so wished and intended.

The authority of Perkins has been greatly relied upon at the bar, as showing that unless there be a marriage by a priest, the woman shall not have dower. Now, without considering whether this may mean dower *ad ostium ecclesiæ*, I would first question whether the right to dower would be a certain test of marriage. For the church, the test is whether the parties are considered as living together in lawful wedlock; and for the lay tribunals, whether the issue * be legitimate. But I think it is [*762] quite clear that the woman who, according to Perkins, shall not have dower, is a woman who had entered into an executory contract of marriage to be afterwards solemnised; for he says (sect. 306), "If a man seised of land in fee make a contract of matrimony with J. S., and he dies before the marriage is solemnised between them, she shall not have dower, for she never was his wife." Does he not, in the most explicit manner, intimate

that, according to the intention of the parties, the contract of matrimony between them was to be afterwards solemnised; that they never intended the contract to operate as marriage and that, till the solemnisation, they were not to live together as man and wife? Wherever Perkins uses the expression "contract of marriage," he places it in opposition to actual marriage; as in title "Feoffments," where he says, "If a contract of marriage be between a man and a woman, yet one of them may enfeoff the other, for yet they are not one person in law, inasmuch as if the woman dieth before the marriage solemnised betwixt them, the man unto whom she was contracted shall not have the goods of the wife as her husband." He is here plainly speaking of an engagement to marry. Bracton, on the contrary, when he is considering the subject of gifts between husband and wife, supposes the parties to be married whether they marry with or without the forms of the church, their intention being to enter into the married state: "Matrimonium autem accipi possit, sive sit publice contractum vel fides data quod separari non possunt, et re vera donationes inter virum et uxorem constante matrimonio valere non debent." With the plighting of troth, which he supposes to take place without any public ceremony, the parties come to-
[*763] gether as man and wife, so that they *cannot be separated. This is totally different from the contract of Perkins to be afterwards solemnised, and is attended with totally different consequences.

The next case much relied upon at the bar was *Bunting* v. *Lepingwell*, 4 Co. Rep. 29, Moore, 169; and supposing that Bunting and Agnes Addishall had gone through the form of a present marriage without the presence of a priest, or had said or done anything which they intended to operate as present marriage, the case would have been very important; for on that supposition, if I am right in supposing that by the common law the presence of a priest was not necessary to the validity of marriage, no doubt could have arisen as to the legitimacy of Charles Bunting, the second marriage being absolutely void, and there being no occasion for any sentence of the Ecclesiastical Court to set it aside, or "*quod prædicta Agnes subiret matrimonium cum præfato Bunting.*" But in referring to the special verdict it is quite clear that Bunting and Agnes, although they used *verba de præsenti*, did not thereby mean to become man and wife, but merely entered into

an absolute engagement to solemnise a marriage between them at a future time; it was only an executory contract; and when Agnes had taken Twede to husband, Bunting libelled her on the contract. Bunting and she under this engagement never had lived together, or intended to live together, as man and wife; their engagement, therefore, was only in the nature of a precontract, which might then be enforced in the Ecclesiastical Court, and which rendered a subsequent marriage with another voidable, but which did not in itself amount to a marriage. But where is the case in * which it has been held that if parties intend to enter into the state of matrimony, and use a ceremony *per verba de præsenti*, and live together as man and wife, and believe that they are lawfully united in holy wedlock, this was a mere executory contract; that a subsequent marriage by one of them during the life of the other would not be void; and that such a subsequent marriage must be set aside on the ground of precontract? I quite agree that the contract actually entered into between Bunting and Agnes neither constituted, nor was ever intended to constitute, a complete marriage, without the intervention of a religious ceremony. [* 764]

The case of *Weld* v. *Chamberlaine*, 2 Show. 300, is relied upon by both sides; Chief Justice PEMBERTON having there held that a marriage by an ejected minister, without a ring, and without following the ritual of the Church of England, was valid. But I cannot help thinking that the opinion of the CHIEF JUSTICE was chiefly influenced by the consideration that this was not a mere contract to marry hereafter; that both parties intended at the moment to enter into the married state; that *nuptiæ* had been celebrated between them; and that he would have given the same effect to the ceremony, if, instead of an ejected minister who had been episcopally ordained, but was not then recognised by the church, the clerygman present had been ordained by the imposition of hands of several ejected ministers, or, in other words, a Presbyterian minister.

The only other case much relied upon by the counsel for the prisoner was *Haydon* v. *Gould*, 1 Salk. 119. Here there was an actual marriage, and the man and the woman intended to become husband and wife, and believed that they were so, and lived together as such for * seven years, till she died. They were of a sect called Sabbatarians, and were married [* 765]

by one of their ministers in a Sabbatarian congregation, and used the form of the Common Prayer, except the ring. Had there been a decision of a Court of law that this was no marriage, and that the issue were illegitimate, it would have been expressly in point; but the case was only in the Ecclesiastical Court, and the only question there was, whether the husband was entitled to administration. It was held in the Prerogative Court, and confirmed by the delegates, that the husband could not demand administration from the Ecclesiastical Court, as he had not been married according to the forms of the church, "though perhaps it should be so that the wife, who is the weaker sex, or the issue of this marriage, who are in no fault, might entitle themselves by such marriage to a temporal right." The delegates, therefore, who allowed the husband to be punished for his nonconformity to the church, instead of deciding the marriage to be void, appear to have intimated an opinion that under it the wife would have been entitled to dower, and the children would have been legitimate. The reporter, it is true, adds, the constant form of pleading marriage is, "*per presbyterum sacris ordinibus constitutum.*" But if this were the only form, it would exclude marriages by a deacon, which are now admitted to be valid. Had there been a reference to the Court which decided *Haydon* v. *Gould*, pending a real action involving the question of the legitimacy of the eldest son, there is reason to suppose the certificate would have been that he was born *in justice nuptiis;* and I make no doubt that in such a case such an answer would have been returned by the bishop in early times, when it was the universal opinion of the [* 766] * Western church that to administer the sacrament and to constitute the bond of marriage, the presence of a priest was unnecessary. With respect to the refusal of administration to the husband, I am by no means clear that the same decision would not have taken place under a clandestine marriage by a Roman Catholic priest.

Beau Fielding's case is exceedingly entertaining to read, but throws no light upon the present controversy, as no question arose as to the validity of the first marriage, and his guilt depended upon the credit of the witnesses who swore to the second.

The *Sabbatarian* case was decided in the ninth year of Queen Anne, and I will venture to say, that from that time downwards till the present controversy arose, about 130 years, the opinion of

all the greatest Judges who have presided in Westminster Hall and in Doctors' Commons has been, that by the common law the presence of a priest in orders was not indispensably necessary to the celebration of a valid marriage.

In *Jesson* v. *Collins*, 2 Salk. 437, we have the *dictum* of that distinguished Judge, Lord HOLT, "that a contract *per verba de præsenti* was a marriage." He, no doubt, meant where it was intended to operate as a present marriage, and he expressly excluded the presence of a priest. It seems to me plain that by a marriage, he must be understood to intend a marriage by the common law of the land. It has been supposed that this could not be his meaning, because in *Wigmore's Case* (2 Salk. 438) he says, "By the canon law, a contract *per verba de præsenti* is a marriage." Both propositions are true, and both are consistent. The common law adopted * that maxim of the [*767] canon law with respect to the validity of marriages. This will be found to be the opinion and the language of Sir W. SCOTT, the Judge of the highest authority on this subject who has ever presided in an English Court of justice. HOLT appears to have said in *Wigmore's Case*, as was said by the delegates in *Haydon* v. *Gould*, that to entitle the parties to all the privileges attending legal marriage, marriages ought to be solemnised according to the rites of the Church of England; but he gives no countenance to the notion that the marriage by the minister of the congregation who is not in orders is a nullity, and that the children would be bastards. We have the authority of Mr. Justice GOULD, Mr. Justice POWIS, and that distinguished Judge, Mr. Justice JOHN POWELL, to the same effect as that of Lord HOLT; for according to the report of *Jesson* v. *Collins*, under the name of *Collins* v. *Jessot*, 6 Mod. 155, the CHIEF JUSTICE saying, "If a contract be *per verba de præsenti*, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God as if it had been *in facie ecclesiæ;*" the reporter observes that to this the whole Court agreed, "*quæ omnia tota Cur. concess.*"

I do not find the subject again discussed till the publication of Blackstone's Commentaries, where, if anywhere, we may look to find the principles of our jurisprudence. If he has fallen into some minute mistakes in matters of detail, I believe upon a great question like this, as to the constitution of marriage, there is no

authority to be more relied upon. He began, before the [*768] Marriage Act, to read the lectures *at Oxford, which became the Commentaries, but did not publish them till after, and his attention must have been particularly directed to the law of marriage. Does he say that at common law marriage could not be contracted in England without the intervention of a priest? His words are, "Our law considers marriage in no other light than as a civil contract; the holiness of the matrimonial state is left entirely to the ecclesiastical law." 1 Blacks. Comm. 437. He lays it down in the most express terms, that, before the Marriage Act, in England a marriage *per verba de præsenti*, without the intervention of a priest, was *ipsum matrimonium*. He says that for many purposes it was marriage; it must have been marriage to make the children legitimate, for that is the test by which a valid marriage is to be determined; and if it makes the children legitimate, there can be no doubt it would be valid so as to make the person who has entered into it liable for the penalties of bigamy if he enters into a second marriage. He mentions Lord Hardwicke's Act (26 Geo. III., c. 33); he then says, "Much may be and much has been said both for and against this innovation upon our ancient laws and constitution." He adds, "Any contract made *per verba de præsenti*, or in words of the present tense, and, in case of cohabitation, *per verba de futuro* also, between persons able to contract, was before the late Act deemed a valid marriage to many purposes." This passage is to be found in the twenty-five editions of his work, which have now for a period approaching to a century taught the law of England to this country and to all civilised nations who have had any curiosity to inquire into our polity.

[*769] *At last came the case of *Dalrymple* v. *Dalrymple* (p. 11, *ante*), which was for many years understood to have finally settled the law by judicial decision. I believe it is universally allowed that Lord STOWELL was the greatest master of the civil and canon law that ever presided in our Courts, and that this is the most masterly judgment he ever delivered. I have read it over and over again, and always with fresh delight. For lucid arrangement, for depth of learning, for accuracy of reasoning, and for felicity of diction, it is almost unrivalled. Although it seems to flow from him so easily and so naturally, it is evidently the result of great labour and research. Luckily he had full

leisure to mature his thoughts upon the subject, and satisfactorily to explain to us the authorities and arguments on which his opinion was founded. Your Lordships are aware that the case turned upon the validity of a marriage in Scotland, *per verba de præsenti*, without the intervention of a clergyman, and it became essential to consider what was the general law respecting the manner in which marriage was contracted. Your Lordships will find he clearly lays it down that there was the same law on the subject all over Europe, and that, till the Council of Trent, by this law there was no necessity for the intervention of a priest to constitute a valid marriage. Among other things to the same effect, he says: "The law of the church, although in conformity to the prevailing theological opinion it reverenced marriage as a sacrament, still so far respected its natural and civil origin as to consider that where the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest; it had even in *that state the character [*770] of a sacrament, for it is a misapprehension to suppose that this intervention was required as matter of necessity even for that purpose before the Council of Trent. It appears from the histories of that Council, as well as from many other authorities, that this was the state of the earlier law till that Council passed its decrees for the reformation of marriage. Such was the state of the canon law, the known basis of the matrimonial law of Europe. The canon law, as I have before described it to be, is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe. It becomes of importance, therefore, to consider what is the ancient general law upon this subject; and on this point it is not necessary for me to restate that by the ancient general law of Europe, a contract *per verba de præsenti*, or a promise *per verba de futuro cum copula*, constituted a valid marriage, without the intervention of a priest, till the time of the Council of Trent."

Lord KENYON had before laid down the same doctrine, though in a less peremptory manner: "I think," he says, "though I do not speak meaning to be bound, that even an agreement between the parties *per verba de præsenti* is *ipsum matrimonium*." *Reed* v. *Passer*, 1 Peake, 303 (3 R. R. 696). But ever since *Dalrymple* v. *Dalrymple*, every Judge who has touched upon the subject has unhesitatingly adhered to the law as there laid down by Lord

STOWELL. In *Lautour* v. *Teesdale*, 8 Taunt. 830 (17 R. R. 518), Lord Chief Justice GIBBS says: "The judgment of Sir W. SCOTT in *Dalrymple* v. *Dalrymple* has cleared the present case of all the difficulty which might at a former time have belonged to it. From the reasonings there made use of, and from the [* 771] authorities cited by * that learned person, it appears that the canon law is the general law throughout Europe as to marriages, except where that has been altered by the municipal law of any particular place. From that case, and from those authorities, it also appears that before the Marriage Act, marriages in this country were always governed by the canon law, which the defendants, therefore, must be taken to have carried with them to Madras. It appears also that a contract of marriage *per verba de præsenti* is considered to be an actual marriage, though doubts have been entertained whether it be so unless followed by cohabitation."

In *Rex* v. *The Inhabitants of Brampton*, 10 East, 282 (10 R. R. 299), which turned upon the validity of a marriage contracted in a part of St. Domingo occupied by the English army, Lord ELLENBOROUGH says: "I may suppose, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognised by subjects of England in a place occupied by the King's troops, who would implicitly carry that law with them. It is then to be seen whether this would have been a good marriage here before the Marriage Act. Now certainly a contract of marriage *per verba de præsenti* would have bound the parties before that Act."

In *Smith* v. *Maxwell*, 1 Ryan & M. 80, tried before Lord WYNFORD, Chief Justice of the Common Pleas, where a question was made respecting the validity of a marriage in Ireland which had been celebrated by a dissenting minister in a private house, he observed: "I am aware of no Irish law which takes marriages performed in that country out of the rules which prevailed in this before the passing of that Act, and which, as it is said [* 772] * in the case of *Dalrymple* v. *Dalrymple*, are common to the greater part of Europe. That case has placed it beyond a doubt that a marriage so celebrated as this has been, would have been held valid in this country before the existence of that statute." That was a marriage celebrated in Ireland by a Presbyterian minister.

No. 2. — Reg. v. Millis, 10 Cl. & Fin. 772, 773.

The LORD CHANCELLOR. — Between what parties?

Lord CAMPBELL. — That would be quite immaterial. Lord WYNFORD says, "This marriage would have been valid in England before the Marriage Act." And in England there is no statute which makes any distinction as to the religious persuasion of the parties married by a dissenting minister.

The LORD CHANCELLOR. — So far it is a *dictum*.

Lord CAMPBELL. — But as far as respects this marriage in Ireland it is expressly in point. He says, "There can be no doubt that a marriage so celebrated (that is by a Presbyterian minister in a private house) would have been valid in England before the existence of the Marriage Act." In *Beer* v. *Ward* (10 Cl. & Fin. 611 *n.*), another case on the validity of a marriage in England before the Marriage Act, Lord TENTERDEN laid it down distinctly, that if the parties in the presence of witnesses formally acknowledged themselves to be man and wife, that before the Marriage Act constituted a marriage valid in law, and that the issue would be legitimate. He said: "As I understand the law before the Marriage Act, a marriage might be even celebrated without a clergyman, upon a declaration by the parties, in terms of the contract, that they were man and wife, accompanied by cohabitation as man and wife. A contract verbally made before witnesses, and a *declaration of that in the [*773] presence of witnesses, would, at that time of our history, have made a good and valid marriage in England, as it does now in Scotland."

The LORD CHANCELLOR. — That is not in print.

Lord CAMPBELL. — It is not in print, but it is taken from the shorthand writer's notes, authenticated by Mr. Serjeant Clarke, who was counsel in the cause.

The LORD CHANCELLOR. — I certainly heard him express himself to that effect.

Lord CAMPBELL. — Here then we have a most positive declaration by Lord TENTERDEN, a most cautious Judge and most attentive to the rights of the church, that before the Marriage Act the law of England and the law of Scotland upon this subject were the same; and that in England, if parties came together and declared that they were man and wife, and lived together as man and wife, they were married to all intents and purposes.

The doctrine of Lord STOWELL in *Dalrymple* v. *Dalrymple* has

been recognised by all his successors, and I have reason to believe is at this day approved of both by the Judges and the Bar in Doctors' Commons. In *Wright* v. *Elwood*, 1 Curt. 670, Sir HERBERT JENNER, the present Dean of the Arches, a most learned civilian, and most cautious as well as laborious Judge, says, "Before 26 Geo. II., c. 33, marriages without publication of banns or any religious ceremony, contracts *per verba de præsenti*, might be good and valid, though irregular; the parties and the minister might be liable to punishment, but the *vinculum matrimonii* was not affected."

[*774] Now I come to criminal cases. In criminal as *well as in civil proceedings, the validity of a marriage by the common law, celebrated without the intervention of a priest in episcopal orders, has been repeatedly recognised by judicial decision. Lathroppe Murray was convicted of bigamy at the Old Bailey, in the year 1815. The case turned on the legality of the first marriage, which was celebrated in Ireland by a Presbyterian minister. The prisoner was a member of the Established Church, the woman to whom he was married a dissenter; the facts were the same as here. The Recorder of London, after consulting the Judges, held the first marriage to be valid. The prisoner petitioned the House of Commons to interfere in his favour, on the ground that the first marriage was invalid. On that occasion Sir Samuel Shepherd, then Solicitor-General, a most learned and accurate lawyer, and then, I may say, speaking judicially, observed: "That in his opinion and that of the Attorney-General, after having examined every Act of Parliament in Ireland respecting the validity of the marriage ceremony, the first marriage was a legal one. That certain very eminent civilians in Ireland had been consulted several years before respecting that marriage, all of whom declare it was a legal marriage, and that he had no doubt as to the legality of the conviction." This is the identical case of *Reg.* v. *Millis*.

In Ireland there have been many convictions for bigamy, the marriage having been by a dissenting minister, and both parties not dissenters. I will mention a few, of which I have MS. authentic reports. In the case of *Rex* v. *H. Marshall*, tried at Enniskillen Spring Assizes, 1828, before Baron M'CLELAND, the first marriage was by a Presbyterian clergyman, the prisoner

[*775] being a member of the Established Church; the *prisoner

was convicted. In *Rex* v. *Wilson*, tried at Armagh Summer Assizes, 1828, before Mr. Justice TORRENS, the first marriage was unquestioned; the second was celebrated by a Presbyterian clergyman, the prisoner being a member of the Established Church, and the woman a Presbyterian; the prisoner was convicted. In *Reg.* v. *Halliday*, tried at Donegal Spring Assizes, 1838, before Mr. Baron PENNEFATHER; the prisoner being indicted for bigamy, a Presbyterian minister was produced on the part of the Crown to prove the celebration of the first marriage by himself. The prisoner was a member of the Established Church, the woman a Presbyterian. The counsel on behalf of the prisoner contended that such a marriage was invalid; but Mr. Baron PENNEFATHER said he considered such a marriage in Ireland to be perfectly good, and directed the jury accordingly. The prisoner was acquitted; but the reason was that the witnesses to one marriage did not sufficiently identify him. In *Reg.* v. *Robinson*, tried at Cavan Spring Assizes, before Mr. Baron FOSTER, the prisoner was indicted for bigamy: it was proved for the Crown that the prisoner and both wives were Protestants; that the first marriage was solemnised by a seceding clergyman; that the prisoner cohabited with his first wife, who was then living; that the second marriage was solemnised by a person who had been duly ordained by the synod of Ulster, and had a congregation, but was removed from it, and ceased to be a member of the Presbyterian Church before this marriage. The counsel for the prisoner submitted that there was not legal evidence of the second marriage, the person who performed the ceremony not being qualified, inasmuch as he had withdrawn from the Presbyterian congregation and synod, and should therefore be *considered as a layman. [*776] The counsel for the Crown contended, that even if the ceremony were performed by a layman, that it would be valid, and cited *The King* v. *Marshall*. Mr. Baron FOSTER, after conferring with Baron PENNEFATHER, held that the marriage in question was good. The prisoner was found guilty. In *Rex* v. *M'Laughlin*, tried at Antrim Spring Assizes, 1831, before Mr Justice MOORE, for bigamy; the prisoner, being a member of the Established Church, was married to a Presbyterian woman by a Presbyterian minister; afterwards, during her life, he was again married by a Presbyterian minister to another Presbyterian woman. It was argued for the prisoner that the marriages were illegal, as

having been celebrated by Presbyterian ministers, though one of the parties belonged to the Established Church. Judge MOORE declared both marriages legal, and added that the point had been so often ruled by the Judges on the circuits, that he had scarcely expected to hear it raised. The prisoner was convicted, and transported for seven years. In *The Queen* v. *Daniel Ancruey*, tried at Down Summer Assizes, 1841, before Mr. Justice CRAMPTON, on an indictment for bigamy; Mary O'Hara proved that she saw the prisoner married, about three years before, to Margaret Berry, by Mr. Murray, the Roman Catholic priest of Newry, in the Roman Catholic chapel of that town, and that said Margaret is still alive. John Conroy swore that he knew prisoner and said Margaret to live together as man and wife; that in May last, prisoner said he had got a divorce from her; and that witness then accompanied him in the evening, and saw him married to Margaret Courtney, by the Rev. Mr. Weir, Presbyterian minister in Newry. Margaret Courtney stated that she was and is [*777] a *Presbyterian; she left prisoner at the end of a week, on discovering his first marriage. The prisoner was convicted, and sentenced to twelve months' imprisonment with hard labour; which punishment he underwent.

These are the criminal cases to which I beg to draw your attention; and I ask, are we now to be told that all these convictions were illegal, and that if, upon a second conviction, there had been a counter plea to the prayer of clergy, the Judges who gave effect to it would have been guilty of murder? I refrain from citing the passages from Chief Baron Comyn's and other abridgments of the common law, to show the constant opinion of the profession in this country; but I cannot refrain from asking your Lordships to consider how the subject has been viewed by our brethren in the United States of America. They carried the common law of England along with them, and jurisprudence is the department of human knowledge to which, as pointed out by Burke, they have chiefly devoted themselves, and in which they have chiefly excelled. Their two greatest legal luminaries are Chancellor Kent and Professor Story. In Kent's Commentaries I find this passage: "No peculiar ceremonies are requisite by the common law" (he is speaking of the common law of England) "to the valid celebration of marriage; the consent of the parties is all that is required. If the contract be made *per verba de præsenti*,

or if made *per verba de futuro* and be followed by consummation, it amounts to a valid marriage, and it is equally binding as if made *in facie ecclesiæ*. This is the doctrine of the common law, and also of the canon law which governed marriages in England prior to the Marriage Act; and the canon law is also the general law throughout Europe as to marriages, except where it has been * altered." He then goes on to point out par- [* 778] ticular States, such as Maine and Massachusetts, in which particular regulations as to the form of contracting marriage are introduced by statute, but intimates that in the absence of positive statute, the common law of England, as he has expounded it, governs the marriage contract.

In Story's treatise "On the Conflict of Laws," he says (c. 5), "The common law of England, like the late law existing in America, considers marriage in no other light than as a civil contract." He goes on to explain, that wherever particular forms are not required by positive statute, a complete marriage is constituted by the consent of the parties. There can be no doubt that this view of the common law of England has been constantly acted upon in every State of the American Union; but we are now told that all parties who have thus contracted the matrimonial tie have been living together in a state of concubinage.

Now, my Lords, am I not justified in saying that the law upon this subject has long been considered settled by judicial decision? It is possible that some new discovery may have been made, and that all the eminent men whose opinions I have cited may have been in error. But how is this proved? If an express decision against the validity of such a marriage had been dug out from some obscure repository, I should have paid little attention to it against such a current of authority, and I should have treated it as I do the opinion of Mr. Justice Bayley, cited at the bar, that a marriage in Ireland between dissenters by a dissenting minister was void, because it was celebrated, not in a church, but in a private house. But from the earliest times, with the exception of * *Foxcroft's* and *Del Heith's* cases, hitherto allowed [* 779] not to be law, there is no decision discovered to show that a marriage contracted by the parties with the intention of instantly entering into the state of wedlock is void, or is not attended with the incident of marriage of rendering the issue legitimate.

The counsel for the prisoner relied very much upon the general

scope of the statutes respecting marriage, as showing that there can be no valid marriage without the intervention of a priest; and there is great reason to think that this notion was entertained by those who framed the Irish statutes making it highly penal for Roman Catholic priests to marry any except Roman Catholics, and to annul marriages celebrated by Roman Catholic priests unless both parties were Roman Catholics: although it cannot be said that upon a contrary supposition such statutes would be nugatory; for, whatever the law of the land may be, there are few who would enter into the conjugal state without the nuptial benediction from a priest; and the nullifying enactment would avoid the marriage unlawfully celebrated by a Catholic priest, even if at common law the parties might have contracted a valid marriage without any priest, Catholic or Protestant.

The statutes respecting precontracts *per verba de præsenti* do not seem to me by any means to show that there may not be *ipsum matrimonium* without the intervention of a priest; for I have already attempted to explain that there may be a contract *per verba de præsenti* which is not *ipsum matrimonium*, if the parties consider it executory, and do not mean to live together as man and wife till their marriage shall be subsequently solemnised in the face of the church. Contracts *per verba de præsenti,* [*780] *subsequente copulâ,* * are exempted from the operation of the Acts, because cohabitation is supposed to be proof that they meant to contract present marriage, and persons who have so contracted are treated as married. But there is another class of statutes, entirely overlooked by the Judges, and which in my mind afford a strong argument against the necessity of the presence of a priest apostolically ordained to the constitution of a valid marriage; I allude to the statutes for removing doubts as to the validity of marriages where no such priest was present. These are declaratory Acts.

By the Irish Act, 21st & 22nd Geo. III., c. 25, marriages celebrated by dissenting ministers in Ireland, between members of their own congregations, are declared to be valid. These marriages were obviously, before the passing of the Act, in the same situation exactly as the marriage the validity of which we are now considering. At common law the validity of a marriage could in no degree depend upon the religious profession of the parties. By the Act of the Imperial Parliament, 58th Geo. III.,

c. 84, marriages solemnised by Presbyterian ministers in the East Indies are declared to be valid; the law of marriage being the same in the East Indies as in Ireland. Further, by the Imperial Act, 4th Geo. IV., c. 91, marriages in a foreign country celebrated by any chaplain, or by any officer or other person appointed by the commander-in-chief, are declared to be valid. The common law of England with respect to marriage prevails within the lines of the English army abroad, and here you have a parliamentary declaration that according to the common law of England, a marriage by a layman was valid. I have always understood that although a statute in form enactive is not necessarily to be taken as introductory of a new law, a * declara- [* 781] tory law is a positive announcement by the Legislature that the law declared existed before the passing of the statute, and shall have a retrospective operation, and shall guide the decision of other cases similarly circumstanced as the case the law of which is declared. These declaratory statutes were cited at the bar, but they are not noticed by the Lord Chief Justice TINDAL; and it would have been satisfactory to have known how they were viewed by the Judges who, "after considerable fluctuation and doubt, acceded to the opinion of the majority."

There is another Act of Parliament on this subject, which I humbly think is entitled to some consideration. By 32nd Geo. III., c. 21 (Irish), Protestant dissenting ministers may publish banns between a Protestant dissenter and a Roman Catholic, and marry them, but are prohibited from celebrating marriage between a Roman Catholic and a member of the Established Protestant Church; affording an inference that a marriage by a dissenting minister, like a marriage by a Roman Catholic priest, would be valid where not forbidden by the Legislature.

Much reliance has been placed on the statement that actions for breach of promise of marriage have been maintained in Ireland where there had been a *copula* after the promise; and actions for seduction after a promise to marry, the daughter being called as a witness; which it is said would be, upon the doctrine contended for by the Crown, instances of a wife being permitted to sue her husband, and to give evidence against him in a Court of justice. But, in countries where the canon law certainly prevails, it does not follow that in every case marriage is necessarily constituted by a *copula* following a promise to marry. To constitute

[*782] such a marriage there *must first be mutual promises solemnly and sincerely entered into, and then there must be a *copula* while these promises remain unreleased and in force. Now the mere words indicating an intention to marry, used in the course of soliciting chastity, not understood to be serious, however culpable they may be, cannot be construed into a binding contract to marry; and regard must be had to the circumstances under which the *copula* takes place; for if the woman in surrendering her person is conscious that she is committing an act of fornication instead of consummating her marriage, the *copula* cannot be connected with any previous promise that has been made, and marriage is not thereby constituted. In examining all contracts you must look to the intention of the contracting parties, and there can be no binding contract without the parties intending to enter into it. In the cases referred to, it would probably be found that, according to the intention of the parties, the *copula* was not in performance of the promise; and that, if the female gave any credit to the promise, she did not think of then being made a wife, and still treated the promise as executory, to be performed at a future time by a marriage ceremony. It may well be admitted that in Ireland marriage was not usually constituted by such means, for it was not in the contemplation of the parties so to constitute it; but this will by no means show that marriage was not constituted by a ceremony which the parties intended and believed to constitute marriage, and after which they lived together as man and wife.

Then it is said that the Statute of Merton shows that the canon law respecting matrimony was never admitted into England.

The Statute of Merton does not relate to the subject we [*783] are discussing; it settles *only who are to be legitimate, and determines that none shall be legitimate who are not born after the marriage of their parents; but it leaves the question of marriage untouched, and there is no inconsistency in supposing that marriage may be contracted according to the rules of the canon law, although the marriage of the parents after the birth of children may not render them legitimate. As a *reductio ad absurdum*, this case is put: "A. made a contract of marriage *per verba de præsenti* with B., and then in the lifetime of B. marries C. *in facie ecclesiæ*, and has children at the same time both by C. and B.; B. dies. Are the issues of both legitimate?" I have no

difficulty in answering this question. If A. and B. by their contract meant to enter into instant marriage, and to live together as man and wife without waiting for any other ceremony, the issue of B. are legitimate, and the issue of C. are bastards. On the other hand, if A. and B., though using words *de præsenti*, did not mean to become complete man and wife till a subsequent ceremony should be performed, and they afterwards came together without thereby meaning to consummate a marriage, a possible though not a probable supposition, their engagement resting merely in contract, and B. dying before a marriage was solemnised, the issue of C. would be legitimate: but no case is to be found in the books in which issue of parties who have contracted *per verba de præsenti* have been held illegitimate; indeed, in almost all those cases, I believe it will be found that the parties never came together, and never meant to come together as man and wife, so that issue never appeared. It is easy to conceive that parties might contract *per verba de præsenti*, without meaning instantly to become man and wife. Such an engagement was irrevocable; but there might well be an irrevocable [*784] engagement, although it was at the same time only executory. The distinction I have taken solves with equal facility the case put, "suppose two sons born at the same time, one from each mother, which is the eldest son and heir?"

But these difficulties are trifling compared to the difficulties to be encountered on the supposition that, by the common law, marriage could not be possibly constituted without the intervention of a priest episcopally ordained. What if the person who officiates as a priest, and is believed by the parties to be so, is no priest, and has never received orders of any kind? This question was suggested during the argument, but is not met by the Judges. Mr. Pemberton admitted at the bar, as according to the authorities he was bound to do, that the marriage would be valid. Lord STOWELL repeatedly expressed his opinion to this effect; and it turns out that in the instance of a *pseudo* parson, who about twenty years ago officiated as curate of St. Martin's-in-the-Fields, and during that time married many couples, upon the discovery of his being an impostor, which became a matter of great notoriety, no Act of Parliament passed to give validity to the marriages which he had solemnised; which could only have arisen from the government of the day being convinced, after the best advice, that in themselves they were valid.

Indeed, that parties who have vowed eternal fidelity at the altar, and, having gone through all the forms which the Church and the State prescribe, have received the nuptial benediction from one whom they have every reason to believe was commissioned to pronounce it by a successor of the holy Apostles, should [* 785] run the risk of finding that some years after, * from the rector of the parish being imposed upon by a layman pretending to be a priest duly ordained, they are living in a state of concubinage and that their children are bastards, — is a supposition so monstrous that no one has ventured to lay down for law a doctrine which would lead to such consequences. But what becomes of the doctrine of the necessity of a priest in apostolical orders, to the validity of marriage? The proposition must now be changed, that there must be present one believed by the parties to be a priest in apostolical orders; and a marriage by a layman may be good. There is a good marriage by a layman from the mistake of the parties, who thought that he was a priest with power to marry them. Does it not seem strange that at the same time a marriage should be void celebrated by a clergyman who is actually in Presbyterian orders, having been solemnly ordained by the imposition of hands according to the rites of his church, and who is believed by the parties to have sufficient authority by the law of God and man to join them in wedlock?

Here I must observe how little weight is to be given to what was gravely relied upon at the bar, the prevailing belief among mankind of the necessity of the presence of a priest at a valid marriage, as evinced by novelists and dramatists: for it will be found that these expounders of the law always make a marriage by a sham parson void, contrary to the opinion of Lord STOWELL and the canonists; and they give validity to marriages in masquerade, where the parties were entirely mistaken as to the persons with whom they are united; marriages which would hardly be supported in the Ecclesiastical Court, in a suit of jactitation, or for restitution of conjugal rights.

[* 786] There is another case, not met by the learned * Judges, which essentially breaks in upon the rule they have laid down. It has been repeatedly held, and there can be no doubt that such is the law, that in circumstances where it is utterly impossible to procure the presence of a priest, there may be a valid marriage by the consent of the parties. Lord STOWELL has re-

ferred to the marriage between the first parents of mankind; and looking to a more modern case, which would be determined by the common law of England, I presume the learned Judges would not doubt that, in the recent settlement of Pitcairn's Island, the descendants of the mutineers of the "Bounty" might lawfully have contracted marriage before they had been visited by a clergyman in episcopal orders. The necessity for the presence of such a clergyman must be qualified with the condition that his attendance may by possibility be procured. Again, the rule that marriage is void unless celebrated *per presbyterum sacris ordinibus constitutum*, is broken in upon by the admission that a marriage is valid if celebrated by a deacon, who is no more a presbyter than the parish clerk. A deacon is in orders, but not in priest's orders; and if the test of marriage be the question usually put by the temporal Courts to the bishop, on the plea of *ne unques accouples in loyal matrimonie*, where the marriage was celebrated by a deacon, the answer must have been in the negative; so that the widow would have lost her dower; and upon a writ of right by the son as heir, there must have been judgment against him on the ground that he was a bastard.

The Judges seem to intimate that a marriage by a deacon before the Reformation would have been bad, but that since the Reformation it is valid. I should like to know by what authority the change has been *brought about; Lord Hard- [*787] wicke's Act is silent upon the subject, and Parliament has in no shape interfered. Has the Church authority to make such a change, with or without the consent of the Crown; and might it now be ordained by the convocation that marriage may not be celebrated by a deacon, or that it may be celebrated by a parish clerk or a church warden? May the law of England, respecting a contract on which such important civil rights depend, be altered without the authority of Parliament? But if such a power does belong to the Church, where is the canon by which it was exercised? All the canons passed since the time of Henry VIII. are extant, as much as the Acts of Parliament, and no one is to be found alluding to such a subject. In the Book of Common Prayer it is said that a deacon may baptise in the absence of the priest; it is silent as to his authority to marry, which seems always to have been considered one of his ordinary functions.

But I will now show that at common law there might have been

a valid marriage by one not even in deacon's orders, and where no one was deceived, where there was no mistake by the parties. Till the 13th & 14th Car. II., c. 4, s. 14, there was no necessity for the clerk presented by the patron to a living being in orders of any sort, and he had a certain time after his admission to be ordained. There is an important case upon this point, not hitherto cited, *Costard* v. *Windet*, Cro. Eliz. 775. One who was a mere doctor of the civil law, and never any spiritual person, was admitted to a benefice. Not having taken orders, he was afterwards deprived by a sentence declaratory *quia mere laicus.*

[* 788] A question arose whether a lease * granted by him after his admission was valid. GAWDY, J., was at first of opinion that the lease was void, because upon the matter he was never incumbent; but Popham and Fenner *contra*, "for it would be mischievous if all the acts by such averments should be drawn in question. And every one agreed that all spiritual acts, as marriages, &c., by such an one, during the time that he is parson, are good;" and so, with the assent of GAWDY, they resolved to adjudge it.

I must likewise observe that there might have been great difficulty in determining what kind of priest is a good priest to celebrate a marriage; the test being, not whether he be a clergyman of the Established Church, but whether he has been ordained by a bishop. Is a priest of the Greek Church sufficient? or of the Christian Church of Abyssinia? or of the Lutheran Church, which maintains episcopacy in Denmark and Sweden, while in other countries it is governed by a consistory of ecclesiastics, by whom orders are conferred? Upon a question of the validity of a marriage by a priest of a foreign church, by whom and on what principle, between the time of the Reformation and the passing of Lord Hardwicke's Act, would the sufficiency of his orders have been tried? Before the Reformation there would have been no difficulty, for the only orders recognised would have been those of the Church of Rome; but that test cannot now be applied, as a priest ordained by an English Protestant bishop would not be competent, for there is no reciprocity between the Church of Rome and the Church of England on this subject; as English episcopalian orders are not recognised by the Church of Rome, and a clergyman of the Church of England conforming to the

[* 789] Church of Rome must be reordained by a Roman * Catho-

lic bishop. Although now no orders are recognised by the Church of England except those conferred by a bishop, there seems for some time after the Reformation to have been considerable laxity upon this subject. It would appear that clergymen ordained by foreign churches which had laid aside episcopacy, were admitted into English benefices without being reordained. Dr. Whittingham, who had been ordained by the Swiss clergy, and never by a bishop, was appointed Dean of Durham, and held the office many years, till he died. Archbishop Grindall, in 1582, issued a license to Mr. John Morrison, stating that as he had been ordained to sacred orders and the holy ministry five years before, in the kingdom of Scotland, by the imposition of hands, according to the laudable forms and rites of the Reformed Church of Scotland, "We, therefore, as much as in us lies and as by right we may, approving and ratifying the form of your ordination as aforesaid, grant unto you a license and faculty that in such orders by you taken, you may have power, throughout the whole province of Canterbury, to celebrate divine offices, to minister the sacraments," &c. Would a marriage celebrated by Dr. Whittingham or by Mr. Morrison, in the reign of Elizabeth, have been held void?

It is remarkable that in the Act of Uniformity (section 15) there is a provision "that the Penalties in this Act shall not extend to the Foreigners or Aliens of the Foreign Reformed Churches, allowed or to be allowed by the King's Majesty, his heirs or successors, in England." Suppose that Charles II. had allowed, as he might have done, clergymen of the church of Geneva to officiate in England, would marriages by them have been void because they had not been episcopally ordained? Such clergymen could *not have been recognised as priests [*790] when the common law took its origin; nor any clergy not allowed by the Pope.

The question again arises, by what authority a new class of persons, viz., Protestant clergymen, disclaimed by the Pope, are permitted to celebrate a valid marriage, who could not have done so at the common law, and there having been no statute to alter the law upon the subject? Is not the solution of the difficulty this, that at the common law the interposition of a priest was not necessary to the validity of the marriage for civil purposes, although the church, treating marriage as a sacrament, from time

to time varied the forms which it declared necessary to constitute a regular marriage such as the church would entirely approve?

I now come to a difficulty met, I confess, boldly by the Judges; the consideration of the marriages of Quakers, which we are now told are all invalid, because not contracted before a priest episcopally ordained. I admit that this consequence follows inevitably from the doctrine contended for, and that the validity of these marriages is a complete test of that doctrine. They are left by Lord Hardwicke's Act as they were at common law; and they cannot be good at common law, if the presence of a priest episcopally ordained was necessary to the validity of marriage. I must observe, with great deference to my noble and learned friend, Lord ABINGER, who had left the House, that it never has been thought till to-day that that Act gave any validity to Quakers' marriages, which Quakers' marriages had not at common law; for it merely excepts those marriages from the operation of the Act, and leaves them as it found them. I will by and by cite the clause; it treats them exactly like marriages in Scotland.

[*791] *The LORD CHANCELLOR. — What I understood the noble and learned Lord to state was to adopt in substance the statement of the CHIEF JUSTICE, who says, "Since the passing of the Marriage Act it has generally been supposed that the exception contained therein as to the marriages of Quakers and Jews, amounted to a tacit acknowledgment by the Legislature, that a marriage solemnised with the religious ceremonies which they were respectively known to adopt, ought to be considered sufficient; but before the passing of that Act, when the question was left perfectly open, we find no case in which it has been held that a marriage between Quakers was a legal marriage on the ground that it was a marriage by a contract *per verba de præsenti*, but, on the contrary, the inference is strong that they were never considered legal."

Lord CAMPBELL. — That is exactly as I view it; that it is a tacit acknowledgment that the marriages were valid.

The LORD CHANCELLOR. — I do not think that my noble and leaned friend meant to say more than merely to adopt that statement. If he were present I should leave him to speak for himself, but that is the way I understood it.

Lord CAMPBELL. — He seemed to draw a line of distinction between Quaker marriages before Lord Hardwicke's Marriage Act, and since.

Lord BROUGHAM. — So I understood it.

Lord CAMPBELL. — But is not the 18th section of 26th Geo. II., c. 33, a legislative declaration that such marriages, if contracted so that the parties intended they should constitute the relation of husband and wife, were valid before the Act passed, and should *continue valid? The words are, "That nothing [*792] in this Act contained shall extend to that part of Great Britain called Scotland, nor to any marriages amongst the people called Quakers, or amongst the persons professing the Jewish religion, where both the parties to any such marriage shall be of the people called Quakers, or persons professing the Jewish religion, respectively, nor to any marriage solemnised beyond the seas." Marriages were valid in Scotland before the passing of the Act without the intervention of a priest in orders, and so they were to continue.

The sect of Quakers had existed in England for one hundred and fifty years before the Marriage Act passed. They did not recognise any order of priesthood, and they had contracted marriage by a ceremony which took place only among members of their own persuasion. They would have considered it sinful to be married in a church, or to have been united by a clergyman. They would have submitted to any penalty or punishment, rather than submit to the ceremony of marriage prescribed by the Church of England. They could not be brought under the operation of the new Act. What was the intention of the Legislature respecting their past and future condition? Was it meant that they should be considered as then all living in concubinage, their children being all illegitimate; and that they should be incapable of entering into lawful wedlock in all time to come? If there had been then any grave doubt as to the validity of their marriages entered into according to their own forms, would there not have been an enactment giving validity to such marriages? As to the taking of oaths in Courts of justice, a matter of much less consequence, relief had long before been afforded to them. The statute 6 & 7 Wm. III., c. 6, when properly examined, I think *furnishes strong evidence to show that these were legal [*793] marriages. The Act is "for granting to his Majesty certain rates and duties upon marriages, births, and burials." Quakers marrying are expressly subjected to the duty. In one place the marriage between them is called a pretended marriage;

but by this uncivil expression was it intended to declare that the marriage was void, and to levy a tax upon concubinage? On the contrary, it is declared that "any such marriage or pretended marriage shall be of the same force and nature as if the Act had not been made." The tax is imposed on any other persons who should cohabit and live together as man and wife; — affording a strong evidence that marriage was then constituted by cohabitation and living together as man and wife.

In 1661, a marriage between Quakers according to their own ceremonies, was held valid at Nisi Prius in an action of ejectment, and the ruling appears to have been acquiesced in (1 Hagg. Cons. Rep. App. 9.). The casual doubt imputed to Lord HALE, when he directed a case to be made as to the validity of a Quaker marriage, can be entitled to no weight.

Since the Marriage Act, in 1753, down to the present day, Quakers, many of them men not only of great wealth but highly educated, not only distinguished for literature and science, but eminent lawyers, and ladies, not only of the strictest virtue and the most refined delicacy, but of the most brilliant talents and accomplishments, have contracted marriage according to the forms of their religion, without the most distant suspicion that in doing so they were violating the law of God or of man. I confess I should like to know whether all the Judges who have concurred in the opinion that a marriage is void by the common [* 794] * law if not celebrated in the presence of a priest in episcopal orders, are of opinion that all Quakers, male and female, cohabiting as man and wife, are living in a state of concubinage, and that all the children of all Quakers are illegitimate?

Till this controversy began by a note of the editor of a new edition of an obscure law book, I believe that the validity of the marriage of Quakers had not been questioned. Quakers have maintained actions for criminal conversation, where direct proof of a valid marriage is to be given. *Dean* v. *Thomas*, 1 Moo. & M. 361; *Harford* v. *Morris*, 1 Hagg. Cons. Rep. App. 9. Widowers and widows, being Quakers, and the children of Quakers, have received administration in the Ecclesiastical Courts, and in cases of intestacy have succeeded to personal property according to the Statute of Distributions. In tracing a title to real property, no objection has ever been made on the

ground that it had been in a Quaker family, and no doubt has existed that the eldest son of a Quaker marriage would take by descent lands of which his father died seised in fee simple. I cannot help thinking that such a general understanding and such a long course of acting greatly outweigh any nice scruples that may now be raised upon the subject.

Most of these observations apply, if possible, with greater strength respecting the marriages of Jews. It was utterly impossible that Jews ever could have been married by the intervention of a Christian priest. In every country where they have inhabited, they have been allowed to marry according to their own rites and ceremonies, and marriages so contracted have been held valid. Jews were banished from this * country from [* 795] the time of Edward I. till the time of Oliver Cromwell; but then they were permitted to settle, and they did settle, in England in considerable numbers. They have married here according to their own rites and ceremonies, and their marriages so contracted have undoubtedly been considered valid. Did the Marriage Act mean again to banish them from England, or to prevent them from entering into the married state? It is said they were considered as foreigners. There can be no doubt that when born in England, they are in all respects British subjects. But suppose they were aliens: aliens can only contract marriage in England according to the law of England; and if by that law the presence of a priest episcopally ordained were necessary to the due constitution of marriage, without the presence of such a priest marriage could not be lawfully constituted between any aliens in England. Therefore, the moment it is allowed that in England a marriage contracted by Jews according to their own rites and ceremonies is valid, the doctrine is gone that by the common law the presence of a priest episcopally ordained was necessary to the due constitution of marriage. Although the LORD CHIEF JUSTICE intimates his opinion that Quaker marriages are void, he does not say the same of the marriages of Jews; and I think it is impossible that he should, after the express decisions on the subject.

There is the case of *Andreas* v. *Andreas* in the Consistory Court in 1737, before Dr. HENCHMAN. That was a suit by a wife against her husband, for the restitution of conjugal rights. The parties were both Jews, and the libel alleged that they were married according to the forms of the Jewish nation. Objection

was made that as they had not been married by a [*796] *priest in orders, the marriage was void, and the Court could take no notice of it. The Court was of opinion, however, that as the parties had contracted such a marriage as would bind them according to the Jewish forms, the woman was entitled to a remedy, and that the proceeding would well lie, and admitted the libel. Again, in the case of *Vigevena* v. *Alvarez*, 1 Hagg. Cons. Rep. App. 7, in the Prerogative Court in 1794, before Sir WILLIAM WYNNE, the libel pleaded a marriage between Jews, according to the rites and ceremonies of the Jewish religion. It was objected that the libel was bad upon the face of it, and ought to be rejected; for that persons coming before the Ecclesiastical Court to claim any right by marriage, must show the marriage to have been according to the rites and ceremonies of the Church Christian: for which *Haydon* v. *Gould* was cited. Sir W. WYNNE said, that if a Jew were called upon to prove his marriage, the mode of proof must have been conformable to the Jewish rites; particularly since the Marriage Act which lays down the law of this country as to marriages, with an exception for Jews and Quakers. That is a solemn adjudication upon the validity of such marriages. Here the allegation being that the parties were married according to the rites of the Jewish Church, the Court thought that the libel ought to be admitted; as if the allegation was proved, a valid marriage was constituted. In *Lindo* v. *Belisario*, 1 Hagg. Cons. Rep. 216, and App. 7, which first came before Sir W. SCOTT in the Consistory Court of London, and then before Sir W. WYNNE in the Court of Arches, a Jewish marriage was set aside because the ceremonies prescribed by the Jewish law had not been duly observed, although words amount- [*797] ing to a contract *per verba de præsenti* *had passed between the parties; but if those ceremonies had been duly observed, the marriage would unquestionably have been held valid, although no Christian priest was present at it. *Lindo* v. *Belisario* was cited to show that even among the Jews, mere *verba de præsenti* will not make marriage without the religious ceremony. This only illustrates what I have tried to explain, that the contract *per verba de præsenti* only constitutes marriage when the parties intend that it should do so without any subsequent ceremony; but that when a subsequent ceremony is necessary to the completion of the marriage, the *verba de præsenti* only operate as an executory contract.

No. 2. — Reg. v. Millis, 10 Cl. & Fin. 797, 798.

I ought to observe that the language of the Legislature in 6 & 7 Wm. IV., c. 85, s. 2, regulating the marriage of Quakers and Jews in future, is, in my opinion, very strong to show that their past marriages were valid: "That the Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, may continue to contract and solemnise marriages, according to the usages of the said society and of the said persons respectively, and every such marriage is hereby declared and confirmed good in law," &c., "provided that notice to the registrar shall have been given," &c. A new condition is imposed, and that being observed, the parties continuing to contract and solemnise marriage as before, every such marriage is declared and confirmed good in law. It comes to this, then, that marriages of Jews and Quakers, excepted from Lord Hardwicke's Act, are valid at common law, and prove that at common law there might be a marriage without the intervention of a priest in episcopal orders.

In some parts of the LORD CHIEF JUSTICE'S opinion he intimates that the condition required for the validity * of [* 798] a marriage is only that there should be a religious ceremony performed on the occasion. However becoming and desirable it may be that a relation of such deep importance should be contracted in the manner the most solemn and impressive, and that the blessing of Heaven should be invoked on those entering into it, I cannot find that any religious ceremony has been considered necessary to its validity. But supposing the sound doctrine to be that some religious ceremony upon the occasion is indispensable, I think it would deserve great consideration whether the religious ceremony which the parties consider the most sacred should not be deemed sufficient. Before the Reformation, when there was a religious ceremony, it was celebrated by a priest recognised as in orders by the Church of Rome. Since the Reformation, among members of the Church of England, it has been celebrated by a priest whom the Church of Rome would consider a mere layman. Among Protestant dissenters in England down to the Marriage Act, and in Ireland down to the present time, the religious ceremony has been celebrated by a priest, not episcopally ordained, but ordained by the imposition of the hands of those who had been themselves so ordained, and whom they consider duly commissioned to preach the gospel of Jesus Christ,

and to administer the sacraments of His holy religion; although by the Church of England he is considered only as a layman. The question is, whether this priest might not as effectually perform the religious ceremony required by the common law, as the priest who would have been regarded as a layman by the church which was dominant when the common law took its origin, and for many centuries after.

[* 799] For these reasons, my Lords, I have arrived at * the clear conclusion that the marriage between the prisoner and Hester Graham was a valid marriage. Had I regarded the question as originally more doubtful, I should have thought it right to adhere to decisions by which the law has been considered settled for half a century. On questions of property it has often been said that it is the duty of a Judge to support decisions which have been some time acquiesced in, and which have been acted upon, even if he would not have concurred in them when they were pronounced; lest titles should be shaken. Does not this rule apply with infinitely greater force to questions of *status*, and most of all to questions respecting marriage, on which the happiness of individuals and the welfare of society so essentially depend? Consider the consequences of now holding that by the common law a valid marriage cannot be contracted without the presence of a priest episcopally ordained. I do not suppose that as yet it is intended to impeach marriages in Scotland on this ground, but hundreds of thousands of marriages which have taken place in Ireland since the time of James I., and the validity of which had never been doubted, are now asserted to have been null. In England, the marriages of all Quakers and Jews, and of all persons who before the Marriage Act may have been married by Presbyterian or other dissenting ministers, are also asserted to have been null. And do not let it be supposed that the evil is confined to the members of those sects, with whom there might be less sympathy; but the members of the Established Church may be deprived of most valuable rights of property by the invalidity of such marriages.

When we consider our extensive colonies in every quarter [* 800] of the globe, where the common law of * England respecting marriage prevails, the confusion and dismay will be still greater. Vast numbers of marriages have been celebrated in the East Indies and elsewhere by Presbyterian and missionary

ministers of various persuasions, under circumstances in which no validating statute would apply to them; and where the attendance of a minister of religion could not be procured, many marriages have taken place without any scruple of the parties, or their parents or relatives, before consuls, military officers, magistrates, and captains of ships. As to the past, we may resort to the clumsy expedient of *ex post facto* legislation, and enact that all those marriages shall be as valid and effectual as if they had been celebrated by a priest in episcopal orders; but what are you to do for the future? The common law in its wisdom accommodates itself with respect to marriage to the varying circumstances in which the parties may be placed. By statute you must have rigid rules, to be strictly complied with. Such rules have been wisely framed by the last Marriage Act for England, which proceeds on the principle that marriage is a civil contract to be accompanied by a religious ceremony, unless the parties are so absurd and perverted in their understandings that they object to a religious ceremony; in which case (which I rejoice to think has been very rare) the religious ceremony has been dispensed with. But the framing of a similar Act for Ireland, which shall give satisfaction to the Established Church, to the Roman Catholic priesthood and population, and to the Presbyterians and other Protestant dissenters, with the necessary machinery for notice, license, and registration, I am afraid will be found a task very difficult for any government to accomplish. Then what * pro- [* 801]
spective provisions are to be made for marriages between British subjects in the colonies, in Pagan countries, and on the wide ocean? May you not be driven to enact that the ancient canon law, which Lord STOWELL, as it is now said, erroneously supposed to have been the common law of England, shall be taken to be the law of England wherever it has not been altered by positive statutes; and thus reduce things to the quiet and satisfactory state in which they were before this controversy arose?

But a wiser and more salutary course will be for your Lordships judicially to decide that, according to the opinion of Lord STOWELL, the marriage is valid, and all legislation on the subject may be unnecessary.

Supposing the first marriage to be valid, that the [803]
prisoner was "married" within the meaning of 10 Geo. IV., c. 34, and so guilty of bigamy by marrying again, I cannot

doubt for one moment; and my opinion would have been the same if the second marriage had been exactly in the same form as the first, instead of being in a church according to the rites and ceremonies of the Church of England. How can this be considered a mere executory contract not intended to operate as marriage till publicly solemnised, when the parties were actually married by a minister of religion, who they believed had power to marry them, and after receiving the nuptial benediction from him, lived together as husband and wife?

I must therefore very humbly advise your Lordships to reverse the judgment of the Court of Queen's Bench in Ireland, and to give judgment for the Crown.

[831] The LORD CHANCELLOR. — This, my Lords, is a question of so much importance, embracing such a variety of considerations, and affecting such deep and extensive interests, that I have thought it right, agreeably to the course pursued by my noble and learned friends, to state my opinion upon it in writing; and with your permission I will read it to your Lordships.

The first and material point for consideration in this case is, as to the effect by the law of England, previous to the Marriage Act, of a contract or engagement of matrimony *per verba de præsenti;* by which I understand a contract of present marriage, for that is the sense in which these words are used in all [* 832] the * text writers and reports of decisions upon the subject. "Spousals *de præsenti,*" Swinburne says, "are a mutual promise or contract of present matrimony; as when the man doth say to the woman, 'I do take thee to my wife;' and she then answereth, 'I do take thee to my husband.'"

Such a contract entered into between a man and a woman was indissoluble; the parties could not by mutual consent release each other from the obligation. Either party might, by a suit in the Spiritual Court, compel the other to solemnise the marriage *in facie ecclesiæ.* It was so much a marriage, that if they cohabited together before solemnisation, they could not be proceeded against for fornication, but merely for a contempt. If either of them cohabited with another person, the parties might be proceeded against for adultery. The contract was considered to be of the essence of matrimony, and was therefore, and by reason of its indissoluble nature, styled in the ecclesiastical law *verum matri-*

monium, and sometimes *ipsum matrimonium*. Another and most important effect of such a contract was, that if either of the parties afterwards married with another person, solemnising the same *in facie ecclesiæ*, such marriage might be set aside, even after cohabitation and the birth of children, and the parties compelled to solemnise the first marriage *in facie ecclesiæ*. Such were the effects of a contract of marriage *per verba de præsenti*.

A contract of marriage *per verba de futuro*, that is, a contract for future marriage, might be released, and the Court would not compel, in opposition to the will of either of the parties, solemnisation *in facie ecclesiæ*, though in this case the party refusing to perform the contract might be punished *propter læsionem fidei*. But in the case of a contract of this nature, if it were *followed by cohabitation, it was then put upon the same [*833] footing as a contract *per verba de præsenti*, and was followed by the same consequences.

At present, however, I am directing your Lordships' attention to a contract of marriage *per verba de præsenti*, and its legal consequences and effects. They are such as I have already stated, and the authorities upon the subject will upon examination be found to be uniform and consistent.

I shall, in support of this statement, refer in the first instance to Swinburne, in his treatise of Spousals. The writer lived in the reign of Queen Elizabeth, and was for several years a Judge of the Prerogative Court at York. This treatise is a work of great learning, though tinctured with the quaintness so common with the writers of that period. Lord STOWELL makes constant reference to his authority. Swinburne says, "That woman and that man which have contracted spousals *de præsenti* cannot by any agreement dissolve those spousals, but are reputed for very husband and wife, in respect of the substance and indissoluble knot of matrimony; and therefore, if either of them should in fact proceed to solemnise matrimony with any other person, consummating the same by carnal copulation and the procreation of children, this matrimony is to be dissolved as unlawful, the parties marrying to be punished as adulterers, and their issue in danger of bastardy. The reason is, because here is no promise of any future act, but a present and perfect consent, the which alone maketh matrimony, without either public solemnisation or carnal copulation; for neither is the one nor the other the essence of matrimony but

consent only. The ecclesiastical laws do usually give to women betrothed only or affianced the name and title of wife; [* 834] because in truth the man and woman, * thus perfectly assured by words of present time, are husband and wife before God and his church."

In another passage he expresses himself thus: "Spousals *de præsenti*, though not consummate, be in truth and substance very matrimony, and therefore perpetually indissoluble, except for adultery." Again he says, "The parties having contracted spousals *de præsenti*, albeit the one party should afterwards marry another person in the face of the church, and consummate the same by carnal copulation, notwithstanding, the first contract is good, and shall prevail against the second marriage."

In a subsequent passage he points out the mode of proceeding, "by the laws ecclesiastical of this realm, where a party having contracted spousals *de præsenti*, should afterwards refuse to undergo the holy bond of matrimony."

In the case of *Dalrymple* v. *Dalrymple*, so often referred to, and never without just praise, Lord STOWELL, the most learned ecclesiastical lawyer of his age, expresses himself in accordance with the opinions of Swinburne, whose work he cites, and whose authority he sanctions: "The consent of two parties, expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name of *sponsalia per verba de præsenti;* improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonials of marriage. The expression, however, was constantly used, in succeeding times, to signify clandestine marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; secondly, [* 835] to mere * engagements for a future marriage, which were termed *sponsalia per verba de futuro;* a distinction of *sponsalia* not at all known to the Roman civil law. Different rules, relative to their respective effects in point of legal consequence, applied to these three cases of regular marriages, of irregular marriages, and of mere promises or engagements. In the regular marriage everything was presumed to be complete and consummated, both in substance and in ceremony; in the irregular marriage everything was presumed to be complete in substance, but not in ceremony, and the ceremony was enjoined to be under-

gone as matter of order; in the promise, or *sponsalia de futuro*, nothing was presumed to be complete or consummate either in substance or ceremony. Mutual consent would relieve the parties from their engagement, and one party, without the consent of the other, might contract a valid marriage, regular or irregular, with another person." In a subsequent passage he states that "this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin, and as well on that account as of the religious forms that were prescribed for its regular celebration, and holy estate, holy matrimony; but it likewise retained those rules of the canon law which had their foundation, not in the sacrament or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which had the cognisance of matrimonial causes, enforced these rules; and, among others, that rule which held an irregular marriage constituted *per verba de præsenti*, not followed by any consummation shown, valid to the full extent of voiding a subsequent regular marriage contracted *with another person. The same doctrine," he [*836] adds, "is recognised by the temporal Courts as the existing rule of the matrimonial law of this country;" and he cites *Bunting's* case in support of this position.

In these passages Lord STOWELL is speaking of the ecclesiastical law of England. No man knew better than he did what that law was, and upon what it was founded. When he mentions the canon law he must obviously mean that portion of the canon law received here, and which forms so considerable a part of the ecclesiastical law of this country. It is impossible to suppose that he should for a moment have lost sight of this distinction.

The same doctrine was stated by Sir EDWARD SIMPSON in his judgment in *Scrimshire* v. *Scrimshire*, 2 Hagg. Cons. Rep. 395, pronounced in the year 1752, shortly before the passing of the Marriage Act. His words are these: "The canon law received here calls an absolute contract *ipsum matrimonium*, and will enforce solemnisation according to English rites."

Another authority to the same effect is that of Doctor Ayliffe, the learned author of the "Parergon." He states that "the ancient canon law received in this realm is the law of the kingdom in ecclesiastical cases, if it be not repugnant to the royal

prerogative, or to the customs, laws, and statutes of the realm." There is in his work a chapter "on Marriage or Matrimony, otherwise called Wedlock." He there speaks of "spousals *de præsenti*, commonly called marriage." "The principal thing," he says, "required to a legal marriage is the consent of the parties contracting, which is sufficient alone to establish such a [*837] marriage. The Council of Trent," he adds, "declares *all clandestine marriages to be null and void; but this is not law in England, our law only punishing such marriages with the censure of the church."

In strict conformity with these opinions is the language of Lord HOLT in the case of *Jesson* v. *Collins*, 2 Salk. 437, 6 Mod. 155, which has given occasion to so much observation. A suit had been instituted in the Ecclesiastical Court to dissolve a marriage by reason of a precontract *per verba de præsenti*. A prohibition was moved for, upon a suggestion that the contract was *per verba de futuro*, for the breach of which damages might be recovered at common law. But HOLT, Ch. J., observed in answer, that "though it was *per verba de futuro*, it was a matrimonial matter, and the Spiritual Court had jurisdiction." In the course of his judgment he stated, as it was very natural for him to do, the distinction between such a contract and a contract *per verba de præsenti*. "The latter," he said, "was a marriage; viz., I marry you: You and I are man and wife; and this is not releasable. *Per verba de futuro*, I will marry you; I promise to marry you; &c.; which do not intimate an actual marriage, but refer it to a future act; and this is releasable; and as it is releasable, the party may admit the breach, and demand satisfaction." It cannot, I think, be justly said that he went out of his way in making these observations. A distinction had been taken between a contract *per verba de præsenti* and a contract *per verba de futuro*, and the ground taken for moving for the prohibition was, that the proper remedy in the latter case was by an action for damages.

In the subsequent case, viz., *Wigmore's Case*, 2 Salk. [*838] 438, *the wife sued in the Spiritual Court for alimony. The husband was an Anabaptist, and had a license to marry, but married the woman according to the forms of their own religion. "*Et per* HOLT, Ch. J.: By the canon law, a contract *per verba de præsenti* is a marriage; as, I take you to be my wife; so it is of a contract *per verba de futuro*, viz., I will take, &c.

If the contract be executed, and he does take her, it is a marriage, and they," that is, the Spiritual Court, "cannot punish for fornication."

We have the high authority, therefore, of this learned and eminent Judge, in accordance with the ecclesiastical authorities to which I have referred; and it is added that the other Judges of the Court concurred in the opinion expressed by the CHIEF JUSTICE. It has been supposed that Lord HOLT was speaking of marriage contracts, not with reference to the ecclesiastical law of this country, but to the general canon law, because in *Wigmore's* case he used the expression, "by the canon law." Undoubtedly he did so, but by that expression he could only have meant the canon law received here, and forming part of the ecclesiastical law of this kingdom. It is quite obvious that his observations would have been perfectly irrelevant (a circumstance very unusual with this distinguished Judge) if the expressions were used in any other sense. I cannot, therefore, accede to this explanation. And why are we to put a forced construction upon his words, when they merely express an opinion relating to the ecclesiastical law, in accordance with the most eminent authorities in this branch of jurisprudence, upon a subject peculiarly belonging to their jurisdiction?

The only remaining authority to which I think it necessary at present to refer, is that of Mr. Justice * BLACKSTONE, who [* 839] states, in the first book of his Commentaries (p. 439), that "any contract made *per verba de præsenti*, or in words of the present time, between persons able to contract, was, before the late Act, deemed a valid marriage to many purposes, and the parties might be compelled in the Spiritual Courts to celebrate it *in facie ecclesiæ*." It is obvious that the learned commentator considered this statement of the law of marriage as free from all doubt, for he did not think it necessary to cite any authority in support of the position. These Commentaries passed through several editions in the lifetime of the learned author, but no change was made in the passage to which I have referred. I think your Lordships will be of opinion that these references, which might, if necessary, be greatly extended, sufficiently establish what I have stated as to the nature and effect of a contract of marriage *per verba de præsenti*, and in opposition to which, I conceive, no authority has been or can be adduced.

There is one branch of this subject which I have already mentioned, but to which I must more particularly advert, because it connects itself closely, as I shall hereafter have occasion to show, with the main question before your Lordships; namely, the judgment that has been pronounced in this case by the Court of Queen's Bench in Ireland. I have stated that a contract *per verba de præsenti* may be enforced against either of the parties to it, although such party may have subsequently been married *in facie ecclesiæ* to another person, and even after consummation and the birth of children. This is abundantly clear from the statute 32 Hen. VIII., c. 38, which recites, that " Whereas heretofore divers and many persons, after long continuance together in matrimony, without any allegation of either of the parties or any [* 840] other, that their * marriage, why the same should not be good, just, and lawful, and after the same matrimony solemnised and consummated, and sometimes with fruit of children, have nevertheless, by an unjust law of the Bishop of Rome, upon pretence of a former contract made and not consummated, been divorced and separated, contrary to God's law; and so the true matrimony, both solemnised in the face of the church and consummated, and confirmed also with fruit of children, clearly frustrated and dissolved." The statute, therefore, proceeds to enact, " That such marriage, being contract, and solemnised in the face of the church, and consummated with bodily knowledge or fruit of children, shall be deemed, judged, and taken to be lawful, good, just, and indissoluble, notwithstanding any precontract or precontracts of matrimony not consummate with bodily knowledge, which either of the parties so married, or both, shall have made with any other person or persons before the time of contracting such marriage."

This law was pointed against the injustice of dissolving by reason of precontract a marriage solemnised *in facie ecclesiæ*, and after consummation between the parties; but it left the law, where there had been no consummation, as it stood before. Great dissatisfaction appears to have been occasioned by this change, and very early in the reign of Edward VI. the statute was repealed, and the law restored to its former state.

Bunting's case, *Bunting* v. *Lepingwell*, 4 Co. Rep. 29, Moore, 169, which has been referred to on both sides in the argument, is an instance of the application of the general rule. This was

an action of trespass, and upon a special verdict it was found that John Bunting had contracted marriage *per verba de* **præsenti* with Agnes Adingsel, and that afterwards [*841] Agnes was married to one Twede, and cohabited with him. Bunting sued Agnes in the Court of Audience, and proved the contract, and sentence was pronounced that she should marry Bunting, which she did. They had issue Charles Bunting, and afterwards the father died. The jury found, that if Charles was the son and heir of Bunting, the defendant was guilty of the trespass. The main questions were these: It was contended that there should have been a sentence of divorce, and that the husband ought to have been a party to the suit; but the Court decided that the sentence against the wife only, being but declaratory, was good, and should bind the husband *de facto;* and that as to the other point, the Court must give faith and credit to the proceeding and sentence of the Ecclesiastical Court, to which the cognisance of the subject of marriage belongs. In this case, then, the effect of a precontract *per verba de præsenti* upon a subsequent regular marriage *in facie ecclesiæ*, which this is stated to have been, was admitted and sanctioned by the Court of common law, for it was resolved that the plaintiff was legitimate, and no bastard.

I place little reliance upon the terms of the decree of the Spiritual Court, as recited in the special verdict; for, as they do not correspond with the usual form in similar cases, it is probable that the substance only is stated, and that, too, in the language of the pleader.

I have been furnished, by the kindness and industry of Mr. Hope, with a case of a similar nature, extracted from the rolls of the Province of York, in which the sentence is set forth in the usual and regular form. The suit, which is of ancient date (in the fourteenth century), is thus entitled: *Cecilia de* Portynton versus **John de Steinbergh* and *Alicia Cristyn-* [*842] dome, "*quam idem Johannes de facto duxit in uxorem.*"

The libel charged that the said John and Alicia contracted a marriage *de facto*, and solemnised the same in the face of the church. Then follows this allegation, that the said marriage does not and cannot subsist *de jure*, by reason of a precontract, *cum copula*, between the said John and Cecilia. It therefore prays the marriage *de facto* between John and Alicia may be pro-

nounced to have been and to be (*fuisse et esse*) null and void, and that the said John may be adjudged the lawful husband of the said Cecilia, and be compelled to solemnise matrimony with her *in facie ecclesiæ*, &c. The evidence is set forth, and is followed by the sentence, which dissolves the marriage *de facto* with Alicia, and pronounces it *fuisse et esse invalidum*, and adjudges the said John "*in virum legitimum Ceciliæ.*" It then proceeds thus: "Et ad solemnizandum matrimonium cum eadem in facie ecclesiæ, ut est moris, cononice compellendum et coercendum fore decernimus." The previous contract was *per verba de futuro*, but it was followed by cohabitation, and was therefore in its legal effect and consequences the same as a contract *per verba de præsenti*. The sentence was appealed from, and affirmed.

From this case it appears that the regular course of proceeding was to make the husband of the second marriage a party to the suit, to pronounce a dissolution of that marriage, to adjudge the husband to be the lawful husband of the party to the first contract, and to decree solemnisation in the face of the church. It further appears from the terms of the sentence, that the dissolved marriage was pronounced to have been and to be (*fuisse et esse*) void, agreeably to the rule of the Ecclesiastical Court,
[* 843] that when a marriage * voidable by reason of precontract is annulled, it is annulled *ab initio*.

Lord Coke, 1 Inst. 33 a, in speaking of these marriages *de facto* voidable by reason of precontract, expresses himself thus: "So it is, if a marriage *de facto* be voidable by divorce in respect of consanguinity, affinity, precontract, or such like, whereby the marriage might have been dissolved, and the parties freed *a vinculo matrimonii;* yet, if the husband die before any divorce, then, for that it cannot now be avoided, this wife *de facto* shall be endowed, for this is *legitimum matrimonium quoad dotem;* and so in a writ of dower, the bishop ought to certify that they were *legitimo matrimonio copulati*, according to the words of the writ; and herewith agreeth 10 Edw. III., 35. But if they were divorced *a vinculo matrimonii* in the life of the husband, she loseth her dower." He cites Bracton to the same effect.

Your Lordships will therefore observe, that when a contract *per verba de præsenti* between two parties was followed by a marriage solemnised in the face of the church between one of the parties and another person, the latter marriage was not by reason

of the precontract absolutely void, but merely voidable; and, as a consequence of this, that if such marriage were not annulled by sentence of the Ecclesiastical Court in the lifetime of the parties, it could not afterwards be affected; — the widow would have her dower, and the children be legitimate.

Such, then, were the principal incidents of this species of contract; the engagement was indissoluble, the parties could not, even by mutual consent, release it; either party might compel solemnisation *in facie ecclesiæ;* the parties cohabiting together could not be *punished for fornication, though [*844] liable to ecclesiastical censure; either party cohabiting with another person might be punished for adultery; and lastly, such a contract was sufficient to avoid, by means of a suit, a subsequent marriage entered into by either of the parties, and solemnised *in facie ecclesiæ.*

It must always be remembered that the Spiritual Courts were the sole judges of the lawfulness of marriage, where that question was directly in issue. If the question, whether a marriage be lawful or not, was raised upon a distinct issue in the Courts of common law, the rule was that it should be tried, not by a jury, but referred for decision to the spiritual tribunal, and the certificate of the bishop was conclusive.

The opinions to which I have referred, as to the nature and effect of these contracts, are not, as your Lordships will have observed, merely those of learned individuals and Judges of the ecclesiastical tribunals; I have also shown that these opinions are confirmed by common-law authorities of the most respected and highest character: that a contract therefore *per verba de præsenti* was, at the period to which we are referring, considered to be a marriage; that it was, in respect of its "constituting the substance and forming the indissoluble knot of matrimony" (to use the expression of Swinburne), regarded as *verum matrimonium*, and was followed by such incidents as I have mentioned, — is, I apprehend, clear beyond all controversy.

But then the same authorities inform us that such marriages were irregular, that they were a looser sort of marriages; that they were not, as Swinburne says, perfect marriages, though equally binding; that, according to Blackstone, they were marriages for many, and consequently not for all, purposes; and that, in *order to constitute a regular marriage — a perfect [*845]

marriage — a marriage with all the consequences belonging to a marriage in its complete and perfect state, solemnisation was necessary; and your Lordships will find that the same ecclesiastical authorities admit in the fullest manner this to be the law, in conformity with the opinions of the temporal lawyers and the decisions of the civil tribunals.

Swinburne, Of Espousals, s. 17, in the work to which I have before referred, thus expresses himself upon this subject: "*Spousals de præsenti*, though not consummate, be in truth and substance very matrimony. Although by the common laws of this realm (like as it is in France and other places), spousals, not only *de futuro*, but also *de præsenti*, be destitute of many legal effects wherewith marriage solemnised doth abound, whether we respect legitimation of issue, alteration of property in her goods, or right of dower in the husband's lands." And in another place he says, "Yet do not these spousals, that is, *per verba de præsenti*, produce all the same effects here in England which matrimony solemnised in the face of the church doth; whether we respect the legitimation of their children, or the property which the husband hath in the wife's goods, or the dower which she is to have in his lands; of which effects we shall have better opportunity to deliver our mind hereafter." Again, "Other effects there be of spousals, whereof some respect the issue or children begotten before celebration of the marriage betwixt those which have contracted spousals, and some have relation to their lands and goods. Concerning their issue, true it is that by the canon law the same is lawful; but by the laws of this realm their issue is not lawful, [*846] though the father and the *mother should afterwards celebrate marriage in the face of the church. Likewise concerning lands, by the canon law the foresaid issue may inherit the same; but it is otherwise by the laws of this realm, for as the issue is not legitimated by subsequent marriage, no more can he inherit his father's land; and as he cannot inherit, no more is she to have any dower of the same lands, for whereas by the laws of this realm a married wife is to have the third part of her husband's lands holden in fee simple or fee tail, either general or special, for her dower after her husband's death, during her life, so that she be above the age of nine years at her husband's death, yet a woman having contracted matrimony, if the man to whom she was betrothed die before the celebration of the marriage, she

cannot have any dower of his lands, because as yet she is not his *lawful* wife, at least to that effect. Concerning goods, the like may be said of them as hath already been spoken of lands, that is to say, that although by the civil and canon laws, where the man doth gain any of the woman's goods, or the woman gain any of the man's goods, by reason of marriage, spousals *de præsenti* or *de futuro*, consummate with carnal knowledge, have the same effect as hath matrimony solemnised, yet by the laws of this realm it is otherwise; so that neither spousals *de præsenti*, neither spousals *de futuro* consummate, do make her goods his, or his goods hers; and hence it is that a woman contracted in matrimony, dying before the celebration of the marriage, may make her testament, and dispose of all her goods at her own pleasure, which after solemnisation of the marriage she cannot do without his license and consent. And on the other side, the man dying intestate before celebration of the marriage, the woman to whom he was betrothed * surviving cannot obtain the [*847] administration of his goods as his widow, which otherwise, the marriage being solemnised, she might do. And the like I read to be observed in divers other countries, as in France and Saxony, where neither he nor she gain any part of the other's goods by being affianced, unless the marriage be solemnised, if not consummated also."

Lord STOWELL, in like manner, in the *Dalrymple* case, states, with reference to these contracts, that "the common law had scruples in applying the civil rights of dower and community of goods and legitimacy, in the cases of these looser species of marriage;" obviously meaning, though in more general terms, to express the same opinion as Swinburne, whom, among other authorities, he cites for this position.

The same view of the law was taken by Sir EDWARD SIMPSON in the case of *Scrimshire* v. *Scrimshire*, which occurred shortly before the Marriage Act; his words are these: "I apprehend, unless persons in England are married according to the rites of the Church of England, they are not entitled to the privileges attending legal marriages, as dower, thirds, &c. And when Mr. Justice BLACKSTONE says "such marriages are valid for many purposes," and therefore not for "all purposes," it is evident his view of the subject was in accordance with that of the ecclesiastical law authorities to whom I have referred.

The same opinion is expressed by Lord HOLT in the case before referred to. He thus expresses himself: "In the case of a dissenter married to a woman by the minister of a congregation, not in orders, it is said that this marriage is not a nullity, because by the law of nature the contract is binding and sufficient; for though the positive law of man ordains that marriages shall be [*848] made by a priest, that law only makes *this marriage irregular, and not expressly void; but marriages ought to be solemnised according to the rites of the Church of England to entitle to the privileges attending legal marriages, as dower, thirds," &c.

In a learned work, written in a popular form, on the subject of marriage, published in the year 1632, entitled "The Woman's Lawyer," and which has been ascribed to Mr. Justice DODDRIDGE, is the following passage: "If Titus and Sempronia by words *de præsenti* in a lawful consent contract marriage, they are man and wife before God; but public celebration according to law is it which maketh man and wife in plain view of law. One nail keepeth out another, and a firm betrothing forbiddeth any new contract; yet they which dare play man and wife only in the view of heaven and closet of conscience, let them be advised how they shall take the advantages or emoluments of marriage in conscience or in heaven; for, on earth if the priest see no celebrated marriage, the Judge saith no legitimate issue, nor the law any reasonable or constituted dower." This agrees with the other authorities. I refer to it principally on account of its date. It shows what was the generally received opinion upon the subject at that period.

The next point for consideration, therefore, will be, how far these opinions are supported by the decisions of the Courts of common law. First, then, as to dower, and the case cited with respect to it from Lord Hale's Manuscripts. An account of these manuscripts is given by Mr. Hargrave, in the preface to his edition of "Coke upon Littleton." There is no doubt they were copied from originals in the handwriting of Lord Hale. The case is this: A. contracts, *per verba de præsenti*, with B. [*849] and has issue by her, *and afterwards marries C. *in facie ecclesiæ;* B. recovers A. for her husband by sentence of the Ordinary; and for not performing the sentence he is excommunicated, and afterwards enfeoffs D., and then marries B. *in*

facie ecclesiæ, and dies; she brings dower against D., and recovers, because the feoffment was *per fraudem mediate* between the sentence and the solemn marriage, *sed reversatur coram Rege et Concilio quia prædictus* A. *non fuit seisitus* during the espousals between him and B.

There is, I think, no sufficient foundation for the suggestion that this was not a decision by one of the regular tribunals of the country. It was obviously not considered by Lord Hale as liable to this objection. But as the suggestion has been made, it is proper to observe, that upon the point we are now considering, viz., whether a contract *per verba de præsenti,* without solemnisation, would entitle the widow to dower, the Court below and the Court of Appeal entertained the same opinion. The Court below decided the case on the special ground of fraud, because the alienation by the husband had been made *per fraudem mediate* between the sentence and the solemnisation, for the purpose of defeating the claim of the wife. It is plain that they would not have taken this as the ground of decision if they had considered that the husband's seisin after the contract, and before the solemnisation, would have entitled the wife to dower. Both the Court below and the Court of Appeal agreed therefore in this, that the seisin of the husband after the contract, and before solemnisation, would not support a claim to dower.

Perkins, whose authority has always stood deservedly high in our Courts, states, in his valuable "Treatise on the Laws of England," and in conformity with the *above decision, [*850] that if a man seised of land in fee make a precontract of matrimony with J. S. and die before the marriage is solemnised, she shall not have dower, for she never was his wife. It has been supposed that this might have been the case of a contract *per verba de futuro;* but it is, I think, manifestly impossible to put such a construction upon the passage. It would have been altogether idle to have made such a statement as to the law, for it never was and never could have been supposed that a mere contract *per verba de futuro* could give any right to dower. And what reason is there for making so strained a supposition, where the law, as thus stated, conforms with the decision in the case mentioned by Hale, and with other authorities?

Perkins further goes on to say, that it was holden in the time of King Henry III., that if a wife was married in a chamber she

should not have dower by the common law; but he adds, the law is contrary at this day. So that at that period (the reign of Henry III.) it appears that nothing short of a solemnisation *in facie ecclesiæ* would entitle a woman to dower. Fitzherbert's Natura Brevium, 150, is to the same effect: "A woman married in a chamber shall not have dower at common law; 16th Hen. III. *Quære,*" he says, "if marriage made in chapels not consecrated, &c.? for many are by license of the bishop married in chapels, and it seemeth reasonable that in such cases she shall have dower."

I pass from the question of dower to that of legitimacy. One of the earliest cases upon the subject is that of *Del Heith* (Harl. MSS. 2117, Rogers' Ecc. Law. 584), so frequently mentioned, which was decided in the 24 Edw. I. It was as follows:

[*851] John Del Heith, brother of Peter Del Heith, held * lands in Bishopsthorpe near Norwich, and kept a woman, named Katharine, in concubinage, by whom he had two children, Edmund and Beatrice. Being taken ill, he was advised by the Vicar of Plumstead, for the good of his soul, to marry her. As he was unable to go to church, the ceremony was performed in his own house by the Vicar, when the said John Del Heith pronounced the usual words, and placed a ring upon her finger; but no mass was celebrated. From that time the parties lived together as man and wife, and had another son called William. On the death of John Del Heith, his brother Peter entered upon his lands as his next heir; but a writ of ejectment was brought by the said William as son and heir of the deceased. It was asked on the trial whether any espousals were celebrated between his parents in the face of the church, after his father recovered from his illness? And because it was not proved that John Del Heith was ever married to Katharine in the face of the church, the jury found that the plaintiff had no right to the lands; thus proving that he was illegitimate.

Foxcroft's Case, 1 Roll. Abr. 359, which occurred in the same reign, viz., in the 10th Edw. I., is to the same effect. The marriage not having been solemnised *in facie ecclesiæ*, the issue was held to be illegitimate. These cases it is said ought to be disregarded, as being manifestly contrary to law; solemnisation *in facie ecclesiæ* never, as it is assumed, having been necessary to the validity and full effect of a marriage.

Why this is to be assumed, in opposition to these express decisions, it is not very easy to understand. *Foxcroft's* case is taken from Rolle's Abridgment, a * work always [* 852] held in great estimation, and he refers to the Year Book as his authority.

The case is cited without any doubt or question in the Digest of Chief Baron Comyn, and in other similar compilations; and it was quoted as an authority, though for a different purpose, by Lord ELDON and Lord ELLENBOROUGH, in the case of the *Banbury Peerage*. Upon what principle, then, is it to be assumed that in the reign of Edward I., marriage *in facie ecclesiæ* was not considered necessary upon a question of legitimacy, in opposition to these decisions, and especially when we find it stated by Perkins that in the reign of Henry VII. it was essential in the case of dower; and which is also stated by Fitzherbert, in his "Natura Brevium"? When the Spiritual Court decreed a marriage, it always decreed it to be solemnised *in facie ecclesiæ*, and every other marriage was irregular and clandestine.

Upon this question of legitimacy it is material to observe, that Goldingham, one of the civilians called in for the assistance of the Court in *Bunting's* case, stated, that if issue be born after the contract of marriage (he is speaking of a contract *per verba de præsenti*), and before the solemnisation, such issue is legitimate; but he adds, that is when espousals afterwards take place, for if espousals do not succeed, the issue, he says, born after the contract, will be illegitimate; and this was not controverted by the civilian who argued on the other side. When he says that the issue would be legitimate if espousals afterwards take place, he is evidently referring to the doctrine of relation, which was always rejected by our law.

Another authority to the same effect is Godolphin, who states in his "Repertorium Canonicum," that "by the common law he or she that is born before marriage * celebrated [* 853] between the father and mother, is called a bastard."

When the question of legitimacy depended on the lawfulness of the marriage, it was tried on the issue of *ne unques accouple* in loyal matrimony; the same as in dower. But it is, I think, clear that a contract *per verba de præsenti*, without solemnisation, would not entitle the wife to dower. It follows, therefore, that upon the issue of *ne unques accouple*, &c., the bishop must, in a

case of dower, have certified against the marriage, or the rule of law in the case of dower must have been defeated. But the issue being the same upon the question of legitimacy, there must have been the same certificate; and as the certificate is conclusive, there must consequently have been the same result.

In the case of *Wickham* v. *Enfeild*, Cro. Car. 351, which has been cited, the bishop, instead of the usual form of certificate, returned that the parties were coupled *in vero matrimonio sed clandestino*. The Judges, upon exception to the certificate, determined it to be sufficient. They considered *verum* to be equivalent to *legitimum*; for they were all one, it was said, in intendment, and that the return was not affected by the addition of clandestine. The finding that the marriage was clandestine was not inconsistent with its being *legitimum*, for though performed by a priest it might still have been clandestine.

If it is supposed that a contract *per verba de præsenti* would confer the right to dower, and that the issue would be legitimate, this consequence might ensue: Suppose after such a contract the man were to marry another woman *in facie ecclesiæ*, and [*854] have issue and *die, the second wife would clearly be entitled to dower. Could the first be also entitled? There could not be two contemporaneous marriages with the same man, entitling two women to dower and out of the same estate. Again, the issue of the second marriage would be clearly legitimate. If the man had sexual intercourse with the first woman after the second marriage, and had issue by her, could such issue be legitimate? There could not be two legitimate children of the same father, born of two contemporaneous marriages.

There is another distinction between a contract *per verba de præsenti* and a regular marriage, which relates to their effect upon the property of the respective parties: "If a contract of marriage be between a man and a woman, yet one of them may enfeoff the other, for yet they are not one person in law, inasmuch as if the woman dieth before the marriage solemnised between them, the man unto whom she was contracted shall not have the goods of the wife as her husband, but the wife may make a will thereof without the agreement of him unto whom she was contracted; but after the marriage celebrated between them the man cannot enfeoff his wife, for then they are one person in law." It is evident that Perkins in this passage is speaking of a contract

of marriage *per verba de præsenti;* and this, therefore, is another instance of the different legal effect of such a contract and a regular marriage.

Lord HALE, at the conclusion of the case reported by him, adds these words: "*Nota*, Neither the contract nor the sentence was a marriage." By which he may perhaps have meant, not such a complete marriage as to give a right to dower. The observation of Perkins, that she never was his wife, made in the cases to which I have referred, ought perhaps to be *taken with the same qualification. Lord COKE, speaking of the effect, after the death of the husband, of what he calls an inchoate marriage, says it shall be counted a lawful marriage *quoad dotem.* [*855]

Another and a very important circumstance in which these irregular marriages differed from a marriage solemnised according to the rites of the church, is, that neither party could maintain a suit against the other for the restitution of conjugal rights. The law is so laid down by Sir EDWARD SIMPSON, in the case of *Scrimshire* v. *Scrimshire*, and cannot, I think, be doubted.

So also as to the right to administer to the effects of a deceased wife, a contract *per verba de præsenti* has been considered insufficient. That was the case of *Haydon* v. *Gould*, 1 Salk. 119. There was a contract *per verba de præsenti*, and the parties afterwards cohabited as man and wife for several years; but it appearing that the person who performed the ceremony was not in orders, but a mere layman, which was known by the parties, the letters of administration were recalled by the Court; and upon appeal the sentence was affirmed by the delegates. This decision does not appear to have been ever questioned. It is cited with approbation by Sir WILLIAM WYNNE, and referred to without any doubt as to its soundness by Sir JOHN NICHOLL.

It was argued in that case that the marriage was not a mere nullity; that it was irregular only, but not void; that it was sufficient by the law of nature, though the positive law ordained that it should be by a priest. But it was said in answer, that the man demanding a right due to him by the ecclesiastical law, must prove himself *a husband according to that law. [*856] The decision in this case is another instance in accordance with those which I have already mentioned of the civil effects of a regular marriage being withheld from a contract *per verba de præsenti* not duly solemnised according to the rules of the ecclesiastical law.

A further and perhaps the most essential circumstance in which a contract *per verba de præsenti* differed from a regular and perfect marriage, is that to which I have already adverted; viz., that if a man, after having entered into a regular marriage, married a second time, his first wife living, the second marriage was absolutely void, and the issue of course illegitimate. But where the first engagement was merely a contract *per verba de præsenti*, the second marriage was only voidable; and if not set aside during the lifetime of the parties it could not afterwards be questioned, and the issue would be legitimate. This is abundantly clear from the passage which I have already cited from Coke Littleton, as well as from other authorities.

The subsequent decisions of the Courts of common law, until we come down to comparatively modern times, are not at variance but in conformity with the previous authorities.

In *Welde* v. *Chamberlaine*, 2 Show. 300, which was an issue marriage or no marriage, a contract *per verba de præsenti* was proved; but the doubt suggested was, that as there was no ring the ceremony was invalid, as not conforming to the Book of Common Prayer. PEMBERTON, Ch. J., inclined to think that a contract *per verba de præsenti*, repeated after the parson [* 857] in holy orders, was sufficient; but he reserved * the point for the consideration of the Court. It is obvious, therefore, that a mere contract *per verba de præsenti* was considered in that case to be insufficient.

So, in *Holder* v. *Dickeson*, 1 Freem. 95, VAUGHAN, Ch. J., was of opinion that a priest was necessary for the marriage. The other Judges did not differ from the CHIEF JUSTICE in this respect, though they considered it unnecessary to aver *quod obtulit se* in the presence of a parson, which was the objection made to the declaration.

In *Paine's Case*, 1 Sid. 13, it was said, that in a suit for dissolving a marriage on the ground of precontract, the parties contracting became husband and wife by the effect of the sentence, without further solemnity; and Noy's authority was cited for this position. But TWISDEN, Ch. J., denied this, and said the marriage must be solemnised before they could be completely baron and feme. This opinion expressed by the CHIEF JUSTICE corresponds with what was stated in *Bunting's* case, and the other more ancient authorities upon the subject.

It is obvious that none of these cases impeaches the doctrine stated both by the ecclesiastical and temporal lawyers, as to the imperfect effect, with regard to its civil consequences, of a contract of marriage *per verba de præsenti*, not accompanied or followed by due solemnisation. It is not immaterial to observe that the cases occurred before the Marriage Act, when the subject was much more familiar to both classes of lawyers, ecclesiastical as well as temporal, than it has been since the change introduced by that statute.

I have come, therefore, to this conclusion, that although a marriage contracted *per verba de præsenti* * was indis- [* 858] soluble, — though it could not be released even by the mutual consent of the parties, — though either of them might enforce it, and compel solemnisation, — though it had the effect of rendering a subsequent marriage solemnised *in facie ecclesiæ*, even after cohabitation and the birth of children, voidable, — though it was considered to be of the essence and substance of matrimony, and was therefore, and on account of its indissoluble character, styled in the ecclesiastical law *verum matrimonium*, — yet by the law of England, according to the concurrent opinion of both the ecclesiastical and temporal lawyers, this irregular and looser sort of marriage did not confer those rights of property, or the more important right of legitimacy, consequent on a marriage duly solemnised according to the rites of the church. Whatever name, therefore, is given to the connexion, this is, I conceive, a correct description of the situation of the parties who, previously to the Marriage Act, had entered into a contract of marriage *per verba de præsenti*, not followed by solemnisation.

Various questions and considerations connected with this subject have presented themselves in the course of these discussions, and to which I shall shortly advert. First, as to the religious ceremony: —

It appears from the authorities to which I have referred, that it was formerly considered essential to the full effect of a marriage that it should be solemnised in the church. The ceremony is well known; it had been in use for many hundred years, and corresponded in substance with the present form. This appears from several ancient manuals, particularly those of Salisbury and York, which are still in existence. The rule as to the necessity of a public celebration was afterwards relaxed, and it is clear

[* 859] that in * the temporal Courts the same consequences attended these marriages as if they had been celebrated *in facie ecclesiæ*. I of course except the case of dower *ad ostium ecclesiæ*, which depended upon a particular rule. Such marriages, however, though performed by a person in holy orders, and according to the rules of the church, were considered to be clandestine, and subjected the parties to the censures of the church. Two instances are mentioned, in which, according to popular tradition, such censure was pronounced; viz., upon the marriage of Sir Edward Coke with Lady Hatton, and the marriage of the Lord Chancellor Ellesmere. In the former case the censure is said to have been slight, the parties having erred from ignorance of the law; but in no case of this sort, where the marriage ceremony was performed by a person in holy orders, although the parties might be liable to ecclesiastical censure, were they ever compelled to repeat the ceremony in the face of the church. It is obvious, therefore, that such marriages, though clandestine, were considered by the Ecclesiastical Courts to be complete and lawful marriages, as they indisputably were by the Courts of common law. Still, however, the Spiritual Court, when it decreed the performance of marriage, always decreed that it should be solemnised in the face of the church.

A question has been raised as to the celebration of the marriage ceremony by a deacon; and it has been asked, if it was formerly required that the ceremony should be performed by a person in priest's orders, by what authority this change was introduced. It appears, by reference to the ancient rituals, that formerly the sacrament was administered before the nuptial benediction was pronounced, and that, as this could only be administered [* 860] by a priest, his presence * was necessary. Marriage itself was also, by the mere nature and force of the contract, considered to be a sacrament; and the solemnisation, therefore, by a priest, might on this ground have been thought necessary; but when, at the Reformation, it ceased to be considered as a sacrament, and when it was no longer required that the sacrament should be administered at the time of the marriage, there was no reason why the ceremony should not be performed by a person in holy orders as a deacon.

It is further to be observed, that in the Act of Uniformity, 13th & 14th Charles II., it is expressly enacted that certain of the

offices contained in the Book of Common Prayer shall be performed only by a priest; thereby constructively admitting that the other offices, of which matrimony is one, may be performed by a deacon.

It is said that a marriage may be valid though not performed by a person in holy orders, as in the case stated by Lord STOWELL, in *Hawke* v. *Corri*, 2 Hagg. Cons. Rep. 280: "It seems," he says, "to be a generally accredited opinion, that if a marriage is had by the ministration of a person in the church who is ostensibly in holy orders, and is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties who come to be married are not expected to ask for the sight of the minister's letters of orders, and if they saw them could not be expected to inquire into their authenticity." I do not very well understand the inference intended to be drawn from this case. It amounts to nothing more than this, that where the law requires the ministration of a person in holy orders, if a man assumes that character under such circumstances as * to [*861] impose upon those who require his ministration, and they, acting fairly and *bonâ fide*, are deceived in this particular, the Court which has to decide on the validity of the transaction, will not suffer them to be the victims of imposition and fraud, but will decree in favour of the marriage. This exception can only apply in cases where, by the general rule of law, the service of a person in holy orders is necessary; and cannot, therefore, be properly used to impeach that rule.

Another question that has been raised, and which bears immediately upon the judgment of the Court below, is this: Assuming that a marriage can be solemnised only by a person in holy orders, whether a Presbyterian minister, regularly ordained according to the rules of the Presbyterian Church, is competent to perform the ceremony between members of the Established Church, so as to give full validity and effect to the marriage?

Holy orders, according to the law of England, are orders conferred by episcopal ordination. This was the law of the Catholic Church in this country, and the same law continued after the Reformation as the law of the Episcopal Reformed Church, distinguished by the appellation of the Church of England. The mode of conferring these orders is prescribed in the Act of Uniformity, 2 & 3 Edw. VI., and 13 & 14 Chas. II. Similar laws

were passed at about the same periods in Ireland, for the regulation of the church of that country, which was founded on the same principles and governed by the same rules as the Church of England. A marriage celebrated by a Roman Catholic priest, as in *Fielding's Case* and other instances, has been considered valid.

A priest of the Romish Church is a priest by episcopal [*862] ordination, *and his orders are accounted holy orders by our church. If he conforms to the Protestant faith, and is presented to a benefice, no new ordination is necessary; nor would it, indeed, be proper.

The two churches of England and Ireland, the same in doctrine, in ceremony, and in discipline, have been united, and the same law which applied to each church in its separate state has become the law of the united church. It is said that we admit the validity of the ordination of the ministers of the Church of Scotland, and that by the Act of Union their title, as legally ordained ministers, is valid in every part of the empire. As respects their reverend character that certainly is so, but this conveys no authority out of Scotland. Holy orders in England still mean the same thing as before the union with Scotland, viz., orders conferred by episcopal ordination; and what is required to be done by a minister in holy orders, cannot therefore be done by an ordained minister of the Scotch church. The question is not affected by the Toleration Acts. These Acts remove penalties and disabilities; they confer no title. The claim made by the Presbyterians in Ireland cannot be supported upon any principle that would not apply equally to every denomination of dissenters. I respect the character of the Presbyterian ministers of Ireland, their learning and piety; but this is a question of mere legal interpretation, which must be determined without reference to the character or conduct of the parties.

The view I have taken of the effect of a marriage contract *per verba de præsenti* will afford an immediate and satisfactory answer to the inference attempted to be drawn from different [*863] statutes passed *with reference to this subject. I allude, in the first place, to the statute 12 Chas. II., c. 33, for confirmation of marriages during the Commonwealth. It is said that if a contract *per verba de præsenti* be an actual marriage, what necessity was there for this Act? for the marriages entered into under the ordinance were of this nature. Undoubtedly that is

so; but if such contracts were not followed by all the consequences of marriages regularly solemnised, the Act was obviously necessary, and it accordingly puts these marriages on the same footing as marriages solemnised according to the rites of the Church of England. Equally plain is the explanation of the clause in the statute, by which the validity of these marriages is left to the decision of the Temporal Courts. The reason is obvious: When they were rendered valid and binding by the Act, the question in each instance would not be a question of ecclesiastical law, but merely whether the particular case came within the provisions of the statute.

The same observation will apply to the reasoning founded on the different Acts relating to marriages celebrated by Presbyterian ministers in Ireland and in India. But then it must also be admitted that these Acts would have been unnecessary, if a contract *per verba de præsenti* had been attended with the same civil rights as to property, &c., as a regular marriage solemnised according to the rules of the church. I place very little stress upon the argument that has been founded upon the form of certain of the statutes relating to this subject, some of them being enacting and others declaratory. They appear in a great degree, if I may so express myself, to neutralise each other; and many of them are wholly inconsistent with the notion that the Legislature considered a contract *per * verba de præsenti* [* 864] to have the full effect of a regular solemnised marriage.

I must not pass over the observations that have been made upon the marriages of Jews and Quakers. It is said they can only be supported on the ground of their being contracts *per verba de præsenti*, or *de futuro* followed by cohabitation.

No such argument can, I think, be justly raised from the decisions respecting marriages amongst the Jews. They are treated in those decisions as a distinct people, governed, as to this subject, by their own religious observances and institutions, among which marriage is included. Speaking upon this subject, Lord STOWELL, in the case of *Ruding* v. *Smith*, 2 Hagg. Cons. Rep. 371, observes that "the matrimonial law of England for the Jews is their own matrimonial law; and an English Court Christian, examining the validity of an English Jew marriage, would examine it by that law, and that law only, as has been done in the cases that were determined in this Court on those very prin-

ciples." Such are the admitted grounds of decision in the case of Jewish marriages.

The question as to the marriage of Quakers is of more difficult solution. In the case so frequently referred to, before Lord HALE, that learned Judge is reported to have said, that he would not on his own opinion make their children bastards; and he directed the jury to find a special verdict. It would seem, therefore, that the inclination of his opinion was against the validity of the marriage. If he had considered a contract *per verba de præsenti* to have been sufficient, there would have been no difficulty in the case, and he would at once have decided accordingly. Burnet states, that HALE considered "all marriages, made according to the several persuasions of men, ought to have their effects in law." It is not improbable, therefore, that this was the ground on which he refused to decide the question. Lord Keeper North, no mean lawyer, though full of religious and party prejudices, considered the point too clear for doubt; and observing upon the course pursued by HALE in this case, made it the ground of a bitter and not very decent attack upon that distinguished Judge.

[*865]

In a case mentioned by Mr. Justice WILLES in *Harford* v. *Morris*, 1 Hagg. C. Rep. App. 9, and in *Woolston* v. *Scott*, Bull. N. P. 28, before Mr. Justice DENISON, the former of which was the case of a marriage between Quakers, and the latter an Anabaptist marriage, it was held that an action of criminal conversation might be sustained. Mr. Justice BULLER, in commenting, in his "Law of Nisi Prius," on the latter decision, does not suggest as the ground of the judgment that the marriage was valid as being a contract *per verba de presenti*, but observes that it had been doubted whether the ceremony must not be performed according to the rites of the church; but as this, he says, is an action against a wrongdoer, and not a claim of right, it seems sufficient to prove the marriage according to any form of religion, as in the case of Quakers, Anabaptists, Jews, &c. He rests this class of cases, therefore, upon the distinction made in the Courts of law between a claim of right and proceedings against a wrongdoer.

In *Green* v. *Green*, 1 Hagg. C. Rep. App. 9, which was also the case of a Quaker marriage, it was considered that a marriage according to the forms used among that sect was not sufficient to support a suit for the restitution of conjugal rights.

*A question as to the effect of those marriages arose [*866] in the case of *Haughton* v. *Haughton*, 1 Moll. 611, before Lord MANNERS, when Chancellor of Ireland. He decided in favour of their validity, but not on the ground of a contract *per verba de præsenti*, but because he considered that they were included in the Irish statute 21 & 22 Geo. III., for the relief of dissenters. Quakers are excepted from the Marriage Act, but no other dissenters; and being put in this respect on the same footing with the Jews, it is not an unfair inference that the Legislature intended to place them on the same footing with respect to their marriages, and thus constructively to legalise them. This provision in the Act was considered by Sir WILLIAM WYNNE, in *Sylveira* v. *Alvarez*, as a strong recognition of the validity of these marriages. In none of the cases is it rested on the ground of the form constituting a contract *per verba de præsenti*. Although these marriages, therefore, may afford materials for popular reasoning, they do not, I think, lead to any certain conclusion, or give a greater effect to a contract *per verba de præsenti* than is ascribed to it by the authorities to which I have before referred.

I abstain from referring in detail to the convictions for bigamy in Ireland, in the cases of marriages not authorised by the Legislature, because this is the very subject of the present appeal; but I freely admit that the opinions of the learned Judges, under whose direction these convictions occurred, are entitled to the greatest consideration and respect.

Several modern cases have been referred to, in which the question as to the effect of a contract *per verba de præsenti* has been more or less considered. I will refer to them in their order.

*The first is that of *The King* v. *The Inhabitants of* [*867] *Brampton*, 10 East, 282 (10 R. R. 299), in the time of Lord ELLENBOROUGH. In that case the marriage was publicly celebrated by a person officiating as a priest, in a chapel in the town of Cape St. Nicola Mole, in St. Domingo. What Lord ELLENBOROUGH said upon this occasion does not admit of dispute. His words were these: "A contract of marriage *per verba de præsenti* would have bound the parties before the Marriage Act; and this appears to have been *per verba de præsenti*, and to have been celebrated by a priest;" and, after alluding to *Fielding's Case*, 14 St. Tr. 1327, he adds, "There is this further circum-

stance, that the ceremony was performed in a public chapel, instead of in private lodgings, as it was in *Mr. Fielding's Case.*" All this is perfectly consistent with the view I have taken of this subject. In the case of *Lautour* v. *Teesdale*, 8 Taunt. 830, 2 Marsh. 233 (17 R. R. 518), the marriage ceremony was performed by a Roman Catholic priest in the Black Town, at Madras. This case was the same in principle as the former, except that the ceremony here was performed, not in a chapel, but in a private room, as in *Fielding's Case.* Chief Justice GIBBS, a very acute lawyer, stated on that occasion, but unnecessarily, — for the ceremony was performed by a priest, — the broad principle, that a contract *per verba de præsenti* was before the Marriage Act considered as an actual marriage; but he adds, that doubts have been entertained whether it was so unless followed by cohabitation. There is no foundation for the doubts that were suggested by the CHIEF JUSTICE, and in stating the general position he did not accompany it with any of the explanations and qualifica-
[* 868] tions with * which it had been stated by Lord STOWELL and other eminent civilians.

In *Beer* v. *Ward*, which was an issue out of Chancery, the same position was stated by Lord TENTERDEN, an extremely cautious and very learned Judge, in his direction to the jury. But Lord ELDON, when the case afterwards came before him, and whose attention had been frequently directed to questions of this nature, appears from the shorthand writer's notes of the case, which I have carefully read, to have cautiously abstained from adopting this position, and, after suggesting some other points for consideration, directed a new trial to be had at the bar of the Court of King's Bench.

It may be proper to observe, with reference to this last decision, that in the case of *The King* v. *The Inhabitants of Bathwick*, 2 Bar. & Ad. 639, the Court of King's Bench seem to have considered it necessary that the marriage should have been celebrated by a clergyman, for in any other view of that case the points in controversy must have been wholly immaterial. Lord TENTERDEN was at that time Chief Justice of the King's Bench, and after consideration delivered the judgment of the Court.

In the case of *Smith* v. *Maxwell*, 1 Ry. & Moo. N. P. 80, before Lord WYNFORD, the only question was, whether in Ireland a marriage in a private house was valid. The marriage ceremony

was performed by the curate of the parish, and the learned Judge decided that such a marriage was legal, and that it need not be celebrated in the church. To the same effect was the judgment of Sir JOHN NICHOLL, in *Steadman* v. *Powell*, 1 Addams, 8.

In * Ireland, he says, marriage may be had without any [* 869] celebration *in facie ecclesiæ* or in the presence of witnesses. By celebration *in facie ecclesiæ*, he obviously meant in a church in contradistinction to a private house, where the marriage in question in that case was performed. Lyndwoode's explanations of the terms *in facie ecclesiæ* is this, "*in conspectu ecclesiæ, populi scilicet congregati in ecclesiâ.*" The main point in controversy in the case of *Steadman* v. *Powell* was whether the priest who performed the ceremony was a Roman Catholic.

The opinion of Lord ELDON, in the case of *M'Adam* v. *Walker*, 1 Dow, 148 (14 R. R. 36), was pronounced in a Scotch case, and obviously had reference to the law of that country.

If I may refer to the opinion of the several eminent lawyers, both of the Ecclesiastical and Civil Courts, who were consulted upon the subject of marriages in India performed by ministers of the Church of Scotland, it will be found that they all concurred in stating that those marriages were not to all purposes legal marriages, but that they were binding upon the parties, so that a subsequent marriage by either during the life of the other, with a third person, would be invalid. To this opinion I entirely assent.

I fully admit the learning, ability, and experience of the several distinguished Judges to whom I have thus referred: but with the explanations which I have given, I do not see sufficient ground in these opinions to lead me to change my view of this subject, agreeing as it does with what has been laid down by the most eminent civilians, and with the corresponding decisions of the Courts of common law from the earliest period of our history.

I have been led, in consequence of the range that *has been taken in these discussions, and the great and [* 870] important interests which they involve, to enter into the consideration of this subject more extensively than is perhaps necessary for the decision of the question immediately before your Lordships. The immediate point for decision is, whether the defendant George Millis is, under the circumstances stated in the special verdict, guilty of the crime of bigamy. The marriage in

Ireland, which is the first marriage, is not rendered valid by statute, one of the parties being a member of the Established Church. If, therefore, it was not celebrated by a person in holy orders, according to the meaning of those terms in the law of England, it can, I think, operate only as a contract *per verba de præsenti;* and the question will be, whether such a contract is sufficient to support the indictment. And upon this point, I confess I should feel great difficulty in dissenting from the opinion of the Queen's Judges, as expressed by the learned CHIEF JUSTICE. "If," he says (*ante*, p. 89), "a marriage *per verba de præsenti* without any ceremony is good for the first marriage, it is good also for the second; but," he adds, "it never could be supposed that the Legislature intended to visit with capital punishment (for the offence would be capital if the plea of clergy could be counter-pleaded) the man who had in each instance entered into a contract *per verba de præsenti*, and nothing more."

But independently of this consideration, it is material upon this part of the subject to advert again to the effect of such a contract. Let me suppose a contract of marriage *per verba de præsenti*, and a subsequent marriage duly solemnised by the same man with another woman. The woman dies, — the marriage be-
[*871] comes binding, and the issue legitimate. How can *a prosecution for bigamy be sustained for entering into a marriage which the law recognises, and will not suffer to be annulled? But if an indictment could not under such circumstances be maintained, neither could it, I conceive, during the life of the woman; for the guilt or innocence of the husband could never be made to depend upon the accident of her life or death.

I may further observe to your Lordships, that it seems never to have occurred to any one, in suits to annul a marriage by reason of precontract, to suggest that the party had been guilty of bigamy. There is no trace of any such intimation; and yet in every one of these cases, if a contract *per verba de præsenti* were sufficient for this purpose, that offence must have been committed.

But there is another difficulty in the way of the prosecution in this case, arising out of the change introduced into the law of Ireland by the statute 58 Geo. III., c. 81. It is thereby enacted, "That in no case whatsoever shall any suit or proceeding be had in any Ecclesiastical Court in Ireland, in order to compel a cele-

bration of any marriage *in facie ecclesiæ*, by reason of any contract of matrimony whatever, whether *per verba de præsenti* or *per verba de futuro*, which shall be entered into after the end and expiration of ten days next after the passing of this Act." This clause is copied from the 13th section of the English Marriage Act. The effect of this statute has been to change entirely the character of a contract *per verba de præsenti*, at least as to its temporal effect. It is no longer indissoluble; solemnisation cannot be enforced; it has no longer the effect of avoiding a subsequent marriage solemnised *in facie* *ecclesiæ*, but [*872] such marriage is from the time of its celebration valid and binding, and accompanied with all the civil consequences of a regular and perfect marriage. How then can such a marriage, which the law sanctions, and the obligations of which it enforces, constitute the crime of bigamy? In this offence it is the second marriage that is the criminal act; such marriage is a mere nullity; it is simply void, and so completely void that the woman may be examined as a witness against the person with whom she has gone through the ceremony of marriage. But in the case of a contract *per verba de præsenti*, followed by a subsequent marriage with another person duly solemnised, the second marriage is, on the contrary, by the law of Ireland, legal and binding.

It cannot, I think, be contended, at least with any effect, that as the Act in its terms only prevents a proceeding to enforce the performance of the marriage contract, a suit may still be instituted for annulling a subsequent marriage solemnised *in facie ecclesiæ*. It is not, I think, very reasonable to suppose that such could have been the intention of the Legislature. For what purpose could such a proceeding be had, unless with a view of enforcing the performance of the first contract, which the statute declares shall no longer be done?

Sir WILLIAM BLACKSTONE appears to have entertained the same opinion upon the construction of the English Marriage Act, which contains precisely the same provision; and from that time to the present, a period of nearly a century, no such suit has ever been instituted, or, as far as I can learn, ever contemplated.

I am of opinion, therefore, after much anxious consideration, for the reasons and upon the grounds which I have thus stated to your Lordships, but at the *same time with all [*873] due deference and respect for those who differ from me on

this subject, that the indictment against the defendant, George Millis, cannot be sustained.

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[907] It was ordered and adjudged by the Lords, that the judgment given in the said Court of Queen's Bench be, and the same is hereby affirmed. And that the record be remittted, to the end such proceedings may be had thereupon as if no such writ of error had been brought into this House." — *Lords' Journals*, 29 March, 1844.

The entry on the Minutes of Proceedings of the 29th March is more full than the entry on the Journals, and is in the following form: "*Reg.* v. *Millis* (Writ of Error). The order of the day being read for the further consideration of this case, the House proceeded to take the same into consideration. And it being moved to reverse the judgment complained of, the same was objected to, and the question was put whether the judgment complained of shall be reversed? The Lords COTTENHAM and CAMPBELL were appointed to tell the number of votes; and, upon report thereof to the House, it appeared that the votes were equal; that is, two for reversing and two for affirming. Whereupon, according to the ancient rule in the law *Semper præsumitur pro negante*, it was determined in the negative. Therefore the judgment of the Court below was affirmed, and the record remitted."

In the case of *The Queen* v. *Carroll*, the Order of the House states that, "regard being had to the judgment," in *The Queen* v. *Millis*, the judgment of the Court of Queen's Bench was affirmed.

ENGLISH NOTES.

The question as to what — apart from express statute and local usage — constitutes a marriage in the sense of the word recognised in Christian countries, is still sometimes of great practical importance. The two cases above given contain all the learning on this question contributed by the highest authorities from the English point of view; and as they constitute the ground-work of the arguments in all the more recent cases on the subject, it has been thought useful to set them out fully. Many of the more recent cases relating to this and analogous questions have been already set forth or dealt with in previous volumes. See Nos. 7 and 8 of "Conflict of Laws," and notes, 5 R. C. 783–832; Nos. 9 and 10 of "Conflict of Laws," and notes, 5 R. C. 833-847; and No. 1 of "Husband and Wife," and notes, 12 R. C. 729–738.

With regard to *Reg.* v. *Millis*, it is to be borne in mind that the actual decision, in effect giving the benefit to the defendant on a criminal charge of an equal division of opinion among the Lords advising the House, is of little importance except in a Court bound by it. The arguments upon either side must, however, be taken account of by the Courts in any country where English law may be presumed to have been carried, and where the Courts are not bound by the decision.

The decision has been regarded by the House of Lords as binding on themselves (as well as on inferior Courts). It was so expressly ruled in the case of *Beamish* v. *Beamish* (1861), 9 H. L. Cas. 274, 8 Jur. (N. S.) 770, 5 L. T. 97, where the question arose as to the legitimacy of a child born of a marriage celebrated in Ireland (before the Act of 1844 below mentioned), between a person who himself was a clergyman in holy orders and a young lady, without the presence of any other person in holy orders; and the House of Lords on the authority of *Reg.* v. *Millis* pronounced against the legitimacy. Lord CAMPBELL, who was then Lord Chancellor, took the occasion of reinforcing some of his arguments against the principle of the decision in *Reg.* v. *Millis*, and Lord WENSLEYDALE, while agreeing that the decision in *Reg.* v. *Millis* was irrevocably binding on the House, took occasion to express the difficulty he had experienced in yielding to the opinion of the majority of his colleagues which had been delivered by the Lord Chief Justice (TINDAL) in that case. The rule that the House is bound by its own judgments on a point of law as thus exemplified is again expressly laid down and followed in *London Tramways Co.* v. *London County Council* (H. L.), 1898 A. C. 375, 67 L. J. Q. B. 559.

The decision in *Reg.* v. *Millis* led to the passing of the Irish Act of 1844 (7 & 8 Vict., c. 81), which placed the marriage of Presbyterians and other bodies in Ireland not recognising a priesthood on a statutory basis. This Act, which imposed on some of the dissenting bodies restrictions which were deemed grievances, was amended by 26 Vict., c. 27; and both these Acts, along with the Act 33 & 34 Vict., c. 110, ss. 32–42, and 34 & 35 Vict., c. 49, constitute the statutory basis of the existing law of marriage in Ireland.

The statutory law relating to England is now substantially comprised in the Acts of 1823, 4 Geo. IV., c. 76 (which repealed Lord Hardwicke's Act of 1753); 1836, 6 & 7 Will. IV., c. 85; and 1856, 19 & 20 Vict., c. 119, s. 11. Other Acts relating to special points will be found enumerated in the second schedule to the Short Titles Act, 1896, under the collective title, "The Marriage Acts, 1811 to 1886."

In Scotland, since the case of *Dalrymple* v. *Dalrymple*, and the case of *McAdam* v. *Walker* (H. L. 1813), 1 Dow. 148, 14 R. R. 36, decided by the House of Lords on appeal from the Scotch Court in an

action for declaration of marriage, it has not been doubted that consent *de præsenti* constitutes a valid marriage, without the necessity of any minister of religion or ceremony. The consent must of course be deliberate and serious, and must be proved by the presence of witnesses or by the writing or oath *in litem* of the person charged with it. In order to presume the consent by *copula* following upon a promise of marriage, the promise must likewise be proved by the admission in writing or oath of the party charged. The consent, or promise, as the case may be, must be exchanged or made in Scotland; but the writing by which it is proved may be made anywhere. *Yelverton* v. *Longworth* (H. L. 1864), 4 Macq. 745, per Lord WENSLEYDALE, p. 861.

Such marriages as above mentioned are, in Scotland, accounted clandestine or irregular unless celebrated (1) after due proclamation of banns or (as an alternative introduced by Statute 41 & 42 Vict., c. 43) on production of the registrar's certificate; and (2) by a minister of religion. The latter condition, which at one time was confined to ministers of the Established Church of Scotland, was extended to ministers of all denominations by 4 & 5 Will. IV., c. 28. There are various enactments, imposing penalties upon persons contracting or assisting at irregular marriages; but it does not appear that anybody is concerned to enforce them.

As to the essentials of a Scotch marriage, there has never been any statutory alteration, except by Lord Brougham's Act (1856), 19 & 20 Vict., c. 96, which enacted that an irregular marriage contracted in Scotland should not be valid unless one of the parties had, at the date thereof, his or her usual place of residence in Scotland for 21 days next preceding the marriage.

The effects of a marriage on board a British man-of-war on the high seas, and at the British Embassy, have already been adverted to, 12 R. C. 737. On this subject Sir Howard Elphinstone, in an article entitled "Notes on the English Law of Marriage," Law Quarterly Review, vol. 5, p. 52, says: "It should perhaps be observed that a marriage at the British Embassy at Paris is not recognised as valid by the law of France if one of the parties is not a British subject. And the Royal Commissioners on the Law of Marriage are of opinion (p. xxxviii) that a marriage celebrated in the house or chapel of a foreign ambassador accredited to Her Majesty, between a British subject and a subject of a foreign power represented by the ambassador, not fulfilling the requisites of British law, could not be recognised as legally binding upon the British subject for civil purposes in this country."

The following observations of the learned writer, in the same article, as to consular marriages and other marriages in various situations, are deserving of attention: "By the effect" (he says) "of 12 & 13

Vict., c. 68, as amended by 31 & 32 Vict., c. 61, marriages between persons one of whom at least is a British subject, celebrated after certain notices by or in the presence of a consul-general or consul duly authorised in that behalf by the Secretary of State, and any person acting or legally authorised to act in the place of such consul, or, if there be no resident British consul, any vice-consul or vice-consular agent duly authorised in that behalf by the Secretary of State, are valid. It should perhaps be observed that with the possible exception of cases where the law of the country in which the consulate is situated affords no means by which the parties can go through the form of marriage, marriages of this nature would probably be considered void in all places outside the British dominions, unless perhaps both of the parties were British subjects. See the Appendix to the Report of the Royal Commission on the Laws of Marriage, pp. 191–193."

"I can find no authority on the subject of marriages on board ship (not being a man-of-war). The Merchant Shipping Act, 17 & 18 Vict., c. 104, contemplates marriages taking place on board British merchant ships, as it makes provision for their being entered on the official Log-book (s. 282), and for their being contained in the return directed to be made in certain cases to the Board of Trade (s. 273)."

"It is, I think, clear that a marriage on a British man-of-war, or on a British merchant ship, celebrated on the high seas in the presence of a priest, is valid; possibly in some cases such a marriage contracted *per verba de præsenti* without the intervention of a priest may be valid according to the doctrine of *Maclean* v. *Cristall*." (See *post*.)

In the article already mentioned, Sir Howard Elphinstone further considers the question, — How may persons contract a Christian marriage, where it is impossible for them to satisfy the forms prescribed for Christian marriage by the law of the place where the marriage takes place, or where they are in a heathen country where no forms are prescribed for a Christian marriage? The general answer to this question is that in such a case the marriage is good if it is good according to the canon law. Thus it has been held that a marriage between Protestants performed by a clergyman of the Church of England, in the Pontifical States (where no provision existed by law for such marriages), was valid. *Anon.* (said to be *Lord Cloncurry's Case*), Cruise on Dignities, 276, § 85. "Probably" (Sir H. Elphinstone observes) "a marriage *per verba de præsenti* between Protestants in the pontifical states would have been valid. See the Minutes of Evidence in the *Sussex Peerage Case*. On the same principle marriages between Jews celebrated according to Jewish rites in England have been supported. *Goldsmid* v. *Bromer*, 1 Hagg. C. R. 324; *Lindo* v. *Belisario*, 1 Hagg. C. R. 216; *D'Aguilar* v. *D'Aguilar*, 1 Hagg. E. R. 773."

It is impossible to discuss fully the questions of this kind which may arise in the British Colonies and dependencies; but it seems clear that in the circumstances of some of those colonies and dependencies there is room for the application of the canon law upon the principle above mentioned.

It is to be borne in mind that, in these places, the Courts are not, nor is the Judicial Committee of the Privy Council to whom these decisions may be appealed, *bound* by the decision of the House of Lords in *Reg.* v. *Millis;* but the Courts will of course, if possible, avoid a direct conflict with that decision. The cases of *Maclean* v. *Cristall* (1849 *coram* Sir E. PERRY), Perry Oriental Cases, p. 75; and *Conolly* v. *Woolrich* (1867), 11 Lower Canada Jurist, 197, are notable instances. In both these cases the judges, while freely criticising the decision in *Reg.* v. *Millis*, found reasons why it should not apply, from the circumstances of the community in question, under which it could not be presumed that the English settlers in taking the English common law with them should have taken with them the rule (if it existed), that marriage must be celebrated by a priest or person in holy orders. The former of these cases was that of a marriage in British India before the statute which regulated marriages in India; and the latter case was that of a marriage contracted by a Canadian in the Hudson Bay Territory with a squaw, and treated as a valid marriage by habit and repute for many years.

That English settlers in a new country carry with them only so much of English law as is applicable to their situation is the proposition of Blackstone cited by Lord BROUGHAM in delivering the judgment of the Privy Council in *Mayor of Lyons* v. *East India Co.* (1836), 1 Moore Ind. App. 175. This principle was applied by Dr. Lushington in *Catterall* v. *Catterall* (1847), 1 Rob. E. C. 580, to the condition of the early settlers in New South Wales, and by Sir E. PERRY in *Maclean* v. *Cristall*, *supra*, to the condition of the English community in India in the time of the Company. The judgment of Sir E. PERRY appears to have treated the question in India irrespective of the question whether the services of an English chaplain were or were not practically available. The point was that, having regard to the circumstances of the community in its origin, they could not have brought with them any such rule. The decision in *Maclean* v. *Cristall* was, in effect, confirmed by the proceedings in the House of Lords, in a bill for divorce subsequently brought into that House. See note, Perry's Or. Cas. p. 91. So that, according to the view of the House itself, the decision in *Reg.* v. *Millis* is not binding or applicable in regard to marriages contracted elsewhere than in England or Ireland.

AMERICAN NOTES.

These celebrated cases are cited by all the leading American text-writers on marriage. Mr. Schouler says: "The opinion of Lord Stowell in the case of *Dalrymple* v. *Dalrymple*, to which we have alluded, is an admirable exposition of the law of informal marriages. It is a masterpiece of judicial eloquence and careful research." Mr. Reeve speaks of it as "the celebrated opinion which for learning and elegance of diction has seldom been equalled, and which is a complete treatise on the subject of the common law relating to marriage." (Dom. Rel. 251.) Mr. Bishop pays great and not at all flattering attention to the *Millis* case. He sums up the matter as follows: "The doctrine that the intervention of a person in holy orders is essential to marriage has found small support in this country. It has been held to be unnecessary at the common law, by the Courts of New York, New Jersey, Pennsylvania (undecided whether or not altered by statute), Kentucky (but the law was afterwards changed by statute), Vermont substantially, Ohio, Tennessee, Alabama, New Hampshire, and Maryland possibly, South Carolina, California, Michigan, Missouri, Mississippi, Minnesota, Illinois, Rhode Island, Georgia, Indiana, and Kansas. The same is held in Louisiana, whose common law is derived from Spain, in which country the Council of Trent was received, yet it did not become binding in the Colony. The Supreme Court of the United States was once equally divided on this question, but afterward it accepted the common doctrine of the State Courts just explained. Kent, Reeve, and Greenleaf, in their text-books, consider clerical intervention to be unnecessary at the common law, and this may well be deemed the American doctrine. It is, as otherwise expressed, that the marriage by mere consent is good throughout the United States, except in some States where local statutes have provided otherwise. Nor has the author been able to find in our American books any opinion or adjudged case in harmony with *The Queen* v. *Millis;* holding that "only in the presence of a person of holy orders can a valid marriage be contracted." On the lighter side of the scale Mr. Bishop puts only Massachusetts positively, and Maine as uncertain.

In *Rose* v. *Clark*, 8 Paige (N. Y. Chan.), 579, Chancellor Walworth said: "By the ancient common law of England, it seems that a marriage was invalid unless it was celebrated *in facie ecclesiæ*. Such was the decision in the case of *Del Heith*, decided in the beginning of the fourteenth century (Easter Term, 34 Edw. I.), the report of which case Sir Harris Nicholas has extracted from the Harleian Manuscript, No. 2, 117, fol. 339. See Nicholas, Adult. Bast. 31, 567. And the decision in *Foxcroft's Case*, twenty-four years previous to that time (Easter Term, 10 Edw. I., 1 Rolle, Abr. 359), undoubtedly was placed upon the same ground; and not upon any question of doubt as to the supposed husband's being the real father of the child, as Lord Chief Justice Ellenborough and Lord Chancellor Eldon appear to have understood the decision in that case. See *King* v. *Luff*, 8 East, 299; Le Marchant's preface to the *Gardner Peerage Case*, 5 P.; Nicholas, Adult. Bast. 560. The law on this subject, however, was unquestionably changed (p. 580) at the Reformation, if not before. For it is now a settled rule of the common law, which

was brought into this State by its first English settlers, and which was probably the same among the ancient Protestant Dutch inhabitants, that any mutual agreement between the parties to be husband and wife *in præsenti*, especially where it is followed by cohabitation, constitutes a valid and binding marriage, if there is no legal disability on the part of either to contract matrimony. 2 Kent Com. 87."

In an article in 4 Green Bag, 308, the present writer observed on this subject: "The most extensive and learned treatment of this topic by a text-writer is to be found in Reeve on Domestic Relations (4th ed. p. 253). He says: 'There can be no doubt that the express words of the statute of Geo. II. have rendered those marriages not celebrated as that statute directs, void. But I apprehend that by the provisions of the common law, marriage, although celebrated by a person not qualified by law, or in a manner forbidden by law, are valid. The conduct of the parties concerned has rendered them obnoxious to the penalties of the law; but such singular conduct is not a ground for impeaching the validity of the marriage. Until the civil wars during the reign of Car. I., nothing can be found on this subject. For until that period it had not been supposed that any person but one in holy orders could celebrate a marriage. . . . During the commonwealth the power of celebrating marriages was given to justices of the peace. And they were the only officers whom the law recognizes as possessing power to marry. Yet during the existence of this law it was determined that a marriage celebrated by one not in holy orders, though not a justice of the peace, was valid. After the Restoration, the power of celebrating marriages was committed exclusively to the clergy of the Church of England. And yet we find the Court of the King's Bench issuing a prohibition to the spiritual Court, because the validity of a marriage had in the face of a separate congregation was questioned in said Court. So, too, we find that a marriage celebrated by a preacher in a separate congregation, who was a layman, was recognized as valid; . . . we find also that a marriage by a popish priest was held valid; and that in the strongest possible case the case was that a man had been married by a popish priest, who by law had no authority so marry. This person, so married, during the life of his wife married again. The matter was brought before the ecclesiastical Court, and the second marriage was annulled upon the principle that the first marriage was valid. After the marriage was annulled, he was informed against before a common-law Court of criminal jurisdiction, for bigamy and convicted. This seems to me irrefragable proof that the common law did not consider marriage celebrated irregularly as void.' So Bishop says (1 Mar. & Div. § 277 a): 'There were in former times numerous canons and the like, making it an offence against the church to marry without the presence of the priest; but these were never construed to render the marriage in violation of them void.' But still the question recurs, were they not voidable in proceedings to avoid them?

"In this country generally the mock marriage would bind both parties, for here generally the intervention of a clergyman is not necessary. The doctrine of *Queen* v. *Millis* never obtained here. Bishop says of *Queen* v. *Millis* (1 Mar. & Div. § 281): 'Repudiated, except as bare authority, at home;

decided in haste by Judges who had no knowledge of the very peculiar branch of jurisprudence to which it belonged; determined in the way it was, instead of the reverse, by an accident, — it never was entitled to any particular respect abroad, and it has received none.'

"It was well settled in this country, that if the minister were such *de facto*, and the parties acted in good faith, the marriage would be valid, although he was not a minister *de jure*, and Bishop thinks, even if he were an usurper. A few cases illustrate this.

"In *Pearson* v. *Howey*, 6 Halsted (N. J. L.), 12, it was held that a justice of the peace might celebrate a marriage out of his county. This is put on the ground that no ceremony at all is necessary, but the Courts say: 'But suppose this act had gone to the whole extent of declaring that no other person or persons should solemnize marriage except those mentioned in it, such other persons would commit an offence against the act by solemnizing marriages, for which they might be punished, but still the marriage contract between the parties themselves would remain valid. During the Commonwealth of England, Parliament passed a law requiring all marriages to be solemnized by justices of the peace; yet a marriage solemnized before a clergyman was holden by all their Courts to be valid, although the clergyman was punishable. . . . Our act empowers an *ordained* minister of the gospel to solemnize marriages; but suppose a minister of the gospel to do it before he is ordained, can any person believe that the marriage itself would be invalid?' &c.

"In *Taylor* v. *State*, 52 Mississippi, 84, it was held that the marriage was not invalid because the minister had not been regularly ordained.

"In *State* v. *Bray*, 13 Iredell Law (Nor. Car.), 289, it was held that 'it was not necessary to the validity of the marriage that the minister should have been a minister in charge of a church, or the rector of a parish, or pastor of a particular flock. But it is necessary that he should have appeared to be a minister capable of entering upon the duties of such a charge, according to the ecclesiastical economy of his church, with the faculty of celebrating the rites of matrimony.' This was under a statute requiring the celebrant to have 'the cure of souls.'

"In *Hayes* v. *People*, 25 New York, 390, it was held that on a prosecution for bigamy the defendant is not absolved by the fact that the second marriage was celebrated by one falsely personating a clergyman. But this was put on the ground that the intervention of a clergyman or magistrate is not necessary under the law of New York. The following expressions of ALLEN, J., however, have some bearing on the question under examination here: 'Most certainly the prisoner should not be permitted to evade punishment by showing that he deceived his victim, not only as to his capacity to contract, but also as to the character of the individual called in to attest the contract; that he induced the female to believe that their union had the sanction of the Church as well as the binding force of an enduring civil contract.'

"Still although the defendant may be punishable for his deceit, the question recurs whether the marriage itself would have been valid at common law; whether, although estopped on the criminal side, he is also estopped on the civil side.

"It would seem however that there is a practical opening to justice in the matter out of presumptions. It is very well settled that such an irregular marriage is presumptively valid; the celebrant is deemed *prima facie* duly authorized. (*Patterson* v. *Gaines*, 6 Howard, 550.) The deceived wife may therefore safely rest upon the presumption, for no Court will allow the husband to rebut the presumption by bare proof of his fraud. Thus one technicality is offset by another to attain justice, and that is the best use to which technicalities can ever be put."

Some Courts and text-writers have doubted the policy of common-law marriage, while acknowledging its validity. Thus in *Dunbarton* v. *Franklin*, 19 New Hampshire, 264, the Court observed: "It is singular that the most important of all human contracts, on which the rights and duties of the community depend, requires less formality for its validity than a conveyance of an acre of land, a policy of insurance, or the agreement which the Statute of Frauds requires should be in writing." (But insurance may be effected without a policy.) In *Van Tuyl* v. *Van Tuyl*, 57 Barbour (N. Y. Sup. Ct.), 235, the Court said: "I wish it was in my power to aid the plaintiff's counsel in their efforts to take away from our law respecting the marriage contract the reproach imputed to it." Surrogate Bradford (*Jaques* v. *Public Admr.*, 1 Bradford [N. Y. Surrogate], 508) declared it might well be the subject of anxiety that a contract of such infinite importance to social order and the rights of property had been left, in regard to the evidence of its existence, in so loose and uncertain a condition. Mr. Bullock, a late commentator, says: "In human society as it now is, and particularly in crowded communities, it is both immoral and impossible to mate as the birds mate." And no argument is farther from the truth than that which assumes that common-law marriage serves to prevent the illegitimacy of children or the dishonor or unhappiness of women. The law reports of the State of New York do not present one case of common-law marriage which does not cast its reflection of shame upon some woman." "For the sake of public manners and morals, and to avoid scandal, it is better that such contracts should be attested by some officers of religion or by a civil magistrate, but if parties will not respect the wholesome usages of society in this regard, they should at least save their issue from the reproach of bastardy by making a contract of marriage that shall be susceptible of proof." *Com.* v. *Stump*, 53 Penn. State, 136. In spite of such unfavorable opinions the doctrine has not relaxed its hold in this country. Recent congresses of State Commissions for Promotion of Uniformity of Legislation have recommended a stricter mode of celebration of marriages, but without avail. In a revision of the New York Statutes in 1896, the Domestic Relations Act still recognizes the validity of common-law marriage, although provision is made for ceremonial marriage and registry.

Very little argument is to be found in our books in support of the policy of common-law marriages, but when the present writer was a quarter of a century younger, he wrote in favor of the policy of common-law marriage as follows (9 Albany Law Journal, 402): "We may now briefly give a few imperative reasons why formalities or ceremonies should not be essential to the formality of a marriage. First, many marriages intended to be lawful

would prove mere illicit connections from want of compliance with the requisite ceremonies. If publication of the intention at three public meetings were requisite, and publication at only two were shown, or it should turn out that one of the occasions did not satisfy the definition of a public meeting, or if the priest were not ordained, or the justice were acting out of his jurisdiction, or any one of a hundred other things were true, the marriage is void, and the children are bastards. We submit, if there is to be any mistake, it is better that illicit connections should be construed to be marriages, than that honest and innocent associations, intended as marriages, should be construed to be mere concubinage. Second, such formalities may easily be evaded. In Connecticut, for instance, where publication at a certain number of public meetings is required, the writer has frequently heard an auctioneer at an auction announce such an intention. Third, such formalities are frequently very difficult of proof after a lapse of a few years. Fourth, such formalities are very easily forged or pretended. Many an innocent woman has been made the victim of a mock marriage. The fact has proved the basis of many a romance. We lack space to speak further of this matter at present, except to say that we hope our Legislature will never enact, that to constitute a valid contract of marriage, there must be the sanction of a priest, or the warrant of a magistrate, or a permission from the State, or the consent of parents, or a previous announcement to the public in any way of the intention to enter into such a contract."

In *Park* v. *Barron*, 20 Georgia, 702; 65 Am. Dec. 641, the Court said: "For obvious reasons connected with the welfare of society, the law is more tender of nuptial contracts than ordinary contracts which relate merely to property and the ordinary dealings among men." But the Court did not set forth the "obvious reasons." In *Dumaresby* v. *Fishly*, 3 A. K. Marshall (Kentucky), 368, the Court said of the necessity of following formality: "A doctrine which would thus tend to vitiate a great proportion of the marriages of the country would result in incalculable evils, and cannot be admitted to be correct."

Although "in most if not all of the United States there are statutes regulating the celebration of marriage, and inflicting penalties on all who disobey the regulations, yet it is generally considered that in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be absolutely void, or that none but certain magistrates or ministers shall celebrate a marriage, any marriage regularly made according to the common law, without observing the statutory regulations, would still be a valid marriage:" Greenleaf Evidence, 531; *Hynes* v. *McDermott*, 82 N. Y. 41; 37 Am. Rep. 538; *Badger* v. *Badger*, 88 N. Y. 446; 42 Am. Rep. 263. *Contra: Com.* v. *Munson*, 127 Mass. 459; 34 Am. Rep. 411. See also 16 Albany Law Jour. 217.

The different views of New York and Massachusetts as to the essentials of a contract of marriage are illustrated in two cases in which the facts strain the different theories to their utmost. In a New York case, in the Court of Appeals (*Hynes* v. *McDermott*, 82 N. Y. 41), the administration and succession of the estate of a New York merchant of some wealth was disputed on the

strength of an oral contract of marriage entered into before witnesses by the deceased, first in London, next in a ship crossing the channel, and third in Paris. Neither by French law nor by English does such a contract constitute marriage. Whether it does on board a vessel on the high seas is a delicate question into whose solution many elements would enter. One of the most important would be the nationality of the vessel, and this was not in evidence before the Court, nor does it appear that the marriage law in France was proved, — a singular, not to say unaccountable, oversight. The Court therefore declining to take cognizance of a foreign law unless it was proved as an issue of fact, rendered its decision on the presumption that the marriage contract on board the vessel and in France was made under law like that of New York, and declared the marriage valid and the issue legitimate. In the Massachusetts case (*Commonwealth* v. *Munson*, 127 Mass. 459; 34 Am. Rep. 411), the defendant, at a public religious meeting called by him, at a chapel in Worcester, Mass., at which about fifty were present, but at which no magistrate nor clergyman was present, gave out a text, talked a while about "repentance," read Matthew xx. 1–5; then a woman came forward and read from the sixth to the tenth verse of the same chapter; they then joined hands, and the defendant said: "In the presence of God and of these witnesses, I now take this woman whom I hold by the right hand to be my lawful wedded wife, to love, to cherish, till the coming of our Lord Jesus Christ, or till death do us part;" the woman then said: "And I now take this man to be my lawfully wedded husband, to love, reverence, and obey him until the Lord himself shall descend from Heaven with a shout and the voice of the archangel and with the trump of God, or till death shall us sever;" and the parties then bowed, and the defendant offered prayer; neither party was a Friend nor Quaker, and the ceremony was not conformable to the usage of any religious sect; the rite was performed in good faith, and followed by cohabitation. *Held*, no marriage. The learned Chief Justice, GRAY, at the close of an elaborate opinion, said: "Whether it is wise and expedient so to change the law of Massachusetts as to allow an act which so deeply affects the relations and the rights of the contracting parties and their offspring to become binding in law by the mere private contract of the parties, without going before any one, as a magistrate or minister, is a matter for legislation, and not for judicial consideration." The statutes of the two States do not essentially differ. Both provide for ceremonial marriage, but neither enacts that the absence of such ceremony shall render the marriage void. In 1887 the Legislature of New York added a proviso that marriage should not be deemed invalid because not celebrated according to the statute. Judge Holmes, in a note to Kent's Commentaries, says: "The regulations amount therefore only to legislative *recommendation and advice*. They are not *laws*, because they do not require *obedience!*" (Evidently ironical.)

In Vermont the same doctrine is held as in Massachusetts under a similar statute. *Morrill* v. *Palmer*, 68 Vermont, 1; 33 Lawyers' Rep. Annotated, 411. (The case further holds that a woman deceived into a marriage with a man already married has a cause of action for the deceit.)

In *Denison* v. *Denison*, 35 Maryland, 370, is an extremely learned discus-

sion of the subject, citing *Reg.* v. *Millis*, coming to the same conclusion as the Vermont and Massachusetts Courts, under a similar statute, and observing: "To constitute lawful marriage here there must be superadded to the civil contract some religious ceremony." "These loose and irregular contracts, as a general thing, derive no support from morals or religion, but are most generally founded in a wanton and licentious cohabitation. Hence the law of the State has given them no sanction." Probably this is a survival of the notions of the Roman church introduced by the Catholic founders of that colony and State.

State v. *Walker*, 36 Kans. 297; s. c. 59 Am. Rep. 556, is an interesting case, where the Court refused to sanction a "free-love" marriage. So in *Peck* v. *Peck*, 155 Mass. 479, where the agreement was for marriage "so long as mutual affection shall exist."

To the same effect is *Beverlin* v. *Beverlin*, 29 West Virginia, 732 (citing the *Millis* case); *State* v. *Hodgskins*, 19 Maine, 155; *In re McLaughlin's Estate*, 4 Washington, 570; 16 Lawyers' Rep. Annotated, 699 (license required by the statute). In *Dunbarton* v. *Franklin*, 19 New Hampshire, 257, it was held that cohabitation, acknowledgment, and reputation do not in themselves constitute a marriage, but are evidence from which a jury may find a marriage.

In *Clancy* v. *Clancy*, 66 Michigan, 202, it was held that an agreement "to live together henceforth and forever as man and wife" is not a contract of marriage. One judge dissented, holding that "man" is there equivalent to husband, saying: "I find the common acceptation of the term 'man and wife' in every-day life, and even in our best literature, to be the same as 'husband and wife.' And its use is by all odds the most common. Webster gives as one of his definitions of 'man,' 'a married man, a husband,' quoting a line from Addison, 'Every wife ought to answer for her man.'" It is singular that none of the judges recalled the marriage ceremony, as set down in the Book of Common Prayer, in which the priest pronounces the pair "man and wife."

It is held on all hands that no marriage can be presumed from intercourse illicit or irregular in its commencement. *Williams* v. *Williams*, 46 Wisconsin, 464; 32 Am. Rep. 722; *Collins* v. *Voorhees*, 47 New Jersey Equity, 555; 14 Lawyers' Rep. Annotated, 364; *Appeal of Reading, &c. Co.*, 113 Penn. State, 204; 57 Am. Rep. 448; 31 Albany Law Journal, 106, 127, citing *Barnum* v. Barnum, 42 Maryland, 251; *Port* v. *Port*, 70 Illinois, 484; *State* v. *Worthingham*, 23 Minnesota, 528; *Floyd* v. *Calvert*, 53 Mississippi, 37; so in a case where there was cohabitation, but the marriage ceremony was to have been performed at a future date, and was prevented by the man's death, it was held no marriage: *Grimm's Estate*, 131 Penn. State, 199. But the presumption of the continuance of that character may be rebutted. *Caujolle* v. *Ferrié*, 23 New York, 91; 6 Lawyers' Rep. Annotated, 717.

Common-law marriages were sanctioned in the following cases, many of which were under statutes like that of New York: *Londonderry* v. *Chester*, 2 New Hampshire, 268; 9 Am. Dec. 61 (pronounced *obiter* in *Dunbarton* v. *Franklin*, 19 New Hampshire, 256); *Hutchins* v. *Kimmell*, 31 Michigan, 126; 18 Am. Rep. 164 (where the Court said: "This has become the settled doc-

trine of the American Courts, the few cases of dissent or apparent dissent being borne down by a great weight of authority in favor of the rule as we have stated"); *Pearson* v. *Howey*, 6 Halsted (New Jersey), 12; *Commonwealth* v. *Stump*, 53 Penn. State, 132; 91 Am. Dec. 198; *Duncan* v. *Duncan*, 10 Ohio State, 181; *State* v. *Patterson*, 2 Iredell Law (Nor. Car.), 346; 38 Am. Dec. 699; *Keyes* v. *Keyes*, 22 New Hampshire, 553; *Park* v. *Barron*, 20 Georgia, 702; 65 Am. Dec. 641; *Bashaw* v. *State*, 1 Yerger (Tennessee), 177; *Potier* v. *Barclay*, 15 Alabama, 439; *Dumaresby* v. *Fishly*, 3 A. K. Marshall (Kentucky), 368; *Graham* v. *Bennett*, 2 California, 503; *Patton* v. *Philadelphia*, 1 Louisiana Annual, 98; *Hallett* v. *Collins*, 10 Howard (U. S. Sup. Ct.) 174; *Dyer* v. *Brannock*, 66 Missouri, 391; 27 Am. Rep. 359 (disapproving *Reg.* v. *Millis*); *Cartwright* v. *McGown*, 121 Illinois, 388; 2 Am. St. Rep. 105; *Farley* v. *Farley*, 94 Alabama, 501; 33 Am. St. Rep. 141 (even holding compliance with the requirement for a license dispensed with by consent and cohabitation); *Voorhees* v. *Voorhees*, 46 New Jersey Equity, 411; 19 Am. St. Rep. 404; *Simon* v. *State*, 31 Texas Criminal, 186; 37 Am. St. Rep. 802; *Port* v. *Port*, 70 Illinois, 484 (citing the *Millis* case); *Hiler* v. *People*, 156 Illinois, 511; 47 Am. St. Rep. 221; *McCreery* v. *Davis*, 44 South Carolina, 195; 51 Am. St. Rep. 794; *State* v. *Bittick*, 103 Missouri, 183; 11 Lawyers' Rep. Annotated, 587. In *Hallett* v. *Collins*, *supra*, the Court, citing *Reg.* v. *Millis*, said: "Whether such a marriage was sufficient by the common law in England, previous to the Marriage Act, has been disputed of late years in that country, though never doubted here." The Court also cite the *Dalrymple* case, observing: "where all the learning on this subject is collected." Kent cites the *Millis* case, saying: "the question was most elaborately and learnedly discussed," but is of opinion that common-law marriage is generally valid here, and so even if the statute recognizes ceremonial marriage. Schouler (Husband and Wife, sects. 34, 35), cites the *Millis* case, but says: "Marriage being a matter of common right, it is lately held by the highest tribunal for harmonizing the rule of States (*Meister* v. *Moore*, 96 United States, 76) that unless the local statute which prescribes regulations for the formal marriage ceremony positively directs that marriages not complying with its provisions shall be deemed void, the informal marriage by words of present promise must be pronounced valid, notwithstanding statutory directions have been disregarded," and that Court approved the decision in *Hutchins* v. *Kimmell*, 31 Michigan, 126. The Court pronounce these statutory provisions merely directory, and also call attention to a decision of the Massachusetts Court, in *Parton* v. *Henry*, 1 Gray, 119, where a girl thirteen years old married without parental consent, the statute prohibiting the celebration of marriages of females under eighteen without such consent, and yet the marriage was held valid; and early in Massachusetts the doctrine that the statutory provisions in question were merely directory was held (*Milford* v. *Worcester*, 7 Mass. 48).

In *Dumaresby* v. *Fishly*, *supra*, one judge dissented in a learned opinion, observing: "These ecclesiastical Courts had matrimonial suits in the form of libels, with process similar to our chancery Courts, in which they decided that *verba de præsenti* and *verba de futuro* constituted a valid marriage, and decreed the specific execution of such contracts, and compelled the solemnization of

the marriage *in facie ecclesiæ*, where words of either kind were used. The power of this Court was strong indeed. Disobedience to its determination resulted in the writ *de excommunicato capiendo*, by which the offender was immediately imprisoned until he submitted to the church. See Confectio Eccl. Courts; Boyd's Jud. Proceedings; 3 Black. 101. It is then no wonder, under such a government as that, that rules and principles from the *canon* should incorporate themselves into the *common law:* that thoughtless expressions, such as 'I marry you,' or 'take you to be my wife,' spoken in a moment of unguarded feeling, should be deemed irrevocable, and seized upon by the craving and voracious disposition of a corrupt hierarchy as constituting a valid marriage, or rather, what they would reduce by their sentence and jurisdiction to a valid marriage. Hence Blackstone, vol. i. 439, after laying down the rule that such expressions were formerly 'deemed a valid marriage to many purposes,' adds, 'and the parties might be compelled in the spiritual Courts to celebrate it *in facie ecclesiæ*.' And it is said, in Salk. 437, 438, that such is the rule of the *canon law*. This case in Salk. by mistake has been quoted as declaring it a rule of the *common law*, by subsequent authorities. Assuming then the fact that such a rule was incorporated into the *common* from the *canon* law, it was one of the effects produced by corrupt religious establishments of the same character with the principle that a marriage by the priest could never be dissolved by human authority. When we adopted the common law of England, it was only so far as suited our local situation, and was compatible with the genius and spirit of our government. I would then select from it the most sound and liberal principles, and cast away not only all the maxims of ecclesiastical establishments, but doubt, and also reject, such parts as were tainted by canonical mixtures. In a word, I would say that the common law on this point was corrupted by too long subjection to spiritual usurpation, and that we did not adopt it into our code, and that it is not in this respect obligatory on the Court. I would take this case as one *primæ impressionis* in this country, and subject it to the rules of all other contracts."

In *Hulett* v. *Carey*, 66 Minnesota, 327; 34 Lawyers' Rep. Annotated, 384, the general doctrine is laid down, as to the effect of the agreement for marriage, and it is further held that cohabitation under the agreement is not essential. The Court say on this point: "The maxim of the civil law was *Consensus, non concubitus, facit matrimonium*. The whole law on the subject is that to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage, 1 Bishop on Marriage, Divorce, & Separation, §§ 239, 313, 315, 317. See also the leading case of *Dalrymple* v. *Dalrymple*, 2 Hagg. Consist. Rep. 54, which is the foundation of much of the law on the subject. An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place. *Dalrymple* v. *Dalrymple, supra*. The only two cases which we have found in which anything to the contrary was actually

decided are *Reg.* v. *Millis*, 10 Clark & F. 534, and *Jewell* v. *Jewell*, 42 U. S., 1 Howard, 219, the Court in each case being equally divided. But these cases have never been recognized as the law, either in England or in this country. Counsel for appellants contend however that the law is otherwise in this State, citing *State* v. *Worthingham*, 23 Minnesota, 528, in which this Court used the following language: Consent, freely given, is the essence of the contract. A mutual agreement therefore between competent parties, *per verba de præsenti*, to take each other for husband and wife, deliberately made, and acted upon by living together professedly in that relation, is held by the great weight of American authority sufficient to constitute a valid marriage with all its legal incidents; citing *Hutchins* v. *Kimmell*, 31 Michigan, 126; 18 Am. Rep. 164. Similar expressions have been sometimes used by other Courts, but upon examination it will be found that in none of them was it ever decided, that although the parties mutually agree *per verba de præsenti* to take each other for husband and wife, it was necessary, in order to constitute a valid marriage, that this agreement should have been subsequently acted upon by their living together professedly as husband and wife. In some cases where such expressions were used the Court was merely stating a proved or admitted fact in that particular case, while in others the contract of marriage was sought to be proved by habit and repute, and the Courts merely meant that the act of parties in holding themselves out as husband and wife is evidence of a marriage." Kent says: "The only doubt entertained by the common law was whether cohabitation was also necessary to give validity to the contract." (Com. p. 87.) "The copula is no part of the marriage," says Schouler (Husband & Wife, s. 81), citing *Jackson* v. *Winne*, 7 Wardell (N. Y.), 47; 22 Am. Dec. 563; *Dumaresly* v. *Fishly*, 3 A. K. Marshall (Kentucky), 372; *Port* v. *Port*, 70 Illinois, 484. In *Dumaresly* v. *Fishly*, *supra*, the Court said that the contention that consummation is necessary to a marriage by present agreement "is absolutely untenable."

But where a marriage ceremony was performed, under a mistake of one party as to its legal effect, and it was not and was not intended to be followed by cohabitation, without a future public ceremony, it was held no marriage: *Clark* v. *Field*, 13 Vermont, 460.

It has even been held that license is not essential, although required by statute, in the absence of a provision declaring void a marriage without license. *Holmes* v. *Holmes*, 6 Louisiana, 463; 26 Am. Dec. 482; *State* v. *Bitick*, 103 Missouri, 183; 11 Lawyers' Rep. Annotated, 587; *State* v. *Parker*, 106 North Carolina, 711; *Haggin* v. *Haggin*, 35 Nebraska, 375; *Connors* v. *Connors* (Wyoming), 40 Pacific Reporter, 966; *Ingersoll* v. *McWillie*, 9 Texas Civil Appeals, 543; 87 Texas, 647. *Contra: Re McLaughlin's Estate*, 4 Washington, 570; 16 Lawyers' Rep. Annotated, 699.

Bishop, Kent, and Schouler lay down the rule that in the absence of statutory regulation, consent *per verba de præsenti* with or without consummation, or *per verba de futuro* with consummation, constitutes a valid marriage. But it has been directly held in several States that mere *verba de futuro*, although followed by consummation, do not constitute a valid marriage. "There is no judicial authority with us in favor of inferring a marriage from an executory

agreement followed by intercourse, except the *dictum* in *Starr* v. *Peck* (1 Hill, 274)": *Cheney* v. *Arnold*, 15 New York, 345, referring to Sir William Scott's "masterly judgment" in the *Dalrymple* case; see also *Peck* v. *Peck*, 12 Rhode Island, 485; 34 Am. Rep. 702 (citing the *Millis* case); *Hebblethwaite* v. *Hepworth*, 98 Illinois, 126, *Duncan* v. *Duncan*, 10 Ohio State, 181 (citing the *Millis* case), and observing: "Finding ourselves, then, compelled by no preponderating force of authority to the adoption of a doctrine so loose as that which would be necessary to sustain the marriage claimed to exist in this case, we are unwilling to do so. It seems to us that grave considerations of public policy forbid it; that it would be alien to the customs and ideas of our people, and would shock their sense of propriety and decency. That it would tend to weaken the public estimate of the sanctity of the marriage relation; to obscure the certainty of the rights of inheritance; would be opening a door to false pretences of marriage, and to the imposition upon estates of supposititious heirs; and would place honest God-ordained matrimony and mere meretricious cohabitations too nearly on a level with each other." The like was held in *Fryer* v. *Fryer*, Richardson Equity Cases (So. Car.), 85, where the parties looked forward to a future celebration, not regarding the *copula* as consummation. There the Court said: "Does the *copula, ipso facto*, perfect the previous agreement so as to constitute marriage? This in my opinion depends entirely upon the intention and apprehension of the parties. If an agreement be made, by words *in futuro*, that the parties will marry, and that the act of their coming together shall *per se* signify that they have thereby concluded their contract, there the *copula* is a performance of the contract, and by perfecting reduces it from an executory into an executed agreement. So where there was no express stipulation that the *copula* should perfect the previous executory agreement, yet if it be evident that the parties understood and intended that act to perfect it, I suppose it must have that effect. But it is of the essence of every contract that the parties shall have a present contracting intention, at the time of perfecting their contract; they must understand that they are making a contract, otherwise no contract is made." "The proposition contended for, that *copula* following promises to marry is marriage, without regard to the present intention of the parties, seems to me unfounded in principle. If it were true, there could be no such thing as an action for seduction." Where parties "stipulate that the marriage shall, instead of preceding or accompanying the act, follow it, it would never do to pronounce that *copula* anything else than unlawful." So where there was cohabitation on the agreement as soon as a license could be obtained (*Robertson* v. *State*, 42 Alabama, 509); or when a ceremony could be performed (*Estate of Beverson*, 47 California, 621; *Van Tuyl* v. *Van Tuyl*, 57 Barbour [N. Y. Sup. Ct.]), 235; it was held not to constitute a marriage. In short, I do not find any American decision, directly in point, to uphold the doctrine of English cases and the opinions of Bishop, Kent, and Schouler in respect to the validity of marriage *per verba de futuro* accompanied by consummation. None are cited in the Am. & Eng. Enc. of Law, nor in Mr. Freeman's learned note, 69 Am. Dec. 615, although he says the doctrine is "well settled by the great weight of American authority."

In prosecutions for bigamy, the question whether proof of a ceremonial first marriage is essential is differently held. The weight of authority is that proof of a common-law marriage is sufficient. *Com.* v. *Jackson*, 11 Bush (Kentucky), 679; 21 Am. Rep. 225; *Williams* v. *State*, 54 Alabama, 131; 25 Am. Rep. 665; *Halbrook* v. *State*, 34 Arkansas, 511; 36 Am. Rep. 17; *State* v. *Hughes*, 35 Kansas, 626; 57 Am. Rep. 195; *Dumas* v. *State*, 14 Tex. Cr. App. 464; 46 Am. Rep. 241; *Mills* v. *United States*, 304; *State* v. *Wylde*, — North Carolina, —; *State* v. *Libby*, 44 Maine, 469; *State* v. *Britton*, 4 McCord (So. Car.), 256; *Warner* v. *Commonwealth*, 2 Virginia Cases, 95; *State* v. *McDonald*, 25 Missouri, 176; *Wolverton* v. *State*, 16 Ohio, 173; *Squire* v. *State*, 46 Indiana, 459; *Arnold* v. *State*, 53 Georgia, 574; *Hayes* v. *People*, 25 New York, 390; 82 Am. Dec. 364. *Contra: Com.* v. *Littlejohn*, 15 Massachusetts, 163; *Roswell's Case*, 6 Connecticut, 446; *People* v. *Humphrey*, 7 Johnson (N. Y.), 314; *Green* v. *State*, 21 Florida, 403; 58 Am. Rep. 670; *Hiler* v. *People*, 156 Illinois, 511; 47 Am. St. Rep. 221; *Bashaw* v. *State*, 1 Yerger (Tennessee), 177; *Sneed* v. *Ewing*, 5 J. J. Marshall (Kentucky), 460; 22 Am. Dec. 41.

Where a marriage is celebrated formally, every presumption is in favor of its validity and of the authority of the person celebrating to act as priest or magistrate. *Megginson* v. *Megginson*, 21 Oregon, 387; 14 Lawyers' Rep. Annotated, 540, and notes. Evidence of reputation is not admissible to impeach a formal and ceremonial marriage. *Northrup* v. *Knowles*, 52 Connecticut, 522; 52 Am. Rep. 613, and evidence of marital cohabitation may not be overcome by contrary declarations of one of the parties. *Teter* v. *Teter*, 101 Indiana, 129; 51 Am. Rep. 742.

Mere cohabitation or reputation does not constitute marriage, but is evidence from which a marriage may be found by a jury: *Grimm's Estate*, 131 Penn. State, 199; 6 Lawyers' Rep. Annotated, 717; *Dunbarton* v. *Franklin*, 19 New Hampshire, 257; *Gall* v. *Gall*, 114 New York, 109.

MASTER AND SERVANT.

SECTION I. — *Contract for Service.*

No. 1. — BRACEGIRDLE *v.* HEALD.

(K. B. 1818.)

RULE.

A CONTRACT for a year's service, entered into at a date anterior to that fixed for the commencement of the service, is a contract not to be performed within a year, and no action can be brought for the breach thereof unless the contract, or some memorandum or note thereof in writing, is signed by the defendant or by his agent.

Bracegirdle v. Heald.

1 Barn. & Ald. 722-727 (19 R. R. 442).

Contract for Service. — Statute of Frauds. — Not to be performed within a Year.

A contract for a year's service, to commence at a subsequent day, [722] being a contract not to be performed within the year, is within the fourth section of the Statute of Frauds, and must be in writing; and therefore no action can be maintained for the breach of a verbal contract made on the 27th May for a year's service to commence on the 30th of June following.

The declaration stated, that in consideration that the plaintiff, at request of the defendant, on the 27th May, had made an agreement to enter into defendant's service as groom and gardener, and to come into his service on the 30th June then next, to serve

defendant for twelve months upon the terms therein mentioned, defendant promised to receive and take plaintiff, and to [*723] retain and employ him in such service for * the time and upon the terms aforesaid. Breach, that although plaintiff was willing to enter into the service on the 30th June, and requested the defendant to receive him, yet that the defendant refused to receive plaintiff into his service. To plaintiff's damage of £20. Plea, non-assumpsit. At the trial at the last assizes for the county of Chester, a verbal contract similar to that stated in the declaration was proved to have been made on the 27th day of May between the parties, by which the defendant agreed to take the plaintiff into his service for a year to commence on the 30th June following. It was further proved that the plaintiff on that day tendered himself as servant to the defendant, but that the latter had refused to receive him. It was objected, that as the plaintiff was not to enter into the service until the 30th June, and as the service was to continue for one year from that day, the contract could not be performed within a year from the time when it was made (27th May), and that therefore by the 4th section of the Statute of Frauds, the contract not being in writing, no action could be maintained upon it. The case of *Boydell* v. *Drummond*, 11 East, 142 (10 R. R. 450), was relied on, and the learned Judges upon that authority thought the case within the statute, and nonsuited the plaintiff. A rule nisi for setting aside this nonsuit having been obtained in Easter term,

Cross and D. F. Jones now showed cause. — This action is founded upon a contract made on the 27th May for a service to commence from the 30th June, and to continue for twelve months then [*724] next following. The * contract, therefore, would not be completed until the 30th day of June in the following year, which is more than one year from the making of it, and therefore this case falls expressly within the words of the Statute of Frauds. It is said indeed that there may be a partial performance of this contract within the year by the entering into the service; but the case of *Boydell* v. *Drummond*. 11 East, 142 (10 R. R. 450), is an express authority to show that a complete performance within the year is what is requisite, and that such a case as the present is within the fourth section of the Act. And this case is clearly distinguishable from that of *Fenton* v. *Emblers*, 3 Burr. 1278; 1 Blackst. 353; for there the contract might, on a particular event happening, have

been concluded within a year. But here, from the very terms of the contract, it appears that it must last for more than twelve months.

J. Williams and G. R. Cross, *contra*. — It is strange that, though there must have been a great number of cases of this sort occurring since 29 Car. II. was passed, this objection should never have been made before. And that is a strong argument against its validity. If indeed the contract had been to enter into the service after more than a year from the making of it, it would clearly have been within the words and meaning of the 4th section of the Act. But here the commencement of the service is within a month, and the refusal, which is the gist of the present action, takes place then. It is clearly not necessary in all cases where some one term specified in a contract happens to exceed a year, that the whole contract should be in writing. For if a man * bargains [*725] for goods to be delivered within the year, and that the payment shall not be made till after more than a year from the bargain has elapsed, it is not necessary in such a case that the contract should be in writing. For, as Lord ELLENBOROUGH says, in *Boydell* v. *Drummond*, "in that case the delivery of the goods, which is supposed to be made within the year, would be a complete execution of the contract on the one part, and the question of consideration only would be reserved to a future period." So here, the party tenders himself to serve, which is all he can do; and this being so, it must be considered as a complete performance by him of his contract so as to enable him to maintain this action. If contracts of this sort are void for not being in writing, it is strange that such a point should never have been made in the great variety of sessions cases which depend on contracts of hiring and service. Besides, the policy of the statute does not apply to such a case; for the object of the Legislature was to repress perjury, and the danger to be guarded against was the setting up of supposititious contracts by the imperfect recollection of witnesses, or by perjured testimony, after the lapse of a year; that is the period when the protection of the statute is to commence. It never was intended to extend to a case where a breach must be committed within the year. This seems to have been the general understanding of the statute, and the usage of mankind has been consistent with it. But even on the authority of *Fenton* v. *Emblers*, this rule may be supported. For there it is expressly laid down that a general contract, uncertain

in its duration, or one which becomes so by the insertion of some term which may put an end to it at any time, is not [* 726] * within the statute. Now here there is necessarily implied one which is uncertain. For the continuance of the service by the plaintiff depends on the continuance of his life. And that term "if he shall so long live" must be considered therefore as inserted in the contract. If it had been so expressed, it would clearly have been within *Fenton* v. *Emblers;* but that which is necessarily implied, needs not to be expressed. This case, therefore, at all events falls within that authority, and this rule must be absolute.

Lord ELLENBOROUGH, Ch. J. — This case falls expressly within the authority of *Boydell* v. *Drummond;* and if we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop; for, in point of reason, an excess of twenty years will equally not be within the Act. Such difficulties rather turn upon the policy than upon the construction of the statute. If a party does not reduce his contract into writing, he runs the risk of its not being valid in law; for the Legislature has declared in clear and intelligible terms that every agreement that is not to be performed within the space of one year from the making thereof shall be in writing. That brings it to the question, what is the meaning of the word performed? will an inchoate performance or a part execution satisfy the terms of the statute? I am of opinion that it will not, and that there must be a full, effective, and complete performance. That not being so here, this case falls within the fourth section of the statute, and the nonsuit was therefore right.

[* 727] * BAYLEY, J. — I cannot distinguish this case from that of *Boydell* v. *Drummond,* which I think was rightly decided. The word performance, as used in this statute, must mean a complete and not a partial performance, and if so, this case falls within the fourth section of the Statute of Frauds. Our decision will not raise those points in settlement law which have been suggested. For the statute does not say that such agreement will be void as a hiring, but only that no action shall be maintained upon it; such a hiring, therefore, although not in writing, will be quite sufficient for the purpose of acquiring a settlement.

ABBOTT, J. — I am of the same opinion. This falls within the case of *Boydell* v. *Drummond,* which, I think, was decided according to

the sound construction of the Statute of Frauds. The case put in argument, of an agreement for goods to be delivered by one party in six months, and to be paid for in eighteen months, being after more than a year has elapsed, is distinguishable on this ground, that there, all that is on one side to be performed, viz. the delivery of the goods, is to be done within a year; whereas here, the service, which is the thing to be performed by the plaintiff, cannot possibly be completed within that period.

HOLROYD, J. — I think *Boydell* v. *Drummond* properly decided, and that this case falls within the rule there laid down.

Rule discharged.

ENGLISH NOTES.

The material words of the Statute of Frauds (29 Car. II., c. 3), s. 4, are: "No Act shall be brought whereby to charge . . . any person . . . upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." In *Britain* v. *Rossiter* (C. A. 1879), 11 Q. B. D. 123, 48 L. J. Ex. 362, 40 L. T. 240, the Court of Appeal re-affirmed the ruling that the statutory provision does not make the contract void, but merely renders it unenforceable; and in accordance with a well-known principle, held further that while an express contract unenforceable by reason of the statute was in existence, a fresh contract could not be implied from acts done in pursuance of it.

Of the numerous decisions upon the enactment set out at the commencement of this note, the following cases have been chosen as modern authorities bearing upon the interpretation of the statute. One of the best expositions of the statute is that given by TINDAL, Ch. J., in *Souch* v. *Strawbridge* (1846), 2 C. B. 808, 15 L. J. C. P. 168. "It (the statute) speaks of any agreement that is not to be performed within the space of one year from the making thereof, pointing to contracts the complete performance of which is of necessity extended beyond the space of a year. That appears clearly from the case of *Boydell* v. *Drummond*, the rule to be extracted from which is that where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that where the contract is such that the whole may be performed within a year, and there is no stipulation to the contrary, the statute does not apply." This reading of the statute

was approved in *McGregor* v. *McGregor* (C. A. 1888), 21 Q. B. D. 424, 57 L. J. Q. B. 591, 37 W. R. 45. In that case the question arose on a verbal undertaking by the wife to maintain herself and her children, the husband agreeing to allow the wife a weekly sum for maintenance.

The better opinion would seem to be that an objection founded upon the statute is not competent where the contract is executed. *Mavor* v. *Pyne* (1825), 3 Bing. 285, 28 R. R. 625; *Souch* v. *Strawbridge, supra ; Knowlman* v. *Bluett* (Ex. Ch. 1874), L. R. 9 Ex. 307, 43 L. J. Ex. 151, 22 W. R. 758. But where a contract is in part executed, the statute may still afford a good defence as to so much of the contract as remains executory. *Boydell* v. *Drummond* (1809), 11 East, 142, 10 R. R. 450.

In *Beeston* v. *Collyer* (1827), 4 Bing. 309, 29 R. R. 576, the plaintiff commenced his service in March, and served the defendant for many years as his clerk. In 1811 the plaintiff's salary was paid quarterly, but from 1820 to 1826 it was paid monthly. In December, 1826, the defendant dismissed the plaintiff without assigning any reason. In an action for wrongful dismissal the Court held that there was an implied yearly hiring, and that the contract need not be in writing.

An opinion is expressed by Willes and Byles, JJ., in *Cawthorne* v. *Cordrey* (1863), 13 C. B. (N. S.) 406, 32 L. J. C. P. 152, to the following effect: If a contract is made on a day, for a service for a year, to commence on the following day, then inasmuch as the law takes no notice of fractions of a day, the day on which the contract was made might be rejected, and the contract would not require to be evidenced by writing. The point was adverted to in *Britain* v. *Rossiter* (C. A. 1879), 11 Q. B. D. 123, 48 L. J. Ex. 362, 40 L. T. 240, but left open. At most the opinion is merely a *dictum;* for the facts in *Cawthorne* v. *Cordrey* were that there was a discussion on a Sunday relating to a service to commence on a Monday. On the Monday the plaintiff, with the knowledge and consent of the defendant, commenced the service, and was paid a sum on account of wages. The jury were directed that they might infer a new implied contract on the Monday for a year's service from that day, and this was held a proper direction. As regards the implication of a new contract the decision is contrary to *Britain* v. *Rossiter*, and the decision can only be supported on the ground that what took place on the Sunday was mere negotiation culminating in an actual contract on the Monday.

Davey v. *Shannon* (1879), 4 Ex. D. 81, 48 L. J. Ex. 459, arose upon a demurrer to the statement of defence. The material facts were that in 1868 the defendant entered into the plaintiff's employment as a foreman tailor for three years, on the terms (*inter alia*) that if the defend-

ant should leave the plaintiff, he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor within a certain area. The defendant continued in the plaintiff's employment on the like terms (except as to the period of employment) until 1877. The breach alleged was that in 1877 the defendant left the plaintiff, and carried on business as a tailor within the prohibited area. Judgment was given for the defendant, on the ground that the Statute of Frauds afforded an answer to the claim which was founded on a verbal contract, in that the agreement not to set up or engage in the particular trade was to continue for the joint lives of the defendant and the plaintiff, and was therefore *primâ facie* not to be performed within a year.

This judgment was questioned by the Court of Appeal in *McGregor* v. *McGregor* (C. A. 1888), 21 Q. B. D. 424, 57 L. J. Q. B. 591, 37 W. R. 45, where the action was for arrears of maintenance under a verbal agreement for separation between husband and wife for consideration executed on the part of the wife by withdrawing a summons for assault. The observation of Lord Justice BOWEN upon *Davey* v. *Shannon* may be taken as an accurate statement of the law. "It was laid down" (he says), "in *Peter* v. *Compton* (Skinner, 353, 1 Sm. L. C.) as the headnote states, that 'an agreement that is not to be performed within the space of one year from the making thereof' means in the Statute of Frauds an agreement which appears from its terms to be incapable of performance within the year. In so far as *Davey* v. *Shannon* departs from this principle it seems to me to run counter to the current of authority on the subject." It is possible, however, that the actual decision in *Davey* v. *Shannon* may still be supported. For *Beeston* v. *Collyer*, *supra*, would give some colour to the contention that the agreement as renewed by implication after the 3 years was to continue for a year; and any stipulation regarding the defendant's employment at the expiration of his service with the plaintiff would carry the matter over the statutory period.

A printed heading may constitute a sufficient signature within the 4th sect. of the Statute of Frauds: *Tourret* v. *Cripps* (1879), 48 L. J. ch. 567, 27 W. R. 706. The law was the same regarding the 17th sect. now replaced by sections 4 and 60 of the Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), *Saunderson* v. *Jackson* (1800), 2 Bos. & P. 238, 5 R. R. 580; *Schneider* v. *Norris* (1814), 2 M. & S. 286, 15 R. R. 250. The signature need not be at the end of the document: *Knight* v. *Crockford* (1794), 1 Esp. 190, 5 R. R. 729.

The document must be in existence at the time when action is brought: *Lucas* v. *Dixon* (C. A. 1889), 22 Q. B. D. 357, 58 L. J. Q. B. 161, 37 W. R. 370. This is a decision on the 17th section, but follows and confirms earlier decisions on the 4th section.

AMERICAN NOTES.

This case is cited in Parsons and Lawson on Contracts, Browne on Domestic Relations, Wood on Master and Servant, and Reed and Browne on Statute of Frauds, to the doctrine that if the contract may be performed within a year on one side, although not on the other, it is not within the statute. See (many citing *Donnellan* v. *Read*, 3 B. & Ad. 899; *ante*, vol. 6, 298) *Blanding* v. *Sargent*, 33 New Hampshire, 239; 66 Am. Dec. 720; *Smalley* v. *Greene*, 52 Iowa, 241; 35 Am. Rep. 267; *McClellan* v. *Sandford*, 26 Wisconsin, 595; *Wolke* v. *Fleming*, 103 Indiana, 110; *Jones* v. *Hardesty*, 10 Gill & Johnson (Maryland), 404; *Berry* v. *Doremus*, 30 New Jersey Law, 399; *Compton* v. *Martin*, 5 Richardson Law (So. Car.), 14; *Holbrook* v. *Armstrong*, 10 Maine, 31; *Dant* v. *Head*, 90 Kentucky, 255; 29 Am. St. Rep. 369; *Lockwood* v. *Barnes*, 3 Hill (N. Y.), 128 (citing the principal case); *Holbrook* v. *Armstrong*, 10 Maine, 31 (citing the principal case); *Reinheimer* v. *Carter*, 31 Ohio State, 579. Reed says: "The 'one-side' rule of *Donnellan* v. *Read* has met with much opposition in America." In *Durfee* v. *O'Brien*, 16 Rhode Island, 213, the Court say: "In this country, however, there has been considerable conflict of opinion. In Alabama, Georgia, Maine, South Carolina, Maryland, Illinois, Ohio, Indiana, Arkansas, Missouri, and Wisconsin, the English rule has been followed. See *Rake* v. *Pope*, 7 Alabama, 161; *Johnson* v. *Watson*, 1 Georgia, 348; *Compton* v. *Martin*, 5 Richardson (So. Car.), 14; *Ellicott* v. *Turner*, 4 Maryland, 476; *Curtis* v. *Sage*, 35 Illinois, 22; *Randall* v. *Turner*, 17 Ohio St. 262; *Haugh* v. *Blythe's Executors*, 20 Indiana, 24; *Pledger* v. *Garrison*, 42 Arkansas, 246; *Suggett's Adm'r* v. *Cason's Adm'r*, 26 Missouri, 221; *McClellan* v. *Sanford*, 26 Wisconsin, 595.

"In New Hampshire the decisions are conflicting; the earliest and latest sustaining the English rule. See *Blanding* v. *Sargent*, 33 New Hampshire, 239; *Emery* v. *Smith*, 46 New Hampshire, 151; *Perkins* v. *Clay*, 54 New Hampshire, 518.

"The contrary doctrine has been held in Vermont, Massachusetts, and New York. See *Pierce* v. *Estate of Paine*, 28 Vermont, 34; *Marcy* v. *Marcy*, 9 Allen, 8; *Lockwood* v. *Barnes*, 3 Hill (New York), 128; *Broadwell* v. *Getman*, 2 Denio, 87; *Kellogg* v. *Clark*, 23 Hun, 393."

In *Dant* v. *Head*, *supra*, the Court said: "It now seems to us the statute was intended and does properly apply only to an agreement that is not to be performed by either party within a year, but not to one which is to be or has been performed by one or either of them within such period, and that construction has been adopted elsewhere. *Atchison, etc. R. Co.* v. *English*, 38 Kansas, 110; *McClellan* v. *Sanford*, 26 Wisconsin, 595; *Curtis* v. *Sage*, 35 Illinois, 22; *Berry* v. *Doremus*, 30 New Jersey Law, 403; *Haugh* v. *Blythe*, 20 Indiana, 24; *Smalley* v. *Greene*, 52 Iowa, 241; 35 Am. Rep. 267; *Blanding* v. *Sargent*, 33 New Hampshire, 239; 66 Am. Dec. 720. For if the practical effect and operation of the statute is, as has been uniformly held by this Court, in every case where one party has performed an agreement within a year, to hold the other party liable on such agreement, although he is not to perform within a year, such should be construed and held to be the meaning

and import of the language used. In fact, the statute properly applies to agreements that are wholly executory; and one which has been performed by one of the parties within a year is, to that extent, executed, and cannot, with propriety, be called an agreement to be performed within a year."

Some Courts hold that although that which one of the parties is to do is all to be done within the year, still if the other party's promise is not to be performed within the year, the contract is within the statute. *Whipple* v. *Parker*, 29 Michigan, 375; *Montague* v. *Garrett*, 3 Bush (Kentucky), 297; *Broadwell* v. *Getman*, 2 Denio (New York), 87.

An oral contract for service for a year, to begin as soon as the employee could, and actually beginning a week after the agreement, is within the statute. *Sutcliffe* v. *Atlantic Mills*, 13 Rhode Island, 480; 43 Am. Rep. 39. But not so where the contract was for a year from the next day. *Dickson* v. *Frisbee*, 52 Alabama, 165; 23 Am. Rep. 565 (citing *Cawthorne* v. *Cowdrey*, 13 C. B. [N. S.] 406).

In *Marcy* v. *Marcy*, 9 Allen (Mass.) 8, it was held, on a learned review of the English cases, that no action lies on an oral promise to pay, at a time more than one year from the making of the promise, for land conveyed to the promisor.

In *Duff* v. *Snider*, 54 Mississippi, 245, it is said the authorities are conflicting, but the right to recover in assumpsit is clear.

In *Broadwell* v. *Getman*, 2 Denio (New York), 87, the holding was that a parol agreement not *wholly* to be performed within a year is void, but BEARDSLEY, J., remarked *obiter* (citing the principal case and *Donnellan* v. *Reed*): "But I would not be understood as yielding my assent to the principle stated. It seems to me in plain violation of the statute. Every verbal contract which is not to be performed within a year from the making thereof is declared to be void. Although the terms of the agreement may require full performance on one side within a year, I do not see how this can exclude it from the statute, the other side being incapable of execution until after the year has elapsed. The agreement is entire, and if it cannot be executed fully, on both sides, within the year, I think it is void. What difference does it make that one party can, while the other cannot, complete the contract within a year? Such an agreement is not, in terms, excepted from the statute, and the reason for the enactment applies to it with full force. But it is unnecessary to pursue this subject; and I dismiss it with the remark that although where one party has fully performed on his part within the year, the agreement may notwithstanding be void, still he is not remediless, for he may maintain a general *indebitatus assumpsit* against the party who refuses to proceed further under the contract, and thus recover a compensation for what has been advanced and received upon it. (*Lockwood* v. *Barnes*, *Holbrook* v. *Armstrong*, *supra*; see also Smith's Leading Cases, as referred to above; *Maror* v. *Pyne*, 2 Car. & Payne, 91, and 3 Bing. 285.)"

In *Sheehy* v. *Adarene*, 41 Vermont, 541; 98 Am. Dec. 623, it is said, citing the principal case: "In all the cases where the agreement has been held to be within the statute, the action was for the breach of that side of the contract that was not to be performed within the year." See *Pierce* v. *Paine's*

Estate, 28 Vermont, 34. Reed says (Statute of Frauds, sect. 194): "It is believed that almost every case cited as being within the year clause of the statute is implicitly inconsistent with the singular view taken in the case of *Sheehy* v. *Adarene*," *supra*. "The point is novel and can scarcely be said to be supported by authority, because while in a number of cases the statute has been held a good defence on behalf of the party whose performance requires more than a year, there are some examples of a recovery on the 'one side' rule being allowed against such a person." See notes, *ante*, vol. 6, 305.

No. 2. — WINSTONE *v.* LINN.

(K. B. 1823.)

No. 3. — KEARNEY *v.* WHITEHAVEN COLLIERY COMPANY.

(C. A. 1893.)

RULE.

THE stipulations in a contract for service, or in an apprenticeship deed, are independent.

Winstone v. Linn.

1 Barn. & Cress. 460–471 (25 R. R. 455).

Contract for Service. — Independent Stipulations.

[460] Declaration upon an indenture of apprenticeship for breach of a covenant whereby the defendant, in consideration of a premium of £90, covenanted to instruct the apprentice in his trade, and provide him with diet, etc. Breach, that the defendant did not, after making the indenture, instruct the apprentice, but on the contrary refused so to do; and after the making of the indenture, to wit, on the 13th of July, refused then or at any other time to instruct him, and that the defendant did not, after the making of the indenture, provide the apprentice with diet, etc., but on the contrary thereof, on the 13th of July compelled him to quit his service before the expiration of the term. Plea, as to the not instructing and not providing with diet and lodging before the 10th of July, that he did instruct and provide him with diet and lodging till that time. Upon this plea issue was taken and joined. And as to the not instructing and not providing with diet and lodging upon and after the 10th of July, that the defendant was ready and willing to instruct and provide the apprentice with diet and lodging during the whole term, but that the apprentice would not, after making the indenture, serve the defendant, but frequently, and particularly on the 10th of July, refused so to do, and that on the 10th day of

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July the apprentice refused to do particular acts therein mentioned, which he was bound to do as such apprentice; and on the contrary thereof, against the positive orders of the defendant, absented and wholly withdrew himself from his service, declaring that he never intended to return again to his service, whereby defendant was prevented from instructing and providing him with diet and lodging according to the indenture. Replication, that after the apprentice had been guilty of the supposed breaches of duty as mentioned in the plea, to wit, on the 13th of July, he, the apprentice, returned to the defendant, and offered to serve him as such apprentice during the residue of the term, and requested him to receive him, and provide him with diet and lodging, but the defendant refused so to do. Demurrer, assigning for cause that plaintiffs had by their declaration complained of a continued breach of covenant in not instructing, etc., the apprentice from the time of making the indenture till the commencement of the suit; and although the second plea answered to the whole time in the declaration after the 10th of July, yet that the plaintiffs had omitted to reply to such parts of defendant's second plea as related to not instructing, etc., the apprentice on the 10th of July, and between that time and the 13th of July: *Held*, that the plaintiffs' claim was not entire, but divisible, and covered every part of the time during which the master refused to instruct the apprentice, and, consequently, that there was no discontinuance: *Held, also*, that the replication was not a departure from the declaration, the gravamen of the complaint being that the defendant had compelled the apprentice to quit his service, and the replication showing the manner in which he had so done it: *Held, also*, that the covenants in an indenture of apprenticeship are independent covenants, and consequently that acts of misconduct on the part of the apprentice stated in the plea were not an answer to an action brought for breach of the covenant by the master to instruct and maintain the apprentice during the term agreed upon by the indenture.

Covenant upon an indenture of apprenticeship, bearing date the 11th April, 1820, whereby the defendant, in consideration of a premium of £90, covenanted with the plaintiffs that he, defendant, would, during four years, instruct Winstone the younger in the * trade and business of a tobacconist, and also provide [*461] him with sufficient diet and lodging in the dwelling-house of the defendant. The declaration averred, that the son entered into the defendant's service, and then assigned a breach as follows: that the defendant did not, after the making of the indenture, instruct the apprentice in the trade of a tobacconist; but, on the contrary thereof, had hitherto altogether refused so to do. And after the making of the said indenture, to wit, on the 13th day of July, wholly refused then or at any other time to instruct the said Thomas Winstone the younger in the said trade, contrary to the covenant. And that the defendant did not, nor would, after the

making of the said indenture, provide the said T. Winstone the younger with suitable diet and lodging, although he, the said T. Winstone the younger, at all times after the making of the said indenture was willing to take his meals with the defendant; but on the contrary thereof, he the defendant, afterwards, to wit, on the 13th day of July, in the year aforesaid, compelled the T. Winstone the younger to quit his service before the expiration of the time agreed upon for the said T. W. remaining therein, and refused to maintain and keep him, contrary, &c. Plea first, as to so much of the breaches of covenant as related to the not instructing the said T. Winstone the younger, and not providing him with diet and lodging before the 10th day of July; that he did instruct him till that time, and did provide him with suitable and sufficient diet and lodging, according to the tenor of the covenant. Upon this, issue was taken and joined. And as to so much of the breaches of covenant as related to the not instructing the [* 462] said T. Winstone the younger, and not providing * him with diet and lodging upon and after the 10th day of July aforesaid; that he, the defendant, was ready and willing to instruct the said T. Winstone the younger in the said business, and provide him with diet and lodging during the whole of the four years; but that the said T. W. the younger did not, nor would after the making of the said indenture serve the defendant as an apprentice in his said trade; but afterwards, on the 12th April in the year aforesaid, and on divers other days and times between that day and the said 10th day of July, wholly refused so to do; and on several of those days and times aforesaid refused to obey him in his said business, and to render him, defendant, a proper account of his moneys from time to time entrusted to the said T. W. the younger, as such apprentice. And that when, on the 10th of July, he ordered the said T. W. the younger to add up the day-book used in his said business, which it was the duty of the said T. W. the younger, as such apprentice, to have done, he, the said T. W. the younger, refused so to do; and on the contrary thereof, then and there, against the positive orders of the defendant, absented and wholly withdrew himself from the service of the defendant in his said business; he, T. W. the younger, then and there declaring to the defendant that he never intended to return again to such service, whereby the defendant was prevented from instructing the said T. W. the younger, and from providing him with diet and lodg-

ing, according to the said indenture, as he, the defendant, would otherwise have done. Replication, that after the said T. W. the younger had been guilty of the said supposed misconduct and breaches of duty as such apprentice as in the said second plea mentioned, and during the term in the * indenture [* 463] mentioned, and before the exhibiting of the plaintiff's bill, to wit, on the 13th day of July, he, the said T. W. the younger, returned to the defendant, and tendered and offered himself to the defendant, to serve and obey him as such apprentice, and was then and there ready and willing, and offered to the defendant then and during the residue of the said term, well and truly to perform all things in the said indenture contained on his part to be performed; and then and there requested the defendant to receive him, the said T. W. the younger, as such apprentice, and to continue to instruct him in the said trade of a tobacconist, and provide him with sufficient diet and lodging in pursuance of the indenture; but that the defendant then and there wholly refused to teach or instruct the said T. W. the younger in the said trade, and wholly refused so to do, or any longer to provide him with suitable and sufficient diet and lodging according to the indenture.

Special demurrer, assigning for causes, that although the plaintiff in the declaration complained of a continued breach of covenant, in not instructing the apprentice from the time of making the indenture to the commencement of the suit, as well as of a particular refusal to instruct him, alleged to have been made on the 13th July in the year aforesaid; and that the defendant would not, after the making of the said indenture, provide the said T. W. the younger with suitable diet and lodging; and, although the second plea of the defendant answers to the whole of the time in the declaration, on and after the 10th day of July in the year aforesaid, yet the plaintiffs have wholly omitted to reply to such part of the defendant's second plea, as relates to not instructing the said T. W. the younger, and not providing him with diet and lodging * on the said 10th day of July, or between [* 464] that time and the 13th day of July, and have thereby wholly discontinued their action as to the latter period of time.

E. Lawes, for the demurrer, contended, first, that the master of an apprentice was not bound to take him back into his service under the circumstances disclosed in the special pleas; and admitted by the replication. *Cuff* v. *Brown*, 5 Price, 297 (19 R. R. 621). So

an apprentice is not bound to return, if required so to do, after license from his master to leave his service. *Anon.* 6 Mod. 70. The contract is entire, and imports mutual conditions to be performed at the same time; and the plaintiffs, having in every respect violated the contract, cannot sue the defendant upon it. *Kingston* v. *Preston*, 2 Doug. 691. The defendant's performance is also prevented by the act of one of the plaintiffs. 1 Roll. Abr. 455. This is like the case of a brewer who, having repeatedly furnished bad beer, cannot complain of a refusal to deal with him. *Holcombe* v. *Hewson*, 3 Camp. 391 (11 R. R. 746). The case of *Weaver* v. *Sessions*, 6 Taunt. 154, is very different from the present; the contract there not being entire, and there having been a liberty to buy of others; besides, the plea in that case did not connect the malt purchased with the orders given. The statutes respecting apprentices do not affect the case; and there is no distinction between contracts of apprenticeship under seal, and those between master and servant by parol. In several nisi prius cases between master and servant, misconduct on the part of the latter, and refusal to obey his master's commands, have been held [* 465] sufficient to justify dismissal and non-payment of * wages. *Robinson* v. *Hindman*, 3 Esp. 235; *Spain* v. *Arnott*, 2 Star. 256; *Williams* v. *Rice*, Middlesex sittings after Easter term, 3 G. IV., before ABBOTT, C. J. Secondly, he contended that there was a discontinuance, as pointed out in the causes of demurrer to the replication; and if so, the plaintiff could not have judgment whether the defendant's pleas be good or bad. *Tippet* v. *May*, 1 Bos. & P. 411. The plaintiff having taken issue on the defendant's pleas as to his performance of the covenant from the execution of the indenture to the 13th of July, the whole of the first breach could not be considered as confined to a refusal to teach, etc. on that day. This case, therefore, differs from *Harris* v. *Mantle*, 3 T. R. 307. Thirdly, there is a departure, inasmuch as the declaration states that the apprentice continued in the defendant's service to the 13th of July, and that the latter forced him to quit his service on that day; but the replication admits the contrary, and only relies on a refusal to take him back on his return to the defendant on the 13th of July. A departure in pleading is matter of substance and ground of general demurrer. *Niblett* v. *Smith*, 4 T. R. 504, and other cases cited in 2 Saund. 84 b. Lastly, the replication is bad, as concluding with a general prayer of

damages. The plaintiff should have new assigned. *Anon.* 6 Mod. 70; *Scott* v. *Dixon*, 2 Wils. 4; 1 Saund. 299 a. This is also ground for general demurrer.

BAYLEY, J. — There is not any pretence for saying that there is a departure in this case. It would have * been a [* 466] departure if the plaintiffs had put their case in the replication upon a different ground from that contained in their declaration; but I am of opinion that they have not done so. The declaration charges generally, that the master, from the time of making the indenture, did not instruct and maintain the apprentice, and that he compelled him to leave his service on the 13th of July. The gravamen of the complaint is, that the master compelled the apprentice to leave the service. The replication then shows the mode by which the master compelled him to quit his service, viz. by refusing to receive him again after his misconduct. That is not taking a new ground, but supports and fortifies the declaration; it cannot, therefore, be a departure. Co. Lit. 304 a; 2 Saund. 84 a. I am also of opinion that there is no discontinuance in this case. It is said that the plaintiffs in their declaration claim an entire thing, and afterwards in their replication narrow their claim, instead of answering the whole of the defendant's second plea; and, therefore, that there is a discontinuance of the action as to that part of the claim which they have so abandoned. The charge in the declaration is, that after making the indenture, the defendant would not instruct the apprentice; and that on the 13th of July he wholly refused then, or at any other time, to instruct him; and that he would not provide him meals, etc. It is not one entire claim, but divisible, and covers every part of the time during which the master refused to instruct the apprentice. The defendant's second plea affects to answer the claim of the plaintiffs, as to all the time after the 10th of July, now that is fully answered by showing that the * apprentice made a subsequent ten- [* 467] der of his services, whereupon the master ought to have taken him back. The fallacy of the argument consists in considering this as one entire claim for one entire period of time, instead of a divisible claim. I am also of opinion that the plaintiffs are entitled to the judgment of the Court upon the more important question in the case. That question is, whether the master is at liberty to insist that the indenture is no longer binding upon him, because the apprentice has unwarrantably refused to obey the

commands of his master. By the indenture, the master covenants that he will for four years instruct and maintain the apprentice. Upon this record we are not at liberty to assume that there are any other covenants in the indenture than those set out. Such indentures generally contain reciprocal covenants by each party. Those covenants are not dependent, but are mutual and independent, entitling each party to his remedy for a breach of them. The master, therefore, is liable to an action for a breach of the covenant, to instruct and maintain the apprentice during the term agreed upon. If the second plea be good in this case, there is a sufficient answer to this action. In that plea he relies upon a disobedience of orders, and upon the circumstance that the apprentice withdrew himself from his service, and declared his intention never to return. And if he had continued to absent himself to the end of the term, there can be no doubt that that would have been an answer to the action; but it appears by the replication that the apprentice did return, and offered to serve the master during the remainder of the term, and that the latter refused to receive him. I have entertained some doubt [* 468] whether the replication ought not to * have averred this offer to have been made within a reasonable time; but I am now satisfied that it lay upon the defendant to have rejoined, that an unreasonable time had elapsed before the offer was made. That being so, the question arises upon these pleadings, whether disobedience of orders, or other acts of misconduct by the apprentice, will entitle the master to put an end to the contract of apprenticeship. I am of opinion that it does not. If the parties had intended that the master should have such a power, they might have provided for it by the express terms of the deed. Not having done so, we must conclude that it was not intended that he should have any such power. In the case of parish apprentices, the Legislature by 20 G. II., c. 17, expressly provided, that the indentures may be discharged upon complaint made by the master to two justices, touching the misconduct of the apprentice in his service. The Legislature must have thought, therefore, that without such an express provision, the master of an apprentice would not, at common law, have the power of putting an end to the contract in case of the misconduct of the apprentice. The cases which have been referred to in argument, arising out of the relation of master and servant, do not apply to the present. In

the case of apprentices a premium is usually given, in consideration of which the master expressly contracts to instruct and maintain the apprentice during a given term. The premium is a consideration for the instruction and maintenance during the entire term. Where the ordinary relation of master and servant subsists, it is a condition implied from the very nature of the contract, that the master should only maintain the * servant so [* 469] long as he continues to do his duty as servant; and the contract is to endure for a reasonable time if no specific time be fixed, and is determinable by a reasonable notice. For these reasons I am of opinion that the plaintiff is entitled to the judgment of the Court.

HOLROYD, J.— I think that the formal objections to the replication, on the ground of departure and discontinuance, have been already fully answered. With respect to the general question, I am also of opinion that the plaintiff is entitled to judgment. The cases which have been referred to in argument, and which have arisen out of the relation of master and servant, do not bear upon the present question. Under that contract, the master, in consideration of the servant performing his service, undertakes to maintain him and pay him wages. The moment the latter ceases to do his duty properly as a servant, the consideration for the maintenance and wages fails. The relation that subsists between a master and an apprentice is very different: under that contract all the acts are not to be done by the apprentice, but the master agrees to give him instruction; and the great object of the contract is, that a young person entering into life should receive instruction and protection from the master. The latter has a greater control over his apprentice than over a mere servant, for he may even correct his apprentice. The master, too, usually receives a premium, which is paid him as a consideration for instructing the apprentice during the term agreed upon. If the argument urged on the part of the defendant were to prevail, the effect would be to deprive the apprentice of that protection which it was the object of the indenture * to give him, and to leave him at liberty to [* 470] go where he pleased. The statute relative to parish apprentices tends strongly to show, that at common law the master had no power to put an end to the contract of apprenticeship. It is true that this is not an indenture within the statute, and it must therefore be construed as if the statute had never passed; but the

statute nevertheless shows that the understanding of the Legislature at that time was, that under indentures in the common form the master had no right to put an end to the contract in consequence of the misconduct of the apprentice.

BEST, J.— I entirely concur in the opinions pronounced by my learned Brothers. The argument is, that if the apprentice be guilty of a single act of misconduct, or be absent from the service of the master for two days, he is to lose the benefit of the instruction to which he was entitled by the indenture, and for which the premium of £90 was paid; and it has been said that the act of going away, accompanied with the declaration that he would not return, deprived him of the protection of his master. But it would be most unjust if a single act of misconduct were to deprive a young person of the protection and instruction which he was to receive in virtue of the indentures, and for the continuance of which for a given time a valuable consideration has been paid. The master has at common law a complete remedy, if the apprentice misconducts himself, by an action for a breach of the covenants. The provisions contained in the statute relative to parish ap-
[*471] prentices show that at common law the master could *not determine the contract, if the apprentice misconducted himself. I am, therefore, of opinion that the plaintiffs are entitled to recover. *Judgment for the plaintiffs.*

Kearney v. Whitehaven Colliery Company.

1893, 1 Q. B. 700–715 (s. c. 62 L. J. M. C. 129; 68 L. T. 690; 41 W. R. 594).

[700] *Mine. — Wages. — Payment by Weight of Mineral. — Illegal Stipulation, Effect of, where Good Consideration for Contract. — Coal Mines Regulation Act*, 1887 (50 & 51 *Vict.*, *c.* 58), *s.* 12.

By sect. 12 of the Coal Mines Regulation Act, 1887, where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, — provided that nothing in this section shall preclude the owner of the mine from agreeing with the persons employed that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, such deductions being determined in such special mode as may be agreed upon between the owner and the persons employed.

The appellant was employed by the respondents at their colliery upon the terms that he should be paid wages according to the weight of coal gotten by him; that he should not leave his employment without giving fourteen days' notice;

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and that deductions should be made in respect of dirt sent up to the surface with the coal; and the following special mode of determining those deductions was agreed upon between the respondents and the persons employed by them: About one tub in twenty sent up to the surface was selected at random for testing. The dirt in that tub was separated from the coal and weighed, and if the tub contained more than a certain weight of dirt, the man who sent it up was not paid anything in respect of the coal therein. The men sending up the other nineteen tubs were paid on the total weight of the contents of each tub as though it contained coal only.

Held, that the proviso in sect. 12 was controlled by the first part of that section, and did not authorise any agreement by which a person employed was not to be paid on the weight of the coal in a particular tub; that the agreement with respect to the special mode of making deductions for dirt was therefore illegal, *but that the illegality in that respect did not vitiate the [* 701] whole contract of employment so as to justify the appellant in leaving without giving fourteen days' notice.

Appeal from a judgment of the Queen's Bench Division upon a case stated by justices of the peace for the county of Cumberland, under the Summary Jurisdiction Act, 1879.

The respondents, a colliery company, took out a summons under the Employers and Workmen Act, 1875 (38 & 39 Vict., c. 90), against the appellant, a collier in their employment, claiming 7*s.* 6*d.* damages for breach of contract by the defendant in neglecting to proceed to or perform his duties as a collier in William Pit, on March 3 and 4, 1892. The material facts appearing in the case originally stated by the justices, and in a supplemental case stated by them on hearing further evidence, after the original case had been remitted to them by the Court of Appeal for that purpose, were as follows: —

Prior to March 3, 1892, the appellant entered into a contract of service with the respondents, and signed a document of which the material parts were as follows: "I, the undersigned, in consideration of being employed at this colliery, do hereby agree to give to, and to receive from, the Whitehaven Colliery Company fourteen days' notice to terminate such employment; and, in the event of my leaving without giving such notice, to render myself liable to be proceeded against according to law. And I also further agree that breach of rules on my part shall render me liable to instant dismissal. . . . And I also further agree to the company making the undermentioned deduction from my wages, namely . . . moneys advanced by the company on my behalf for any of the following

purposes, namely, contributions to friendly society or club, or for the education of my children, house-rent, and fines for dirt."

The wages paid to the persons employed in the mine were paid according to the weight of coal gotten by them; the dirt referred to the contract was dirt — not being coal, nor of the nature or substance of coal — sent up from the mine with coal. For a long time prior to December 2, 1891, a system of fines and forfeitures had been in force at the pit in respect of dirt sent up with the coal. The practice was that about one tub in twenty
[* 702] * was tested for dirt by testers employed by the mine-owners, the check-weigher employed by the men having the opportunity of checking the testing if he desired to do so. The dirt was separated from the coal by riddling, and weighed. On December 2, 1891, a revised scale of fines and forfeitures in respect of dirt was arranged between the employers and the men employed in the pit. By that arrangement there was no fine or forfeiture if, after the coal was riddled, the amount of dirt in the tub (which would contain about 15 cwt.) did not exceed 25 lbs. If the amount of dirt after riddling exceeded 25 lbs., but did not exceed 35 lbs., one-half of the tub was to be forfeited, the collier who sent the tub up receiving payment only in respect of half the weight of the total contents of the tub. If the amount of dirt after riddling exceeded 35lbs., then the whole tub was forfeited, the collier who sent it up receiving no payment in respect of it. The tubs were selected for testing at random, and the name of the collier who sent up the tub was not ascertained until the tub had been emptied, when his tally would be found at the bottom of it.

On March 3 and 4, 1892, the appellant did not proceed to his work at the pit. He had not previously given the fourteen days' notice of his intention to leave the respondents' employment required by the contract. At the hearing before the justices the appellant's solicitor contended that the system of making deductions in respect of fines for dirt was illegal, and that the appellant therefore was not bound by the contract of employment, and was justified in refusing to work under it. The justices held the appellant liable in damages; and being satisfied upon the evidence given for the respondents that by reason of the appellant's not proceeding to work on the days named they had suffered the damage claimed, ordered him to pay to them the sum of seven shillings and sixpence.

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The questions for the opinion of the Court were: (1) whether the justices were right in holding that the appellant was not justified in leaving his work without notice; and (2) in the event of the appellant not being justified in leaving his work without notice, were the justices right in holding that the appellant was liable in damages to the respondents? If the Court should be of opinion that the justices were wrong in either of * those points, then the order to be quashed and judgment [* 703] entered for the appellant. If the Court should be of opinion that the justices were right, then the order to stand.

The Divisional Court (GRANTHAM and CHARLES, JJ.) gave judgment for the respondents. GRANTHAM, J., was of opinion that the special mode of determining the deductions to be made in respect of fines for dirt, which had been agreed upon between the respondents and their workmen, was not in contravention of the Coal Mines Regulation Act, 1887 (50 & 51 Vict., c. 58), s. 12,[1] and that, under the proviso in that section, the mine-owner and the persons employed by him were entitled to agree upon a deduction from the latters' wages in respect of stones and substances other than minerals sent up with the coal, even although the special mode of determining the deduction involved that the person employed was not paid anything in respect of the weight of the coal in the particular tub selected for testing. The learned Judge was also of opinion that the decision of the House of Lords in *Netherseal Colliery Co.* v. *Bourne*, 20 Q. B. D. 606, 14 App. Cas.

[1] Sect. 12: "Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable.

"Provided that nothing in this section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer, or by the person immediately employed by him; such deductions being determined in such special mode as may be agreed upon between the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other, or by some person appointed in that behalf by the owner, agent, or manager, or (if any check-weigher is stationed for this purpose as hereinafter mentioned) by such person and such check-weigher, or, in case of difference, by a third person to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other, or in default of agreement appointed by a chairman of a Court of Quarter Sessions within the jurisdiction of which any shaft of the mine is situate."

228 (in which the question turned upon a deduction in
[* 704] respect of coal, and * not in respect of stones or substances other than the mineral contracted to be gotten), was not contrary to his view of the construction of the section.

CHARLES, J., was of opinion that the system of fines and forfeitures adopted at the respondent's colliery was in contravention of the provisions of sect. 12; because, by the first part of the section, the person employed was to be paid according to the actual weight gotten by him of the mineral contracted to be gotten; and the decision in *Netherseal Colliery Co.* v. *Bourne* indicated that the only deductions allowable were deductions in respect of stones and substances other than the mineral contracted to be gotten. The learned Judge thought it was impossible to hold that a system by which, in certain events, the person employed was no longer to be paid according to the actual weight gotten by him of the mineral contracted to be gotten, was justified by the proviso in sect. 12.

Both the learned Judges, however, held that, whether or not that part of the contract of employment was illegal, the illegality did not render the whole contract void so as to disentitle the respondents to rely upon the stipulation that the appellant should not leave the employment without giving fourteen days' notice.

The appellant below appealed from this decision.

Willis, Q. C., and Atherley Jones, for the appellant. — The special mode of determining the deductions for fines, which has been agreed upon between the colliery company and those whom they employ, is in contravention of sect. 12 of the Mines Regulation Act, 1887, and, therefore, illegal. The effect of sect. 12 is to prohibit any contract by which the person employed is not to be paid according to the actual weight gotten by him of the mineral contracted to be gotten. He must be paid by weight, and without any deductions from the weight of the mineral which he sends up. The proviso does not override the first part of the section. It only provides for the mode in which deductions from the weight sent up to the pit's mouth (including both the mineral contracted to be gotten and other substances) should be
[* 705] * made; but the special mode can only be by deduction from weight, not from payment. That is the construction put by the House of Lords in *Netherseal Colliery Co.* v. *Bourne*, upon sect. 17 of the Coal Mines Regulation Act, 1872 (35 & 36

Vict., c. 76), which is substantially the same in terms as sect. 12 of the Act of 1887. In the present case, by the agreed special mode of determining the deductions to be made in respect of fines for dirt, the miner, in the event of the tub selected for testing containing more than a certain proportion of dirt, is not to be paid anything on the actual weight of the coal in that tub. The deduction is, therefore, illegal.

Next, if that be so, it is submitted that the whole contract of employment is vitiated, because the services rendered by the person employed are paid for in a mode prohibited by the statute, which requires that the contract shall be of a particular character. If the term of the contract with respect to those deductions be illegal, it affects, or cuts through, the consideration, namely, payment, passing from the mine-owner to the person employed; and if the consideration be tainted with illegality, the whole contract is bad. The mine-owners, therefore, are not entitled to rely on the term in the contract with respect to notice, and the appellant was entitled to leave his employment without giving the fourteen days' notice stipulated by the contract.

Finlay, Q. C., and Mattinson, for the respondents. — The special agreement made here is not illegal. It is only a mode of ascertaining the average amount of dirt sent up in the tubs. Assuming that sect. 12 of the Coal Mines Regulation Act, 1887, means that in any event the person employed shall be paid for the weight of the coal actually gotten by him, still in fact he is so paid under the special agreement, because, although the man whose tub is tested out of the twenty tubs sent up receives no payment at all on the weight of the coal in that tub if it contains more than 35 lbs. of dirt, he is paid on the weight, both of coal and dirt, in so many of the other nineteen tubs as he has sent up. As the result works out, he is paid, or more than paid, for the weight of coal actually gotten by him. The contention made for the appellant would necessitate the expensive * and troublesome process of [*706] weighing for dirt every tub that came to the pit's mouth — a process which it would be practically impossible for the mine-owner to carry out. It is submitted, further, that the proviso to sect. 12 intended to allow any special bargain with respect to deductions to be made between the mine-owner and the persons employed. It provides that deductions may be made for tubs improperly filled, showing that some deduction from the coal sent

up was contemplated. The decision in *Netherseal Colliery Co.* v. *Bourne* was in respect of a deduction from the weight of coal in the basket. The House of Lords had not to consider deductions in respect of substances other than the mineral contracted to be gotten; it was, therefore, only necessary for them to construe the first part of the section. Next, if the special agreement with respect to deductions be illegal, it does not vitiate *in toto* the contract of employment. The test is, if the acts to be done by the person employed as consideration for the wages paid him are illegal in whole or in part, then the whole contract is illegal. If, on the other hand, the consideration moving from the master — *i. e.*, the employment of the person employed and payment of wages — is illegal in whole or in part, then the whole contract is illegal. But this stipulation as to deductions in respect of fines for dirt is no part of the consideration for the service. It is a stipulation in favour of the master. It is one of the promises in the contract which is bad in itself, though the consideration upon which it is founded is good; but it does not touch the other promises in the contract which are good in themselves and supported by the good consideration. The mine-owners, therefore, were entitled to rely on the appellant's promise not to leave his employment without giving fourteen days' notice.

Atherley Jones replied.

Lord ESHER, M. R. — I am of opinion that this appeal should be dismissed. I think that the judgment of CHARLES, J., was right, and I cannot agree with the judgment of GRANTHAM, J., with respect to the legality of the deductions. I think that the deduction in respect of fines for dirt was an illegal deduction, [*707] but * that the illegality of that particular stipulation, there being no illegality in the consideration for the contract, does not affect the validity of the promise made by the miner not to leave his employment without giving fourteen days' notice. The point as to the illegality of the stipulation that the mine-owners may make deductions in respect of fines for dirt depends upon the construction of sect. 12 of the Coal Mines Regulation Act, 1887. I think that that section has really been construed by the House of Lords in *Netherseal Colliery Co.* v. *Bourne*, 20 Q. B. D. 606, 14 App. Cas. 228. That decision was founded upon particular propositions with regard to the Act of Parliament, and we cannot, on the suggestion that it was not necessary in that case to determine the point now before us, disregard the interpretation the

House of Lords gave to that Act. I take the judgment of the House of Lords to be founded upon certain propositions enunciated and laid down in terms by several — if not all — of the noble Lords. Those propositions are most clearly stated by Lord HALSBURY. They are, in effect, that you must take the whole of the section which was then under consideration, and consider the first part of it with the proviso in order to determine what is the true construction of the first part. If you put one construction upon that proviso you give hardly any effect to it; if you put the other construction you make the first part and the proviso work harmoniously together. Lord HALSBURY says that the phraseology of the first part of the section is general, but that it may be construed into a concrete form by having regard to the practical usage of miners when the Act was passed. He applies that well-known rule of interpretation. He says that the words "where the amount of wages paid to any of the persons employed . . . depends on the amount of mineral gotten by them," might mean, "where the amount of wages paid depends upon the amount of actual mineral gotten by them;" but looking at the practical usage of miners and the ordinary course of business in mining, the words may have another meaning. The well-known usage and course of business is that the miner gets an ascertained quantity of stuff, which is put into a tub and sent up to the surface. When the tub comes to the mouth of the pit its contents are, according to the practical *usage of miners and the ordinary course of [*708] business in mining, taken to be the amount of mineral gotten by the miner, though in the strict interpretation the tub contains the amount of mineral gotten by the miner and something else. If the first part of the section stood alone, we might be obliged to consider whether we could so deal with it; but the proviso makes it clear that we ought to apply the rule of construction I have stated, and then the "amount of mineral gotten by them" means the amount of mineral which a man, in the ordinary course of the business of mining, puts into the tub and something else. It means everything that is in the tub, whether or not there is matter in it which is not mineral. If that be so, the mine-owner would be paying on the weight of mineral which had not been gotten unless the statute provided some means of aiding him. We know that it would be practically impossible for him to have every tub weighed for dirt. The Act, however, by

the proviso arranges a method of aiding him, and says that deduction shall be made in respect of stones or substances other than the mineral contracted to be gotten. Now, what are you to deduct from? From what is in the tub — not from the actual mineral in the tub, but from all that is in the tub. But the deductions must be made in a certain way. The proviso says that an agreement may be made, with respect to deductions, between the mine-owner and the persons he employs; but he and they must at the same time agree that the deductions shall be made in the particular manner specified in the Act. The things in respect of which the deductions are to be made are stones and substances other than the mineral contracted to be gotten, and the deduction must be from the weight in the tub, not from the men's wages. It is true that the amount of the wages depends upon the weight of the mineral contracted to be gotten; but I think that the wording of the first part of the section and of the proviso bring one to the conclusion that the deduction must be from weight, and must be a deduction in respect to things other than the actual minerals. As to the other matter of deduction, namely, in respect of tubs improperly filled, I think the meaning is that you are to take the weight of the tub and to deduct that which has got into it by im-
[* 709] proper filling. The provision is * pointed at the case referred to by Lord MACNAGHTEN in the *Netherseal* case, 14 App. Cas. 228, at p. 246, where an undue proportion of slack or dust has been sent up in the tub. In that case a deduction may be made in respect of improper filling, although the slack or dust is coal. The deduction from the weight would be made by taking out the slack or dust improperly put into the tub. The judgments in the House of Lords establish that the deduction can only be by weight; that it must be a deduction from the weight of the tub; that you can only make the deduction in respect to substances other than coal, and that you can only make it in the mode specified by the Act. Lord HALSBURY says (at p. 234): "The object and intention of the 17th section, upon which this question turns, is obviously, in cases where the wages depend upon the weight of the mineral won, to create a statutable duty to weigh, and to pay according to the weight so ascertained. It is obvious further that the draftsman or some person familiar with mining feared whether in creating that duty and imposing the obligation to pay according to the weight so ascertained — knowing that such weight would

have to be ascertained according to the practical usage of miners — feared, I say, that if the earlier part of the section remained unqualified the mine-owner would be obliged to pay by weight, when so ascertained, whatever might be contained in the tubs, baskets, or hutches, and accordingly the latter part of the section was introduced to save the right of contracting that stone or materials other than the mineral contracted to be gotten should be deducted from the weight; but this reserved right of contract was only capable of being put in force by the mode pointed out in the section." Lord HALSBURY therefore thought that if the first part of the section stood alone the mine-owner would have to pay on all that came up in the tub, basket, or hutch, but that the proviso was made to meet that state of things, and enable deductions to be made in respect of materials other than coal. Lord BRAMWELL says: "The effect of the enactment then is that the men must be paid by weight, that that weight is to be the weight of all they send up, but that from it may be deducted the weight of certain matters provided that weight is ascertained in a certain way." * The [*710] "certain matters" are the matters mentioned in the proviso, namely, stones or materials other than the mineral contracted to be gotten. The same thing is said in effect by Lord HERSCHELL and the other members of the House of Lords present. Lord MACNAGHTEN says: "One thing is clear, that no deduction is permissible except what the Act specifies and allows."

The judgment of GRANTHAM, J., in the Court below, seems to proceed on the assumption that the deductions contemplated by the proviso can be properly made from wages. Having regard to the judgments in *Netherseal Colliery Co.* v. *Bourne*, 20 Q. B. D. 606, 14 App. Cas. 228, I am of opinion that his view is wrong, and that CHARLES, J., was right in saying that the person employed in the mine is to be paid by the weight of the mineral gotten; that the deduction must be from weight; that it must be a deduction from the total weight of the contents of the tub, and that it can only be made in the special mode authorised by the section. When you deduct from weight what you are allowed to deduct by the Act, the person employed is only to be paid upon the weight of coal in the tub in respect of which the deduction has been made. In the absence of an agreement as to deductions between the mine-owner and the persons employed by him, he must pay upon the whole tub. If he and they do agree, the deductions must be made

in the way pointed out by the proviso. In the present case they have gone further than that. In a particular event, after deducting the extraneous matter in the tub, though an amount of coal is left in the tub, the man who sends up the tub is not to be paid wages at all in respect of the coal so brought up. I am of opinion that such a contract is illegal and in contravention of the terms of the Act of Parliament. Whether the men are wise in having brought this matter forward, I cannot say. The arrangement has been acted upon for years with their assent, and the consequences of raising the point may be what they do not expect.

Then comes the question, Does the illegality, in this respect, of part of the contract make the whole contract illegal? Does it make illegal the stipulation by the person employed that he shall not leave his employment without giving fourteen days' [*711] * notice? I take it that the rule is properly enunciated and stated in Maxwell on Statutes, 2nd ed., p. 491. If the consideration, or any part of it, is illegal, then every promise contained in the agreement becomes illegal also, because in such a case every part of the consideration is consideration for the promise. But suppose there is nothing illegal in the consideration, then upon that valid consideration may be several promises or liabilities. If any one of those be in itself illegal, then it cannot stand, not because the consideration becomes illegal, but because the promise itself is illegal. It is a bad promise which cannot be supported by the consideration. But the other promises which are good and legal in themselves remain, and can be supported by the good consideration. That rule of law has long been acted upon, and it was applied by the House of Lords in the *Netherseal* case. Now the contract here is a contract of employment. The consideration on the one side is, "If you will enter into my employment I will make you one, two, or more several promises." The consideration on the other side is, "If you will take me into your employment, I will make you one, two, or more several promises." Therefore on both sides there is consideration which stands without any blemish whatsoever. On the one side there is the consideration, "I will take you into my employment;" on the other, "I will enter into your employment." There is a stipulation in the contract which is illegal in itself, and cannot therefore be supported by the good consideration; but there are other promises not illegal in themselves which can be supported

by the consideration which is perfectly good. The promise by the person employed to give fourteen days' notice before leaving the employment is one which can be supported by the consideration, and one on which, in my opinion, the mine-owners are entitled to rely. The stipulation with respect to deductions is illegal in itself, and cannot stand, but the stipulation as to notice is legal and supported by a good consideration.

I am of opinion, therefore, that the decision of the magistrates was right, and that the judgment of the Court below should be affirmed, and this appeal dismissed.

* LOPES, L. J. — I am of the same opinion. I think that [* 712] the judgment of CHARLES, J., was right. I think that the deductions made by the mine-owners in respect of fines for dirt are deductions not authorised by the Act, and illegal; but that the contract of employment is only illegal in part, so that the provision in it that the person employed shall give fourteen days' notice before leaving the employment is valid. The question turns on the construction of sect. 12 of the Coal Mines Regulation Act, 1887. It may be truly said that the language of that section is not wholly clear and unambiguous. In the first part of the section [the Lord Justice read it] it is, in my opinion, obvious from the expressions used, — namely, "weight" and "truly weigh," — that every word in the section is meant to refer to payment according to weight. I think that the words "shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten," are intended to refer to the whole of the stuff in the tub when it comes to the pit's mouth. That construction makes the provisions of the section intelligible, and it is the construction adopted by the House of Lords in *Netherseal Colliery Co.* v. *Bourne*. When we come to the deductions dealt with by the proviso, I am clearly of opinion that the words, "nothing in this section shall preclude the owner . . . of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten," refer to deductions in respect of weight. In my view the intention of the Legislature was that the men should, in any event, be paid according to weight for the mineral actually gotten by them. The mine-owner is entitled to make certain deductions in weight, in respect of stones and substances other than minerals, from the quantity brought up in the tub to

the pit's mouth; but it is essential that the men should be paid according to the weight of the actual coal gotten by them and contained in the tubs. In the present case an agreement has been made between the masters and the men, that if a tub of 15 cwt. contained over 25 lbs. of dirt, the men were to be paid on one-half only of the weight of the tub; and if it contained [* 713] over 35 lbs. of dirt, they were to be paid nothing at * all in respect of the coal in the tub. Such an arrangement appears to me to be in contravention of the proviso to sect. 12, and therefore unlawful. It has been argued that the result of that unlawful provision is to vitiate the whole contract of employment. The law is clear that where the consideration for a promise or promises contained in the contract is unlawful, the whole agreement is void. The reason is that it is impossible to discriminate between the weight to be given to different parts of the consideration, and therefore you cannot sever the legal from the illegal part. But where there is no illegality in the consideration, and some of the provisions are legal and others illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, unless they are inseparable from and dependent upon one another. Here the consideration moving from the master to the men is the employment and the payment of wages. The consideration moving from the men to the master is the services rendered by them. Both are good and lawful considerations. Then we come to the stipulation with respect to deductions. I am of opinion that that stipulation is altogether separable from and independent of the consideration. It follows that CHARLES, J., was right in holding that the promise to give fourteen days' notice was separable from the promise as to deductions, and that the one promise should be given effect to, and the other not. I think, therefore, that this appeal should be dismissed.

A. L. SMITH, L. J. — I am of the same opinion. The proceedings taken by the respondents against the appellant were founded upon a breach by the appellant of his contract by leaving the employment without giving fourteen days' notice. The proceedings were taken under the Employers and Workmen Act, 1875, and the defence raised was that by virtue of sect. 12 of the Coal Mines Regulation Act, 1887, the stipulation in the contract with respect to deductions was illegal, and that the whole contract

was thereby rendered illegal, so that the appellant was entitled to disregard the provision about giving notice. It is admitted that what has been done was agreed to by the men, and has been going on for years, and probably may have been
* beneficial to them. What has been done is this: They [* 714]
do not weigh for dirt every tub which comes to the top,
but they give the men the benefit of nineteen out of twenty tubs. They test about one tub in twenty, no matter by what man it is sent up. If it contains no more than 25 lbs. of dirt, then no drawback is made. If it contains more than 25 lbs. and not more than 35 lbs., then a drawback of one-half the weight of the coal in the tub is made; and if it contains more than 35 lbs., then no payment at all is made for the coal in the tub. Now, in my judgment, the House of Lords has practically put this construction on the section: A pitman, when paid by weight, must be paid according to the weight of the coal he actually wins, but by the proviso the master may agree with him to make deductions from the total weight of what is sent up in the tub in respect of stones and substances other than mineral. If all that had been done here was to agree upon some mode of finding out what was the average amount of dirt in a given number of the tubs sent up, without weighing every one of them, I do not think any difficulty would arise under the section; but what was done was this: when a certain proportion of dirt was found in the tub selected for testing, the actual coal in that tub was not paid for at all. In face of that, can it be said that the provisions of sect. 12 have not been disregarded? I am of opinion that they have. Then the question is, Does that illegal part of the agreement vitiate the whole? CHARLES, J., has held that it does not; and I think his reasons for coming to that conclusion are well founded. The rule is, that if the consideration is tainted with illegality, either in whole or in part, all the promises depending upon that consideration must fail; but if the consideration be not tainted with illegality, either wholly or in part, then if one of the several promises depending upon it be illegal in itself and the others legal, the legal promises stand, and may be enforced against the person who has made them. In the contract before us the master agrees to employ the man, who, in consideration that the master will take him into his employment and pay him wages, promises to serve the master, and not to leave the employment without fourteen

days' notice. Both considerations from the man to the [* 715] *master and from the master to the man are good. Then there is one promise — that with respect to the deductions — which is illegal and cannot be enforced. But the promise which the master is here seeking to enforce against the servant is not illegal. It is founded upon a good consideration; and I am, therefore, of opinion that the defence set up by the appellant fails. This appeal should be dismissed. *Appeal dismissed.*

ENGLISH NOTES.

The application of the rule, like every rule of construction, may be varied by the terms of the contract. Thus in *Westwick* v. *Theodor* (1875), L. R. 10 Q. B. 224, 44 L. J. Q. B. 110, there was a proviso in an apprenticeship deed that the apprentice would obey all commands and give his services entirely to the business during office hours. The justification was that, "after the contract and before breach, [the apprentice] misconducted himself in the service by wilfully disobeying the reasonable and lawful orders of the defendant, by him given to [the apprentice], in the service, and by habitually neglecting his orders in the service, and failing to perform the same, and by absenting himself from the defendant's service and refusing to give his services during office hours without just cause, and by acting and behaving with insubordination to the defendant so being his master." This was held, upon demurrer, a good cause of dismissal.

So too where the act of the apprentice is the cause of the breach of stipulation complained of, the action will fail. *Raymond* v. *Minton* (1866), L. R. 1 Ex. 244, 35 L. J. Ex. 153, 14 L. T. 367, 14 W. R. 675. There, to an action for not teaching the apprentice, the defendant pleaded that "at the time of the alleged breach the apprentice would not be taught, and by his own wilful acts hindered and prevented the defendant from teaching him," &c. This was held a good plea on demurrer.

Habitual dishonesty will entitle the master to discharge the apprentice. *Learoyd* v. *Brook* (1891), 1 Q. B. 431, 60 L. J. Q. B. 373, 64 L. T. 458, 39 W. R. 480. There the apprentice to a pawnbroker was in the habit of purloining small sums from the till. It appeared that from £300 to £400 worth of jewellery, together with other articles of value, were pledged daily at the shop where the apprentice was employed. It would seem, however, that mere petty pilfering, such as helping himself to the contents of a sugar basin, would not entitle the master to put an end to the relationship. *Phillips* v. *Clift* (1859), 4 H. & N. 168, 28 L. J. Ex. 153.

The right of the persons aggrieved by the refusal of the master to perform his part of the agreement is in damages only, and there is no right to a return of the premium. This was first settled, overruling the earlier decisions to the contrary, in *Rex* v. *Vandeleur* (1716), 1 Str. 69; see also 1 Wms. Saund. 525, note (3), ed. 1871. To the cases cited in Wms. Saund. may be added *Whincup* v. *Hughes* (1871), L. R. 6 C. P. 78, 40 L. J. C. P. 104, 24 L. T. 74, and *Learoyd* v. *Brook*, *supra*. The master may, however, bind himself to return the premium, or a part of it. *Derby* v. *Humber* (1867), L. R. 2 C. P. 247, 15 L. T. 538. The Court has, in the case of articled clerks to solicitors, ordered a return of a part of the premium; but this is only in exercise of its jurisdiction over them as officers of the Court. *Ex parte Bayley* (1829), 9 Barn. & Cress. 691, 33 R. R. 290.

The right of the master to enforce the stipulations in his favour depends in the first instance on the validity of the apprenticeship deed. If the apprentice be an infant, it is necessary that the contract should not be prejudicial to him. The question was adverted to in the notes to *Warwick* v. *Bruce*, No. 4 of "Contract," 6 R. C. 43. The leading authority respecting infant apprentices is *Reg.* v. *Lord* (1848), cited 6 R. C., at p. 48 (12 Q. B. 757, 17 L. J. M. C. 181). An infant bound apprentice is, upon attaining majority, entitled to be discharged from the indenture. *Ex parte Davis* (1794), 5 T. R. 715, 2 R. R. 690. If the apprentice on coming of age avoids the indenture, an adult party will be liable upon a covenant for his service beyond that time: *Whitley* v. *Loftus* (1713), 8 Mod. 190; *Ex parte Davis*, *supra*; *Cuming* v. *Hill* (1819), 3 Barn. & Ald. 59, 22 R. R. 305; unless the whole deed of apprenticeship is made void by statute: *Guppy* v. *Jennings* (1793), 1 Anstr. 256, 3 R. R. 585.

An infant apprentice, however, is not liable in an action of covenant. *Gylbert* v. *Fletcher* (1628), Cro. Car. 179. Where there is no remedy on the covenant at law, there is no equitable remedy by injunction. *De Francesco* v. *Barnum* (1889), 43 Ch. D. 165, 59 L. J. Ch. 151, 62 L. T. 40.

In the case of a servant, not being an apprentice, it is only rarely that the rule would apply, and then generally under complicated circumstances, as was the case in the second principal case. In the case of master and servant, there is seldom a stipulation respecting matters other than the length of service and the remuneration to be paid. The master is entitled to avail himself of any cause for dismissal in justifying his conduct in an action for wrongful dismissal; even although he was unaware of the cause giving him his right to dismiss at the time when he put an end to the service. *Boston Deep Sea Co.* v. *Ansell* (C. A. 1888), 39 Ch. D. 339, 59 L. T. 345. This is really established

by many old cases, but the point is frequently obscured in the reports of the earlier cases by the discussion whether a *virtute cujus* was traversable. As to this see 1 Wms. Saund. 16, 490, ed. 1871.

The following causes have been held to justify a dismissal: — The receipt of a secret commission: *Boston Deep Sea Co.* v. *Ansell, supra.* Gambling by a clerk on the Stock Exchange: *Pearce* v. *Foster* (C. A. 1886), 17 Q. B. D. 536, 55 L. J. Q. B. 306, 54 L. T. 664. Generally a claim incompatible with the continuance of the relationship, as a claim by a clerk to be considered a partner: *Amor* v. *Fearon* (1839) 9 Ad. & El. 548, 1 P. & D. 398, 8 L. J. Q. B. 95. Disobedience of an express order, however harshly the master may have acted: *Spain* v. *Arnott* (1817), 2 Stark. 256, 19 R. R. 715; *Turner* v. *Mason* (1845), 14 M. & W. 112, 14 L. J. Ex. 311. Immorality justifies dismissal: *Rex* v. *Welford* (1778), Cald. 57; *Atkin* v. *Acton* (1830), 4 Car. & P. 208; but mere concealment of previous immoral conduct does not justify a breach of the engagement: *Fletcher* v. *Krell* (1872), 42 L. J. Q. B. 55, 28 L. T. 105. Incompetence justifies dismissal: *Harmer* v. *Cornelius* (1858), 5 C. B. (N. S.) 236, 28 L. J. C. P. 85, 4 Jur. (N. S.) 1110.

Temporary illness will not justify dismissal. *Cuckson* v. *Stones* (1859), 1 Ell. & Ell. 248, 28 L. J. Q. B. 25, 7 W. R. 134.

"It is clear and established beyond all doubt by authorities which we should not be justified in overruling, even if we desired to do so, that the servant who is dismissed for wrongful behaviour cannot recover his current salary, that is to say, he cannot recover salary which is not due and payable at the time of his dismissal, but which is only to accrue due and become payable at some later date, and on the condition that he had fulfilled his duty as a faithful servant down to that later date. The authorities put the question beyond dispute, and principle also leads us to the same conclusion. The servant cannot sue in such a case on the original contract with the master, because the contract which his master has made is that he shall pay the salary only at the end of the current period which has not yet expired, and the servant by his wrongful conduct has prevented himself from suing for that salary by non-performance of the condition precedent under the contract. He cannot recover, therefore, on the special contract, nor can he recover on a *quantum meruit*, because he cannot take advantage of his own wrongful act to insist that the contract is rescinded. As regards himself the contract is still open, although he has chosen to break it." Per BOWEN, L. J., in *Boston Deep Sea Co.* v. *Ansell* (C. A. 1888), 39 Ch. D. 339, 364, 59 L. T. 345. The leading case is *Cutter* v. *Powell* (1795), 6 R. C. 627 (6 T. R. 320, 3 R. R. 185, 2 Smith Lead. Cas. 1, 10th ed.).

Where a servant has been wrongfully dismissed, and it appears that

he could have at once obtained a fresh employment, which a reasonable man would have accepted, he will only be entitled to nominal damages. *MacDonnell* v. *Marston* (1884), 1 Cab. & Ell. 281.

AMERICAN NOTES.

Winstone v. *Linn* is cited in Wood on Master and Servant.

The master takes the apprentice for better or for worse, and so is bound to furnish proper medical attendance: *Easley* v. *Craddock*, 4 Randolph (Virginia), 423; and is liable for his wages while he is sick: *Caden* v. *Farwell*, 98 Mass. 137.

In *Powers* v. *Ware*, 2 Pickering (Mass.), 452, it was held that the stealing by an apprentice of his master's property was no ground of dismissal, although it might justify a Court in cancelling the indentures (citing *Winstone* v. *Linn*).

But a master is not bound to furnish a mere servant with medicines or medical attendance (2 Kent Com. 261), except in case of sudden and extreme emergency. *Ohio & M. R. Co.* v. *Early*, 141 Indiana, 73; 28 Lawyers' Rep. Annotated, 546.

In *Percival* v. *Nevill*, 1 Nott & McCord (So. Car.), 452, it was held that a master is not liable for medical attendance on an apprentice unless by special agreement or employment, and where it was rendered under his own roof.

In *Dunbar* v. *Williams*, 10 Johnson (N. Y.), 249, it was thought that the master of a slave would be liable for necessary medical attendance on a slave where there was no opportunity for previous consultation with the master.

A servant may be discharged for pregnancy: *Hobbs* v. *Harlan*, 10 Lea (Tennessee), 268; robbery: *Libhart* v. *Wood*, 1 Watts & Sergeant (Penn.), 265; habitual drunkenness: *Gonsolis* v. *Gearhart*, 31 Missouri, 585; *Ulrich* v. *Hower*, 156 Penn. State, 414; fraudulent conduct toward master: *Singer* v. *McCormick*, 4 Watts & Sergeant, 265; engaging in the same business on his own account during the term of service: *Dieringer* v. *Meyer*, 42 Wisconsin, 311; 24 Am. Rep. 415; sending a challenge to fight a duel: *Dolby* v. *Kinnear*, 1 Kerr (New Brunswick), 480; selling pills to produce abortion: *Kidd* v. *Pill & M. Co.*, 91 Iowa, 261; for lack of ordinary skill as a ball-player: *Baltimore Baseball Club* v. *Pickett*, 78 Maryland, 375; 44 Am. St. Rep. 304; 22 Lawyers' Rep. Annotated, 690; see *Crescent Horseshoe & I. Co.* v. *Eynon* (Virginia), 27 S. E. Rep. 935; for long sickness: *Lacy* v. *Getman*, 119 New York, 109; *Johnson* v. *Walker*, 155 Massachusetts, 253 (seven weeks); *Waugh* v. *Shunk*, 20 Penn. State, 133; *Powell* v. *Newell*, 59 Minnesota, 406; for introducing gambling into a hotel of which the servant is manager, and absenting himself every evening from eight to eleven o'clock: *Wyatt* v. *Brown* (Tennessee), 42 S. W. Rep. 478.

But not for refusing to work on Sunday: *Van Winkle* v. *Satterfield*, 58 Arkansas, 617; 23 Lawyers' Rep. Annotated, 853; nor for getting married, unless it interferes with her performance of her duties: *Edgecomb* v. *Buckland*, 146 New York, 332; nor for absence a single day in a term of a year:

Shaver v. *Ingham*, 58 Michigan, 649; 55 Am. Rep. 712; nor for absence nine and a half days in such a term: *Bast* v. *Byrne*, 51 Wisconsin, 531; 37 Am. Rep. 841; nor for occasional absence from Saturday till Monday, where servant had agreed to devote his whole time: *Shoemaker* v. *Acker*, 116 California, 239.

SECTION II. — *Liability of Master for Injuries to Servant.*

No. 4. — BADDELEY *v.* EARL GRANVILLE.

(Q. B. D. 1887.)

No. 5. — YARMOUTH *v.* FRANCE.

(Q. B. D. 1887.)

RULE.

THE maxim *volenti non fit injuria* is not applicable in cases where the injury arises from the breach of a statutory duty.

Mere knowledge on the part of the servant that the plant employed was defective and dangerous will not necessarily be construed as amounting to a voluntary undertaking of a particular risk.

Baddeley v. Earl Granville.

19 Q. B. D. 423–428 (s. c. 56 L. J. Q. B. 501; 57 L. T. 268; 36 W. R. 63).

[423] *Master and Servant. — Breach of Statutory Duty. — Volenti non fit Injuria.*

The plaintiff's husband had been employed in the defendant's coal mine. One of the rules established in the mine, under sect. 52 of the Coal Mines Regulation Act, 1872, required a banksman to be constantly present while the men were going up or down the shaft; but it was the regular practice of the mine, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed in coming out of the mine at night by an accident arising through the absence of a banksman. In an action under the Employers' Liability Act, 1880, —

Held, that the defence arising from the maxim *volenti non fit injuria* was not applicable in cases where the injury arose from the breach of a statutory duty on the part of the employer, and that the plaintiff was entitled to recover.

APPEAL from the Hanley County Court of Staffordshire.

The action was under the Employers' Liability Act, 1880 (43 & 44 Vict., c. 42), s. 1, sub-s. 2, and was brought to recover damages

No. 4. — Baddeley v. Earl Granville, 19 Q. B. D. 423, 424.

for the death of the plaintiff's husband, which happened under the following circumstances: —

The defendant was a colliery owner, and special rules for the management of his collieries were established under sect. 52 of the Coal Mines Regulation Act, 1872 (35 & 36 Vict., c. 76), which provides that "there shall be established in every mine to which this Act applies such rules (referred to in this Act as special rules) for the conduct and guidance of the persons in the management of such mine, or employed in or about the same, as, under the particular state and circumstances of such mine, may appear best calculated to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in
*or about the mine, and such special rules, when estab- [*424]
lished, shall be . . . observed in and about every such
mine, in the same manner as if they were enacted in this Act." One of the special rules required a banksman to be constantly present at the pit's mouth when the men were going up or down the shaft. It was, however, the regular practice of the mine that no banksman should be in attendance during the night, and of this practice the deceased, who worked in the colliery, was fully aware. While the deceased was coming out of the shaft at night, no banksman being present, an accident happened owing to a signal to lower the cage being improperly given to the engineman by a boy of fourteen years of age, who took upon himself to interfere and to give the signal; from the effects of this accident the deceased died on the following day.

The County Court Judge, being of opinion that the negligence of the certified manager of the mine in systematically allowing the rule to be broken was the proximate cause of the accident, gave a verdict and judgment for the plaintiff for £120. The defendant appealed.

Upon the argument of the appeal three points were taken on behalf of the defendant: 1st, That the County Court Judge misread the rule in assuming that it imposed upon the defendant an absolute obligation to have a banksman at the surface at all times during the progress of the cage up or down the shaft; 2nd, that the negligence of the manager in allowing the banksman to be absent during the night was not the proximate cause of the accident, which was due to the improper interference of the boy; and, 3rd, that, as the deceased performed his duties with a full knowl-

edge of the practice of the mine, he voluntarily incurred the risk, and the maxim *volenti non fit injuria* was therefore an answer to the action. All the points were decided in the plaintiff's favour, but the case is only reported on the last point.

Aspland, Q. C. (G. E. Tyrrell with him), for the defendant. — The plaintiff was fully aware of the practice of the mine, and voluntarily undertook the risk; the maxim *volenti non fit injuria* therefore affords a good defence to the action. The dis-
[* 425] tinction * between the breach of a statutory duty and of a duty at common law cannot be maintained, as was pointed out by the MASTER OF THE ROLLS in *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, which is not distinguishable from the present case. It is true that in *Clarke* v. *Holmes*, 7 H. & N. 937, 31 L. J. Ex. 356, there was a breach by the defendant of a statutory duty to fence machinery, but the decision proceeded upon the ground that the workman had called the master's attention to the defect, that a remedy had been promised, and that the servant had gone on working under such promise, and upon the further ground that, apart from any question of statutory obligation, there was a duty at common law upon the master to fence, and that a breach of that duty was negligence for which he was responsible. *Wilson* v. *Merry*, L. R. 1 Sc. App. 326, is a direct authority in the defendant's favour.

C. A. Russell, for the plaintiff. — The distinction between a common-law duty and one imposed by statute is well established, and is recognised both by BOWEN, L. J., and FRY, L. J., in *Thomas* v. *Quartermaine*. It is possible that the deceased might not have been able to bring an action for wages lost by him if he had not gone down the pit owing to the banksman's absence; but it is unnecessary to show that he had such a right of independent action for the breach of duty before he can acquire a right to sue in respect of the negligence.

Aspland, Q. C. in reply.

WILLS, J. — The question raised in this case is one of some difficulty. The recent decision of *Thomas* v. *Quartermaine* has established the doctrine that, in cases where *primâ facie* an action lies under the Employers' Liability Act, an answer is supplied if the servant voluntarily took on himself the risks which proved fatal. That decision is one of which we have not heard the last; it has opened up a new field of inquiry and a new domain of liti-

gation in this class of cases. Like all cases where general words of wide application are used, it has given rise, and will continue to give rise, to much discussion. It must not be supposed that in saying this I have the slightest intention of speaking disparagingly of that decision, or that I express [*426] anything but my sense that a class of questions difficult of determination will arise from it.

I do not attempt to frame any general rule; the circumstances of each case vary immensely, and my remarks are confined to those of this particular case. Nor do I in any way discuss the general meaning of, or the limitations which should be imposed upon, the maxim of *volenti non fit injuria*; I only say that its application will require to be watched with great care. Assuming it to be generally applicable in the widest sense, it is sufficient to say that in *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, both the Lords Justices thought that the maxim would not apply at all where the injury arose from a direct breach by the defendant of a statutory obligation. I agree with the suggestion of Mr. Russell that the remarks of BOWEN, L. J., on this point were not made in any casual manner. It is true indeed that the MASTER OF THE ROLLS expressed a different opinion, and that the observations were unnecessary for the decision of that particular case; but we have the deliberately expressed opinion of two of the Judges of the Court of Appeal, to which, though not strictly binding upon us, I should be in any case disposed to pay the greatest respect, and with which I in fact agree. There is, besides, much to be said on public grounds in favour of it. An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation people may come to what agreements they like; but as to future breaches of it, there ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. Such an agreement might be illegal, though I do not hold as a matter of law that it would be so. But it seems to me that if the supposed agreement between the deceased and the defendant, in consequence of which the principle of *volenti non fit injuria* is sought to be applied, comes to this, that the master employs the servant on the terms that the latter shall waive the breach by the master of an obliga-

tion imposed on him by statute, and shall connive at his [*427] disregard *of the statutory obligation imposed on him for the benefit of others, as well as of himself, such an agreement would be in violation of public policy and ought not to be listened to. On that ground there is much to be said in favour of the opinion expressed in the Court of Appeal, that where there has been a breach by a defendant of a statutory obligation the maxim *volenti non fit injuria* has no application.

Mr. Russell took a narrower and finer point, and argued that before applying the maxim *volenti non fit injuria* to an action of this kind it must be shown not merely that the servant knew that the cage would travel up and down without the attendance of a banksman, but also that he knew that the necessity for the presence of a banksman was provided for by the colliery rules, as otherwise the servant would not be "*volens*" that he should be deprived of the protection to which he has a right conferred by statute. It is not shown in the present case that the rules were brought to the notice of the deceased, and an essential link in the evidence appears to me to be wanting. I do not, however, decide the case on this ground, nor do I wish it to be supposed that I mistrust what I have before said as to the applicability of the legal maxim.

GRANTHAM, J. — I am of the same opinion. It is argued here that the plaintiff cannot recover because of the decision in *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, but we are precluded from taking that view by the peculiar character of that case. It is admitted that but for that decision the present defendant would be liable; but then both the Lords Justices in *Thomas* v. *Quartermaine* say that their decision is not to apply to a case like the present. How then can the defendant rely on the decision in that case when the learned Judges in the Court of Appeal say that it is not to apply to cases where there is a statutory obligation imposed on the defendant? The application of that decision seems to me to be intentionally limited by the Court to the case before it. If that is so, the Lords Justices agree with the MASTER OF THE ROLLS that the defendant would be liable in such a case as the present. I think that *Blamires* v. *Lancashire and York-* [*428] *shire Ry. Co.*, L. R. 8 Ex. 283, is *very much in point. It was there held that a breach by the defendants of a statutory obligation to have a communication between the guard

of a train and the passengers was evidence against them in an action of negligence, although the non-compliance with the statutory obligation was not the proximate cause of the accident. I am clearly of opinion, therefore, that where there has been a distinct breach of a statutory obligation (the obligation in the present case being to have a banksman continually watching during the progress of the men up and down the shaft) the case of *Thomas* v. *Quartermaine*, is no authority; and the verdict and judgment for the plaintiff in the County Court must be upheld.

Appeal dismissed.

Yarmouth v. France.

19 Q. B. D. 647–668 (s. c. 57 L. J. Q. B. 7; 36 W. R. 281).

Negligence. — Employers' Liability Act, 1880 (43 & 44 *Vict.*, *c.* 42. — [647] *Volenti non fit Injuria. — "Workmen." — "Plant," "Defect" in Condition of.*

In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff was in the employment of the defendant, who was a wharfinger, and for the purposes of his business the owner of carts and horses. It was the duty of the plaintiff to drive the carts and to load and unload the goods which were carried in them. Among the horses was one of a vicious nature, and unfit to be driven even by a careful driver. The plaintiff objected to drive this horse, and told the foreman of the stable that it was unfit to be driven, to which the foreman replied that the plaintiff must go on driving it, and that if any accident happened his employer would be responsible. The plaintiff continued to drive the horse, and while sitting on his proper place in the cart was kicked by the animal, and his leg was broken.

Held, by Lord ESHER, M. R., LINDLEY, L. J., and LOPES, L. J., sitting as a Divisional Court, that the plaintiff was a "workman" within the definition in sect. 8 of the Act.

Held, by the majority of the Court, Lord ESHER, M. R., and LINDLEY, L. J. (LOPES, L. J., expressing no opinion), that the horse which injured the plaintiff was "plant" used in the business of the defendant, and that the vice in the horse was a "defect" in the condition of such plant, within the meaning of sect. 1 of the Act.

Held, by the majority of the Court, Lord ESHER, M. R., and LINDLEY, L. J. (LOPES, L. J., dissenting), that upon the facts a jury might find the defendant to be liable, for there was evidence of negligence on the part of his foreman, and the circumstances did not conclusively show that the risk was voluntarily incurred by the plaintiff.

By LOPES, L. J., dissenting, that there was no evidence for the jury of the defendant's liability, inasmuch as the facts showed that the plaintiff, with full knowledge of the risk to which he was exposed, had elected to continue in the defendant's employment.

No. 5. — Yarmouth v. France, 19 Q. B. D. 647, 648.

Action under the Employers' Liability Act, 1880 (43 & 44 Vict., c. 42), tried in the City of London Court, without a jury. The facts were as follows: The plaintiff was in the employ of the defendant, a wharfinger and warehouseman in London. He had the care of a horse and trolley, part of his duty being to load the trolley and to unload and deliver goods to the consignees, and to return with the trolley to his employer's premises, and there stable the horse. He had been so engaged for about four years. In [* 648] August, 1886, the defendant bought a new horse, * which was placed under the plaintiff's control by the defendant's stable-foreman, Tomlin. The plaintiff found that the animal was vicious, — a kicker and a jibber, — and altogether dangerous and unfit to be driven; and he repeatedly complained of it to Tomlin, who had the general management and control of the defendant's horses, telling him that he objected to drive so unsafe an animal. Upon these occasions Tomlin's answer was, "Go on; you must keep driving;" adding, "if you meet with an accident, we shall have to stand responsible for that." The plaintiff went on driving the horse until the 12th of November, when, whilst sitting on the fore part of the trolley (the only place provided for the driver's seat), with his legs hanging down, the horse, without (as the plaintiff swore) any provocation, kicked out and broke one of his legs. There was no evidence that the plaintiff had ever complained to the defendant himself, or that the complaints he made to Tomlin had ever been made known to the defendant.

It was objected on the part of the defendant that the evidence disclosed no cause of action under the Employers' Liability Act; that the plaintiff was not a "workman," nor was the horse "plant," within the Act; that the plaintiff had been guilty of contributory negligence; and that, having continued to drive the horse after he became aware of its vicious character, he must be taken to have assented to incur the risk of accident therefrom (citing *Thomas* v. *Quartermaine*, 18 Q. B. D. 685).

The Judge held that the plaintiff was a "workman," and that the horse was "plant" within the Act; but he further held, upon the authority of *Thomas* v. *Quartermaine*, that as the plaintiff continued to drive the horse after he had become aware of its vicious nature, he must be assumed to have assented to take upon himself the risk attending it; and he accordingly gave judgment for the defendant.

The plaintiff appealed, and the argument took place before Lord ESHER, M. R., LINDLEY, L. J., and LOPES, L. J., sitting as a Divisional Court.

1877. July 26. W. E. Hume Williams, for the plaintiff. — First, the plaintiff was a "workman," — a person engaged in manual * labour, — within the definition given in sect. 10 [* 649] of the Employers and Workmen Act, 1875, 38 & 39 Vict., c. 90; secondly, the horse which caused the injury was "plant" within sect. 1, sub-sect. 1, of the Employers' Liability Act, 1880; and, thirdly, that the plaintiff, having called the attention of the defendant's foreman (under whose orders he worked) to the fact that the horse was dangerous and unfit to be driven, had brought himself within sub-sect. 3 of sect. 2, and was not disentitled to recover by reason of his having under the circumstances continued in his employment rather than risk dismissal for disobedience of orders. *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, is distinguishable. There the plaintiff, knowing the dangerous condition of the premises, and making no complaint, might fairly be assumed to have assented to incur the risk incident to his employment. [He cited *Paterson* v. *Wallace*, 1 Macq. 748, and *Clarke* v. *Holmes*, 7 H. & N. 937, 31 L. J. Ex. 356.]

Wood Hill, for the defendant. — *Cook* v. *North Metropolitan Tramways Co.*, 18 Q. B. D. 683, shows that a "driver" is not a workman within the Employers and Workmen Act, 1875, and consequently not entitled to the benefit of the Employers' Liability Act, 1880; secondly, the term "plant" in sect. 1, sub-sect. 1, of the last-mentioned Act is confined to fixtures and other inanimate chattels used in a trade or business. But, even assuming that a horse could be considered to be "plant" the case is governed by *Thomas* v. *Quartermaine*. The plaintiff, if he objected to the risk involved in driving the horse, might have relinquished his employment. His reluctant assent to obey the orders of the foreman did not make him the less a free agent.

[He cited *Woodley* v. *Metropolitan District Ry. Co.*, 2 Ex. D. 384, per COCKBURN, Ch. J.] *Cur. adv. vult.*

1887. Aug. 11. Lord ESHER, M. R. — In this case, the plaintiff was in the employment of the defendant, who was a wharfinger, and for the purposes of his business the owner of carts or trolleys and horses. Amongst these was a horse which was of an ex-

[* 650] traordinarily * vicious nature and wholly unfit, so far as is stated to us, to be driven even by the most careful driver. The plaintiff objected to drive him, and told the foreman of the stable that the horse was unsafe to drive; whereupon the foreman said: "You have to drive him; and if any accident happens, we (meaning the employer) will be responsible." The plaintiff continued to drive the horse, and whilst so doing, sitting on a part of the trolley where it is said to be usual and not improper for the driver to sit, the horse kicked out and broke the plaintiff's leg. The plaintiff thereupon sues the owner of the horse, his employer. The Judge of the City of London Court did that which I believe many County Court Judges have done since the decision of the Court of Appeal in *Thomas* v. *Quartermaine*, 18 Q. B. D. 685. The moment it was proved before him that the plaintiff knew the horse to be vicious, but continued to drive him, the Judge said it was useless to inquire further, for that alone disentitled him to recover, upon an application of what is called the maxim of *volenti non fit injuria*. The Judge acted upon the notion that that was the effect of the decision of the majority of the Court of Appeal in *Thomas* v. *Quartermaine* and as I am given to understand, many County Court Judges have from the time that case was reported supposed that to be the effect of it. We are called upon now to say whether that is the true effect of the decision. My own position in the matter is extremely delicate, because I dissented from the decision of the rest of the Court. I thought, and after mature consideration I have still the strongest conviction, that, if that is really the effect of it, the decision in that case was absolutely wrong; but I hope I have loyalty enough to say, that, if I thought that the decision of the majority of the Judges there did mean what the County Court Judges have supposed it to mean, I should at once bow to it. The question we have now to consider is, whether that was the real meaning of the majority, — whether the judgment was not to a less rigid effect than that, and whether it does not leave open certain questions which must still be tried.

The first question here is, whether this case is within the Em-

[* 651] ployers' Liability Act at all. If it be not, then, according to * the old law, if that Act had not existed I have no doubt this plaintiff could not have recovered. He would have been a servant in the employment of the master, a part of whose machinery for carrying on his business was defective, —

in such a state that it would be a culpable want of care for the safety of his servants on the part of the employer to permit a necessary part of the machinery for carrying on his business to remain. But that was no concern of the jury. At all events it was a thing which was patent, so that any person in the employ could know and see it. The horse here in question was not accidentally or suddenly vicious, but inherently vicious, and known to be so. Under the old law it would have been said: "You" (the servant) "have entered into or continued in this employment where this thing of which you complain is open and palpable, and therefore it is an implied condition of your contract of service that you take upon yourself the risk of accidents therefrom, and consequently you have no remedy against your employer." As between master and servant, that was the way the immunity from liability was always stated. The maxim *volenti non fit injuria* was not wanted as between master and servant. It was only wanted, if at all, where no such relation as that of master and servant existed. That being so, then comes the question, What is to be the effect of the Employers' Liability Act? Does that Act apply to the present case?

Now, the first question must be, whether the plaintiff was a "workman" within the definition given in the Employers and Workmen Act, 1875. I cannot entertain a doubt upon that. He is a man who drives a horse and trolley for a wharfinger. We must take into account what his ordinary duty was. He has to load and unload the trolley. That is manual labour. His duty may be compared to that of a lighterman who conducts a barge or lighter up and down the river. The driving the horse and trolley and the navigating of the lighter form the easiest part of the work: his real labour, that which tests his muscles and his sinews, is, the loading and unloading of the trolley or the lighter.

Then comes the question which is somewhat more difficult, — Can a horse be considered "plant" within sect. 1, sub-sect. 1, of the Employers' Liability Act? It is suggested that nothing that is *animate can be plant; that is, that living creatures can in no sense be considered plant. Why not? In many businesses horses and carts, wagons, or drays seem to me to form the most material part of the plant: they are the materials or instruments which the employer must use for the purpose of carrying on his business, and without which he could not carry it [*652]

on at all. The principal part of the business of a wharfinger is conveying goods from the wharf to the houses or shops or warehouses of the consignees; and for this purpose he must use horses and carts or wagons. They are all necessary for the carrying on of the business. It cannot for a moment be contended that the carts and wagons are not "plant." Can it be said that the horses, without which the carts and wagons would be useless, are not? If, then, this horse was part of the plant, it had a defect, that is, it had the constant habit, whether in a stable or harnessed to a trolley, of kicking whatever was near it, whether a human being or a brick wall. In short, it was a vicious beast that could not be managed or controlled by the most careful driver. The plant, therefore, was defective. There was no evidence that the master (the defendant) knew of the defect. But the foreman, who had the management of the stable and under whose directions the horse was used, knew it; and, after having repeatedly been told that it was unsafe, he said what practically amounted to this: "I care not whether the horse is vicious or not; you have got to drive him; and it matters nothing to you, for, if you meet with an accident, the master will be responsible." The foreman probably had no power to bind his master to that; but it is at all events conclusive to show that he realised the fact that the plant was defective: and nothing was done to remedy the effect. Was this negligence on the part of the foreman for which the master was responsible? If the master had any duty at all to take care of his workmen, then allowing this imperfect plant to continue to be used was surely a breach of that duty. But it is said he may have had that duty, and may have neglected it as to those of his workmen who did not know of or were not affected by the particular defect, but not as to the plaintiff, who, knowing of the defect, still continued to drive the horse, and therefore comes within the maxim [* 653] referred to. I confess that has always * seemed to me to be not a bad way of illustrating the result; but it is, to my mind, a horrible way of stating the duty, to say that a master owes no duty to a servant who knows that there is a defect in machinery, and, having pointed it out to one in authority, goes on using it. It seems cruel and unnatural, and in my view utterly abominable. It may be that the breach of this duty gives no right of action, — that it is what is called a duty of imperfect obligation. Although the employer does not himself know of the defect, if he

has put a person in his place to do what he ought himself to do, he is responsible for the negligence of that person.

Before the Employers' Liability Act, there was this condition in the contract of hiring, that, if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk. That is the doctrine which is embodied in the maxim *volenti non fit injuria*. I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them. I do not doubt that if we put this maxim into plain English, part of it is true; that is to say, that if a thing is put before a workman and he is told, "Now, I do not ask you to do this unless you like; but I will give you more wages if you do. You see what it is. There is a rotten ladder: it is ten to one that it will break under you; but, if you choose to run that risk, I will give you higher wages." If the workman, seeing the risk, elects to incur it, no one could doubt that he would be precluded from recovering damages against his employer for any injury he might sustain from the breaking of the ladder. The same result would follow if the injured person was not a workman for hire. But does the maxim *volenti non fit injuria* go this length, that the mere fact of the workman knowing that a thing is dangerous, and yet using it, is conclusive to show that he voluntarily incurs the risk? The answer to that depends (so far as this Court is concerned) upon whether or not *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, has so decided. I *never entertained a doubt that the [*654] Employers' Liability Act does not prevent the proper application of the maxim *volenti non fit injuria;* and I can only say, as an excuse for the part I took in *Thomas* v. *Quartermaine*, that that doctrine had never been mentioned on the argument of that case, but was for the first time suggested in the judgment of my Brother BOWEN. For myself, I cannot help thinking that, whether or not a workman has voluntarily agreed to incur the risk of defective machinery, is a question of fact; and that, in my opinion, would have made the decision in *Thomas* v. *Quartermaine* wrong; for the majority of the Judges there took upon themselves to decide the question of fact; whereas, in my opinion, they had no right to decide it: the utmost they properly could do was to send it back

to the County Court. They held in that case that the facts were conclusive to show that the plaintiff did voluntarily — in the sense in which they understood the word — accept the risk. This revives the old difficulty as to contributory negligence in cases of railway accidents. *Davey* v. *London and South Western Ry. Co.*, 11 Q. B. D. 213, 12 Q. B. D. 70. I have always protested that it is not for the Judge to say whether or not a plaintiff (or the deceased, in the case of death) has been guilty of contributory negligence: he (the Judge) has no right to hold that the evidence of it is conclusive: it should be left for the decision of the jury.

Now comes the other question, whether the Employers' Liability Act has done away with the old doctrine that a workman impliedly contracts or consents to incur a risk which is a visible and palpable one, and one which, therefore, he is to be taken to know of, or, if you please, which he does know of; or whether it applies only to the risks incident to common employment. For a time I was under the impression that the judgment in *Thomas* v. *Quartermaine* was that the Act only absolved the employer from liability for any injury resulting from the negligence of a fellow-workman. But, upon looking at the matter more carefully, I do not think they meant to say that. It was not necessary for them to say it, because they held that inasmuch as the case was conclusively within the maxim *volenti non fit injuria*, no other question arose in the case.

[* 655] * Now, let us go back to the statute. We must look once more at sect. 1, sub-sect. 1, — where, after the commencement of this Act, personal injury is caused to a workman "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer," the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work." Here, I say, there was such defect and consequent personal injury. Read with this sub-sects. 1 and 3 of sect. 2. Sub-sect. 1 provides that the workman shall not be entitled under this Act to any right of compensation or remedy against the employer under sub-sect. 1 of sect. 1, "unless the defect therein mentioned arose from or had not been remedied owing to the negligence of the employer, or of some person in the service of the employer and intrusted by him with the duty of see-

ing that the ways, works, machinery, or plant were in proper condition;" and sub-sect. 3, that "In any case where the workman knew of the defect or negligence [see sub-sects. 2 and 3 of sect. 1] which caused his injury, and failed within a reasonable time to give or cause to be given information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer already knew of the said defect or negligence," the workman shall in like manner be disentitled to any right of compensation or remedy. Here the defect arose from the negligence of a person in the service of the employer and intrusted by him with the duty of seeing that the plant was in proper condition, and who had notice of the defect, and failed to take steps to avert injury. To my mind it is clear that this was negligence with regard to the safety of his workman for which the employer is responsible. But then, it is said, there may be that which prevents the workman from recovering compensation for an injury sustained by him in consequence of that negligence. The implied contract which I have adverted to under the old law did prevent it. Where there is no duty, it is said, there can be no negligence; or in other words, there may be negligence which is not actionable negligence. It is very difficult to give a
* sensible construction to sub-sect. 3 of sect. 2. The work- [* 656]
man who discovers the defect is to give notice of it or he cannot recover. From that I infer that if he does give notice, and the defect is not remedied, he may recover. When is he to give notice? And what if the defect is not immediately remedied? Is the workman at once to refuse to incur the risk and quit the employ? That is a dilemma to which it never could have been intended to reduce the workman. I cannot help thinking that it is clearly enacted in the 3rd sub-sect. of sect. 2, that, if the workman gives notice of the defect, and the employer fails to remedy it, the workman's claim for compensation is valid, unless he is brought clearly within the maxim *volenti non fit injuria.* Does the judgment of BOWEN, L. J., in *Thomas* v. *Quartermaine,* — for that is the judgment which is adopted by FRY, L. J., — mean to say that the mere knowledge of the workman and his continuing in the employ is fatal to him? If I thought the judgment in *Thomas* v. *Quartermaine* really did mean that, whatever my own private opinion might be, I should unhesitatingly bow to it. I have been trying to construe that judgment fairly. At p. 697 of the report

the learned Judge, after referring to *Winch* v. *Conservators of the Thames*, L. R. 9 C. P. 378, and *Lax* v. *Corporation of Darlington*, 5 Ex. D. 78, says: "The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger which but for a breach of duty on his own part would not exist at all. But where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defence in itself. But, when it is a knowledge under circumstances that leave no inference open but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete." I must confess I do not like [* 657] * that way of putting it. I think there is a duty, though I agree that there is no actionable breach of that duty if the person injured, knowing and appreciating the danger, voluntarily elects to encounter it. In the preceding page the learned Judge says: "It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier, must be a knowledge under such circumstances as lead necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not 'scienti *non fit injuria*,' but 'volenti.' There may be a perception of the existence of the danger without appreciation of the risk; as where the workman is of imperfect intelligence." So that a dull man may recover damages where a man of intelligence may not! Both know of the danger, but one is imperfectly informed as to its nature and extent!

Taking the whole of that judgment together, it seems to me to amount to this, that mere knowledge of the danger will not do: there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim *volenti non fit injuria*. If so, that is a question of fact. Here, the Judge of the Court below has come to the conclusion that the moment it appeared that the plaintiff knew and appreciated the danger, and did not at once quit the defendant's employ, he came within the maxim, and was therefore, upon the

authority of *Thomas* v. *Quartermaine*, disentitled to recover. He did not bring his mind to bear upon the motives which induced the plaintiff to act as he did, — whether he relied upon the foreman's statement that the employer would be responsible in case of an accident, or whether he was influenced by the fear of being thrown out of employ if he disobeyed the foreman's orders. All that was for a jury; and the Judge ought to have applied his mind to it. I see nothing in the decison in *Thomas* v. *Quartermaine* to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.

* For these reasons, I think this case ought to go down [* 658] for a new trial.

LINDLEY, L. J. — The first question is whether the plaintiff is a "workman" within the meaning of the Employers' Liability Act. In my opinion he is. His duty was, not only to drive, but also to load and unload the goods which had to be transported on the trolley which it was his business to drive. This loading and unloading requires bodily labour and exertion, and brings the plaintiff within the statutory definition of a workman. (38 & 39 Vict., c. 90, s. 10.)

The next question is whether the horse which injured the plaintiff is "plant" within the meaning of sect. 1, sub-sect. 1, of the Act. There is no definition of "plant" in the Act; but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business, — not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business. See *Blake* v. *Shaw*, Johns. 732. The word "defect," and the words "way and machinery," which occur in the section, throw some doubt on whether "plant" can include horses; but I do not think the doubt sufficient to require the Court to hold that "plant" cannot include horses, or to hold that "plant" must be confined to inanimate chattels. The defendant in this case has a number of horses for use in his business: they were part of his plant, not only in the ordinary sense of the word, but also, in my opinion, in the sense in which the word "plant" is used in sect. 1, sub-sect. 1, of the Employers' Liability Act.

The next question is whether vice in a horse can be a defect in the condition of plant. Here, again, I think it can. I take defect to include anything which renders the plant, &c., unfit for the use for which it is intended, when used in a reasonable way and with reasonable care; and if a horse intended for drawing trolleys is from any cause unfit for such work, and a person is driving him with reasonable care, and is injured by reason of the unfitness of the horse for his work, such person may be properly said to be injured by reason of a defect in plant.

Having cleared the ground thus far, it is necessary to consider * whether the defect "arose from or had not been discovered or remedied owing to the negligence of the defendant or of some person in his service and intrusted by him with the duty of seeing that the plant was in proper condition." See sect. 2, sub-sect. 1. The defect, *i. e.*, the unfitness of the horse, did not arise from the negligence of the defendant, nor, in truth, of any one; nor is there any evidence that the defendant himself knew of such defect. But his stable-foreman did know of it, and he nevertheless took no steps to prevent the horse from being used for a purpose for which he knew it was unfit; for he told the plaintiff to go on driving it, and said, if anything happened, "we," *i. e.*, his master, "must take the consequence." This, I think, is evidence of negligence on the part of the stable-foreman for which the defendant can properly be held accountable, unless his liability is excluded upon the ground that the plaintiff not only knew of the defect but also took the risk upon himself.

[* 659]

This is the point which presents the greatest difficulty in the case, and which requires careful consideration.

It must be taken as settled by *Thomas* v. *Quartermaine*, 18 Q. B. D. 658, at p. 692, (1) that the words at the end of sect. 1 do no more than "remove such fetters on a workman's right to sue as had been previously held to arise out of the relation of master and workman;" (2) that sect. 2, sub-sect. 3, does not extend the master's liability beyond that imposed by sect. 1, and sect. 2, sub-sect. 1; (3) that, in each of the cases specified in sect. 1, the maxim *volenti non fit injuria* is applicable, and that if a workman, knowing and appreciating the danger and the risk, elects voluntarily to encounter them, he can no more maintain an action founded upon the statute than he can in cases to which the statute has no application. Those principles are in my

opinion perfectly sound; but the proper application of them is by no means always easy. The question whether in any particular case a plaintiff was *volens* or *nolens* is a question of fact, and not of law. BOWEN, L. J., was careful to point out that the mere fact that the plaintiff knew of the danger and yet incurred it is not conclusive. He says (at p. 696): "The maxim, be it observed, is not *scienti non fit injuria*, but *volenti non fit injuria.*" He further points out (at p. 693) that there may be cases
*in which a non-workman who knew of a danger and [*660]
incurred it might nevertheless maintain an action against
the person exposing him to it. The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff (see p. 696).

The learned Judge who tried the present case thought he was bound by *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, to decide it in favour of the defendant. In this respect I differ from him. The principles laid down in that case are no doubt to be accepted and followed; and, if I may say so, I entirely concur in them: but it is not in my opinion correct to regard that case as deciding this. The facts there and the facts here are materially different. In *Thomas* v. *Quartermaine* the facts were all one way: there was evidence that the plaintiff was *volens*, and not merely *sciens;* he was not even directed to do what led to his injury; he did it voluntarily, of his own accord; there was no evidence that the plaintiff was *nolens;* the plant was not defective or dangerous to persons engaged in the ordinary course of their employment; the plaintiff had never complained of it; the injury was the result of a pure accident: and the case might well have been decided on that ground alone. In the present case, the horse was vicious; the plaintiff was constantly complaining of it to the defendant's foreman; the foreman told the plaintiff to go on driving it, and the plaintiff did so rather than run the risk of dismissal: nor is it possible to regard this case as one of accident. Under these circumstances, the question is whether the plaintiff, with knowledge and appreciation of both the risk and the danger, voluntarily took the risk upon himself. The plaintiff was not engaged to drive vicious horses; and the conversation with the foreman, though not evidence against the defendant of any promise by him

to take the risk, is in my opinion admissible to explain the conduct of the plaintiff, and to rebut the inference that he voluntarily took the risk upon himself.

To hold that this case is concluded by *Thomas* v. *Quartermaine* is, I think, to carry that case further than is warranted by the principle on which it was decided: it is to do the very [*661] *thing BOWEN, L. J., so carefully pointed out the danger of doing, viz., to treat *sciens* as equivalent to *volens*. The Act cannot, I think, be properly construed in such a way as to protect masters who knowingly provide defective plant for their workmen, and who seek to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations or submit to use what is known to be unfit for use. *Thomas* v. *Quartermaine* is no authority for any such construction of the statute.

If in any case it can be shown as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But, in the cases mentioned in the Act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot in my opinion be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it because he does not refuse to face it; nor can it in my opinion be held that there is no case to submit to a jury on the question whether he has agreed to incur it or has voluntarily incurred it or not, simply because, though he protested, he went on as before. The facts of each particular case must be ascertained and considered. If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may in my opinion properly find that he had not agreed to take the risk and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred. *A fortiori* might the jury properly come to such a conclusion if it was proved that the workman was told by his superintendent not to mind, and that if any accident happened the employer must make it good. Such an additional circumstance would go far to negative the inference that the complaining workman took the risk upon himself.

I cannot construe the Act as shutting out such considerations

as these; and, as the learned Judge did not think himself at liberty to entertain them, and decided in favour of the defendant * upon what I consider a misconception of [* 662] *Thomas* v. *Quartermaine* I think there ought to be a new trial.

LOPES, L. J. — This is an important and difficult case; and I regret that I am unable to agree with the decision of the rest of the Court.

The action was brought under the Employers' Liability Act, 1880; but the Judge in the Court below has not decided the case on any question arising under that Act, apart from the law as it existed before the passing of that Act; but has given judgment for the defendant on the ground that the plaintiff knew all the facts, was well acquainted with the character of the horse, and voluntarily encountered the risk, and that therefore there was no evidence of negligence arising from any breach of duty which the defendant owed the plaintiff entitling the plaintiff to recover.

It is to be observed that sect. 1, sub-sect. 1, and sect. 2, sub-sect. 1, of the Act, — which must be read together, — effect no change in the law as regards the liability of the employer, except in certain specified cases by identifying a "person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, machinery, or plant are in proper condition," with the employer, and taking him out of the category of fellow-servants, and rendering the employer responsible for his negligence.

There is nothing here to affect the doctrine of *volenti non fit injuria*, if it applies; nor is that doctrine touched by anything in sect. 1, sub-sect. 3: but of that presently. The doctrine of *volenti non fit injuria* is exhaustively dealt with in the cases of *Woodley* v. *Metropolitan Railway Co.*, 2 Ex. D. 384, and *Thomas* v. *Quartermaine*, 18 Q. B. D. 685. Both these cases were in the Court of Appeal; and the judgments of the majority of the Court are not only binding on us sitting as a Divisional Court, but are binding on the Court of Appeal itself. The question, therefore, is, whether the present case is governed by these cases or either of them.

To determine this it is essential to state shortly the facts of the present case: The plaintiff was the driver of a trolley, and at the time of the accident had been about four years in the employ

of the defendant, who was a wharfinger. The accident [* 663] happened in * November, 1886. In the previous August a horse had been purchased by the defendant which was by Tomlin, the defendant's stable-foreman, assigned to the plaintiff to drive in his trolley. The plaintiff's duty was to clean, take care of, and drive the horse in his trolley, and to go with his trolley where ordered by Tomlin, who had superintendence of the horses, and to load and unload as instructed. From the first, the horse was vicious and troublesome, — so vicious and troublesome that it was said to have broken down a brick wall, and generally to be a kicker and a jibber. The plaintiff had constantly complained of this horse to Tomlin, and had been told by him to go on driving the horse, and that his employer would be responsible for anything the horse did. The plaintiff, though daily, as he said, complaining, continued in the defendant's service, driving the horse. On the 12th of November, the plaintiff was driving the horse, sitting on the trolley with his legs hanging down behind the horse. There was no other place on the trolley provided for him where he could sit to drive. The horse kicked violently, broke the plaintiff's leg, and injured him severely. In these circumstances, he brings his action against the defendant. The case came on to be tried in the City of London Court without a jury; and the Judge, considering it undistinguishable from *Thomas* v. *Quartermaine,* and that the doctrine of *volenti non fit injuria* applied, stopped the case, and gave judgment for the defendant.

Is this a case where the employer is absolved from liability because the plaintiff voluntarily exposed himself to the risk, within the principle contained in the cases to which I have referred?

In *Woodley* v. *Metropolitan District Railway Co.* the plaintiff was a workman not in the employment of the defendants, but in that of a contractor employed by them. He had to work in a dark tunnel, rendered dangerous by trains constantly passing. After he had been working for a fortnight, he was injured by a passing train. The jury found that the defendants were negligent, and gave a verdict for the plaintiff for £300. A rule to set aside this verdict was discharged; and, on appeal, it was held by the majority of the Court of Appeal that the plaintiff, having continued in his employment with full knowledge, could not

*make the defendants liable for an injury to which he [*664] voluntarily exposed himself.

The only distinctions that I can find between that case and the present are the following: Woodley was hired to do dangerous work, and knew its dangerous character and attendant risks. Yarmouth was hired to do work not dangerous, viz., amongst other work, to drive horses, which most frequently are manageable. The horse which did the mischief was intrusted to his care after he entered on the employment, and it was then first he learned its propensities; but long after he had been made aware of its vicious nature he continued to drive it. There was no evidence that Woodley ever made any complaint to his employer. Yarmouth, on the contrary, complained, but continued in the employment. Having regard to the judgments of the majority of the Court, I do not think that what I have suggested furnishes any substantial ground for distinction. COCKBURN, Ch. J., says: "With a full knowledge of the danger, he (Woodley) continued in the employment, and had been working in the tunnel for a fortnight when the accident happened. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or, in the alternative, to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. If a man chooses to accept the employment, or to continue in it, with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work, without doing all in their power to obviate the danger, are highly reprehensible, as I certainly think the company were in the present instance. The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which as a matter of *humanity he ought not to be exposed. But, looking at [*665] the matter in a legal point of view, if a man, for the sake

of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury." This judgment, in which the majority of the Court concurred, covers the present case, and, subject to the provisions of the Employers' Liability Act, disposes of the only distinction which I am able to suggest.

The point that Yarmouth was not engaged to drive a dangerous horse is met by the fact that he continued in the service after he knew the horse was dangerous; and his constant complaints may be regarded as evidence of his thorough appreciation of the risk he was incurring and of his willingness to incur that risk rather than relinquish his employment. After complaining he remains in the service for a long time, knowing the risk and knowing that no steps had been taken to prevent its continuance. This is more consistent with his acquiescence in a disregard of his complaints, and with a willingness to incur the risk, than with the contrary view.

In *Griffiths* v. *London and St. Katharine Docks Co.*, 12 Q. B. D. 493; on appeal, 13 Q. B. D. 259, it was held that, in an action brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant, of the danger. The present MASTER OF THE ROLLS (13 Q. B. D., at p. 260) said: "If the danger is one which was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action; and, as it is necessary that these two things should exist in order to form a *primâ facie* cause of action, it is necessary that they should be shown to exist in the statement of claim." And BOWEN, L. J., in the same case says (at p. 261): "Both these allegations are material, because without them there is no cause of action." It is therefore abundantly clear that, as the danger was known to the servant (the plaintiff), he could not recover before the Employers' Liability Act.

It is said, however, that *Woodley* v. *Metropolitan Dis-*
[* 666] *trict Railway* * *Co.*, *Griffiths* v. *London and St. Katharine Docks Co.*, and other cases, do not govern the case before the Court. It is said that the law has been altered in cases to which the Employers' Liability Act applies; and I

No. 5. — Yarmouth v. France, 19 Q. B. D. 666, 667.

assume, for the purposes of this case, that the Employers' Liability Act applies to the case of this plaintiff. It is suggested that there is something in the Employers' Liability Act which qualifies the defence of *volenti non fit injuria*, — a defence which would have been available for the master before the Act. It is said that a workman who can bring himself within one of the five clauses of sect. 1 of the Act is not to be treated as *volens*, although he thoroughly appreciated the risk he was incurring, complained of it, and for a long time continued in the service, preferring the risk to quitting the service; and this, although he would have been treated as *volens* before the Act.

I cannot accede to this view. It is opposed to the case of *Thomas* v. *Quartermaine*. The third sub-section of sect. 2 is relied upon. BOWEN, L. J., in *Thomas* v. *Quartermaine*, deals with that clause. He says (at p. 693): "The object of that clause is to limit the employer's liability, not to enlarge it." I read it thus: Although, under sect. 1, the workman, with certain exceptions, is to be placed in a position as advantageous as, but not better than, the rest of the world who use the master's premises in his business, the workman is not to have this advantage if, knowing of any defect or negligence, he does not inform the employer, as provided in that section. The object of this is to give the employer the opportunity of remedying the mischief. In fact, the workman is not to have the advantages of the Act unless he performs the condition precedent of making the master aware of his cause of complaint. This leaves the employer's defence of *volenti non fit injuria* untouched by the Act, if he can prove it. It is said that such a construction would make the Act nearly a dead letter. But this is not the case. In all cases where the workman is ignorant of the defect or negligence, and is injured by a fellow workman's negligence, "common employment" * is no longer a defence for the [* 667] master in the cases specified in sect. 1, as it would have been before the passing of the Act. It is said that the object of the Act was to exclude in the specified cases the two legal inferences which were before the Act to be drawn against a workman from the mere fact of his employment; viz., first, the inference that he accepted the risk of his fellow servants' negligence; and, secondly, the inference that he accepted the risks which were involved in the execution of his employer's orders, if he in

fact ran them, rather than refuse to do so, and thereby incur the risk of dismissal. I agree that it was the object of the Act to exclude the first inference, and in the specified cases to destroy the defence of "common employment." But what authority there is for the contention that it was intended to extinguish the second inference I fail to be able to discover.

The true construction of the third sub-section of sect. 2, in my opinion, is, that whereas before the Act knowledge would have disentitled the workman to recover, now knowledge in the specified cases is no longer to create a disability, provided the workman gives information; but if, after giving information, he continues in the employment, knowing the danger he is incurring, the same inference arises as heretofore, viz., the inference that he voluntarily runs the risk, and any evidence of negligence arising from any breach of duty on the part of the employer is by the workman's conduct displaced.

I agree with the decision of the majority of the Court in *Thomas* v. *Quartermaine*, and with the construction they place on the Employers' Liability Act. That Act only removes such obstacles to a workman's right to sue as had been held to arise from the relation of master and servant. It leaves the doctrine of *volenti non fit injuria* untouched. Now, as before the Act, to use the words of BOWEN, L. J. (18 Q. B. D., at p. 699), "one man cannot sue another in respect of a danger or risk not unlawful in itself that was visible, apparent, and voluntarily encountered by the injured person." The present case seems a stronger case of voluntary exposure to danger than that of *Thomas* v. *Quartermaine*. In the latter case there is little if any evidence that Thomas knew of or appreciated the danger; but, in the present case, the evidence is strong to show that Yarmouth thoroughly understood [*668] *the danger to which he was exposing himself. With a knowledge of the danger, though complaining, he continues in the service, indicating thereby a willingness to incur the risk rather than give up his employment.

In my opinion, the case of *Thomas* v. *Quartermaine* decides that every defence (except in specified cases the defence of "common employment") is still open to the employer; thus leaving the law, except in the case of "common employment" in the specified instances as it was laid down in *Woodley* v. *Metropolitan District Ry. Co.* It was for the plaintiff here to make out

that the defendant was negligent towards the plaintiff in conducting himself as admittedly he did. I can see no evidence of any negligence arising from any breach of duty which the defendant owed the plaintiff.

The plaintiff deposed that, when he complained, Tomlin told him to go on driving the horse, and that his employer would be responsible. There is no evidence that Tomlin was authorised by the defendant to make this statement. The Judge below disregarded this evidence, and I think rightly: it was not admissible as evidence against the master (the defendant). I am unable to see any substantial difference between the present case and the cases to which I have referred; and I think the Judge was right in giving judgment for the defendant.

I am also of opinion that the Judge was right in holding that the plaintiff was a person to whom the Employers and Workmen Act, 1875, applied, and therefore in that respect entitled to sue under the Employers' Liability Act, 1880. The case of *Cook* v. *North Metropolitan Tramways Co.*, 18 Q. B. D. 683, is an authority for this.

Holding as I do, it is unnecessary to decide whether a horse is "plant" within sect. 1, sub-sect. 1; for, assuming it in the plaintiff's favour, in my opinion he cannot recover. I wish to be understood as not expressing any opinion on this.

The appeal will therefore be allowed. *Appeal allowed.*

ENGLISH NOTES.

One elaboration of the maxim *volenti non fit injuria* culminated in England in the doctrine of a common employment. This doctrine appears to have sprung into existence in 1838 with the decision in *Priestley* v. *Fowler* (1837), 3 M. & W. 1, 7 L. J. Ex. 42; and it has since been developed in England, and by the House of Lords in appeals from Scotland in the following cases: — *Bartonshill Coal Co.* v. *Reid* (H. L. 1858), 3 Macq. 316, 1 Paterson Sc. App. 785; *Hall* v. *Johnson* (Ex. Ch. 1865), 3 H. & C. 589, 34 L. J. Ex. 222, 11 Jur. (N. S.) 180; *Wilson* v. *Merry* (1868), L. R. 1 H. L. Sc. 326, 6 Macph. H. L. 84, 2 Paterson Sc. App. 1597; *Charles* v. *Taylor* (C. A. 1878), 3 C. P. D. 492, 38 L. T. 773, 27 W. R. 32. The rule, however, will probably soon be abolished. It has already met with general condemnation in the House of Commons, and when the avowedly tentative measure, the Workmen's Compensation Act, 1897 (60 & 61 Vict., c. 37), has been extended to include all classes of workmen, this refinement will cease to exist, or have little practical importance.

That knowledge by the servant of the risk of danger is not a conclusive limit of the master's liability is supported by *Smith* v. *Baker* (H. L.), 1891, A. C. 325, 60 L. J. Q. B. 683, 65 L. T. 467. In that case the contrast between knowledge and consent is illustrated by such examples as the danger undertaken by a sailor in mounting the rigging, or by a workman in a calling necessarily injurious to health, and the cases where a workman does not press a complaint for fear of dismissal.

It is to be observed that although the doctrine of a common employment has been modified by the Employers' Liability Act, 1880 (43 & 44 Vict., c. 42), that statute has not varied the effect of the maxim *volenti non fit injuria* so far as it involves the undertaking by the servant of the ordinary risks inherent in his particular employment. *Thomas* v. *Quartermaine* (C. A. 1887), 18 Q. B. D. 685, 56 L. J. Q. B. 340, 57 L. T. 537, 35 W. R. 555. The actual decision in *Thomas* v. *Quartermaine* has been adversely criticised in *Smith* v. *Baker* (*supra*), but the particular view adverted to in this paragraph does not seem to be disapproved.

Under the Employers' Liability Act, 1880, a notice of the injury was a condition precedent to the right of action under the statute. *Keen* v. *Millwall Dock Co.* (C. A. 1882), 8 Q. B. D. 482, 51 L. J. Q. B. 277, 30 W. R. 503. And the notice had to be in writing. *Moyle* v. *Jenkins* (1881), 8 Q. B. D. 116, 51 L. J. Q. B. 112, 46 L. T. 472, 30 W. R. 324; *Carter* v. *Drysdale* (1883), 12 Q. B. D. 91, 32 W. R. 171. The cause of the injury might be stated in general terms: *Stone* v. *Hyde* (1882), 9 Q. B. D. 76, 51 L. J. Q. B. 452, 46 L. T. 421, 30 W. R. 816; *Clarkson* v. *Musgrave* (1882), 9 Q. B. D. 386, 51 L. J. Q. B. 525, 31 W. R. 47. The omission of the date when the injury happened does not necessarily render the notice invalid, unless the defendant has been prejudiced thereby, or the omission was with a view to mislead. *Carter* v. *Drysdale*, *supra*.

Where a defective notice had been given, the High Court refused a *certiorari* to remove proceedings from the County Court, on the ground that the object of the Legislature in passing the Employers' Liability Act, 1880, was to provide less costly and more speedy remedies. *Munday* v. *Thames Ironworks & Shipping Co.* (1882), 10 Q. B. D. 59, 52 L. J. Q. B. 119, 49 L. T. 351.

AMERICAN NOTES.

The general doctrine of complaint and promise or expectation of repair is found in *Patterson* v. *Pittsburgh, &c. R. Co.*, 76 Penn. State, 389; 18 Am. Rep. 412; *Greene* v. *Minneapolis & St. Louis Ry. Co.*, 31 Minnesota, 248; 47 Am. Rep. 785; *Gulf H. & S. A. Ry. Co.* v. *Drew*, 59 Texas, 10; 46 Am. Rep. 261; *Missouri F. Co.* v. *Abend*, 107 Illinois, 44; 47 Am. Rep. 425; *Flynn* v.

Kansas, &c. R. Co., 78 Missouri, 195; 47 Am. Rep. 99; *Ford* v. *Fitchburg R. Co.*, 110 Massachusetts, 240; 14 Am. Rep. 598; *Kroy* v. *Chicago, &c. R. Co.*, 38 Iowa, 357; *Colorado, &c. R. Co.* v. *Ogden*, 3 Colorado, 499; *Buzzell* v. *Manuf. Co.*, 48 Maine, 113; *Hawley* v. *N. Y., &c. R. Co.*, 82 New York, 370. These authorities declare that such promise or expectation does not absolutely absolve the servant from the charge of contributory negligence in continuing in the work, but simply makes it a question of fact for a jury. As was said in *District of Columbia* v. *McElligott*, 117 United States, 633, the District "certainly would not be liable if the danger which the plaintiff apprehended from the beginning was so imminent or manifest as to prevent a reasonably prudent man from risking it upon a promise or assurance by the proper authority that the cause from which the peril arose would be removed." See Beach on Contributory Negligence, sect. 140; Thompson on Negligence, p. 1009; Wood on Master and Servant, sects. 336, 352, 359; *Indianapolis & St. L. Ry. Co.* v. *Watson*, 114 Indiana, 20; 5 Am. St. Rep. 578; *Gulf, &c. Ry. Co.* v. *Donnelly*, 70 Texas, 371; 8 Am. St. Rep. 608; *Stephenson* v. *Duncan*, 73 Wisconsin, 404; 9 Am. St. Rep. 806; *Brownfield* v. *Hughes*, 128 Penn. State, 194; 15 Am. St. Rep. 667; *Roddy* v. *Missouri Pacific Ry. Co.*, 104 Missouri, 234; 24 Am. St. Rep. 333; *Meador* v. *Lake Shore, &c. Ry. Co.*, 138 Indiana, 290; 46 Am. St. Rep. 384; *Cheeney* v. *Ocean S. S. Co.*, 92 Georgia, 726; 44 Am. St. Rep. 113; *Roux* v. *Blodgett & D. L. Co.*, 85 Michigan, 519; 13 Lawyers' Rep. Annotated, 728. A very noticeable recent decision is in *Murch* v. *Thomas Wilson's Sons & Co.*, 168 Massachusetts, 408, where a pilot was provided with a stateroom, but was told that he might warm himself and rest in a small deck-house in which there was a stove not connected with the outer air by any pipe, and burning a patent fuel, and he was told to leave the door open and there would be no danger from the fumes, and he went to sleep there with the door partly open, and it was afterwards closed by a fellow-servant, and the pilot was injured by asphyxiation; the defendant was held not liable, as the risk was assumed; and in *Erdman* v. *Illinois Steel Co.*, 95 Wisconsin, 6; 60 Am. St. Rep. 66, it is held that the rule of complaint and promise does not apply where the risk is so obvious, immediate, and constant that serious bodily injury is likely to occur from a continuance of the work. Citing *Ford* v. *Fitchburg R. Co.*, 110 Massachusetts, 240; 14 Am. Rep. 598; *Hough* v. *Railway Co.*, 100 United States, 214; *Chicago, &c. Co.* v. *Van Dam*, 149 Illinois, 337; *Rothenberger* v. *North W., &c. Co.*, 57 Minnesota, 461; *Indianapolis, &c. R. Co.* v. *Watson*, 114 Indiana, 20; 5 Am. St. Rep. 578.

The American rule on the subject of the servant's knowledge of danger has been thus stated by the present writer (Domestic Relations, p. 131): "If the danger is as well known or as manifest to the servant as to the master, the servant enters or continues in the employment at his own risk. *Baylor* v. *Delaware, &c. R. Co.*, 11 Vroom (New Jersey), 23; 29 Am. Rep. 208 and note, 210; *Ladd* v. *New Bedford R. Co.*, 119 Massachusetts, 412; 20 Am. Rep. 331. But see *St. Louis, &c. R. Co.* v. *Irwin*, 37 Kansas, 701; 1 Am. St. Rep. 266; *Penn. Co.* v. *Sears*, 136 Indiana, 460.

"The cases of unfenced machinery, low railway bridges, and coupling cars are examples.

"If the servant continues in the employment after learning of the incom-

petency of his co-servant, he does so at his own risk. *Davis* v. *Detroit & M. R. Co.*, 20 Michigan, 105; 4 Am. Rep. 364.

"So if he continues in the employment after learning of its danger or of the defectiveness of any of the machinery or appliances. *Greenleaf* v. *Cent. R. Co.*, 29 Iowa, 14; 4 Am. Rep. 181.

"Subject to the master's duty to exercise reasonable care in the selection and retention of co-servants, the master is not liable to the servant for any injury occasioned to him by the negligence or want of skill of a co-servant. *Farwell* v. *B. & W. R. Co.*, 4 Metcalf (Mass.), 49; *Feltham* v. *England*, L. R. 2 Q. B. 33.

"A general exception to the last two rules is where the servant notifies the master of the incompetency or the defectiveness, and the master promises to discharge the incompetent servant or repair the defective machinery or appliances, or the servant has a reasonable expectation that he will do so, if the servant continues in the employment it is a question of fact whether he was negligent in so doing. *Davis* v. *Detroit & M. R. Co.*, 20 Michigan, 105; 4 Am. Rep. 364; *Coombs* v. *New Bedford Cordage Co.*, 102 Massachusetts, 572; 3 Am. Rep. 506; *Clark* v. *Holmes*, 7 Hurl. & N. 937; *Hough* v. *Ry. Co.*, 100 United States, 213. But he must not continue longer than a reasonable time after the unfulfilled promise. *Eureka Co.* v. *Bass*, 81 Alabama, 200; 60 Am. Rep. 152; *Gulf, &c. Ry. Co.* v. *Brantford*, 79 Texas, 619; 23 Am. St. Rep. 377 and cases in note, 387. In *Illinois Steel Co.* v. *Mann*, 170 Illinois, 200, it was held, three Judges dissenting, that such a reasonable time means only such a time as is sufficient to enable the master to remove the defect or make the repairs." See *Erdman* v. *Illinois Steel Co.*, 95 Wisconsin, 6.

If the time for performance of the master's promise to correct the defect has expired, the servant remains at his own risk. *Counsell* v. *Hall*, 145 Massachusetts, 468; *Gulf, &c. R. Co.* v. *Donnelly*, 70 Texas, 371; *District of Columbia* v. *McElligott*, 117 United States, 621; *Atchison, &c. R. Co.* v. *McKee*, 37 Kansas, 592; *Sioux City, &c. R. Co.* v. *Finlayson*, 16 Nebraska, 578; *Thorpe* v. *Missouri P. Ry. Co.*, 89 Missouri, 650; *Marsh* v. *Chickering*, 101 New York, 396; *Crutchfield* v. *R. & I. R. Co.*, 78 North Carolina, 300; *Belair* v. *C. & N. W. R. Co.*, 43 Iowa, 662; *Louisville, &c. R. Co.* v. *Stutts*, 105 Alabama, 368; 53 Am. St. Rep. 127.

A seaman on a voyage is bound to obey the orders of the master at all hazards, and consequently in so doing is not chargeable with contributory negligence where he exposes himself to a manifest risk and danger and receives injury in consequence of the defective condition of the ship's appliances. *Thompson* v. *Herman*, 47 Wisconsin, 602; 32 Am. Rep. 784. So of a locomotive engineer who remains at his post in danger when he might have left it and escaped. *Penn. R. Co.* v. *Roney*, 89 Indiana, 456; 46 Am. Rep. 173; *Cottrill* v. *Chicago, &c. R. Co.*, 47 Wisconsin, 634; 32 Am. Rep. 796; *Dickson* v. *Omaha, &c. R. Co.*, 124 Missouri, 140; 25 Lawyers' Rep. Annotated, 321. But this doctrine is not applicable to a master and the cook of a steam-tug. *Williams* v. *Churchill*, 137 Massachusetts, 243; 50 Am. Rep. 304.

Mr. Wood says (Master and Servant, sect. 397): "Where the statute imposes a duty upon the master, a neglect to comply therewith is negligence *per se*, and for injuries resulting therefrom he is liable, unless the servant can be

fairly treated as having assumed the risk." *Cayzer* v. *Taylor*, 10 Gray (Mass.), 274 (omission of safety plug upon steam-engine). "But a servant is not excused from the charge of contributory negligence in working in the face of a manifest and avoidable risk or danger simply because the fault of the master grows out of the omission of a statutory duty. The ultimate question is as to the servant's knowledge of the risk and his continuance in the service without protest."

The general American rule, founded on *Priestly* v. *Fowler*, 3 M. & W. 1, and *Feltham* v. *England*, L. R. 2 Q. B. 33, is that subject to the master's duty to use reasonable care in selecting and retaining his servants, each servant takes upon himself the risk of injury arising wholly from the carelessness or incompetence or wantonness of his fellow-servants. The leading case on this subject is *Farwell* v. *Boston, &c. R. Co.*, 4 Metcalf (Mass.), 49; 38 Am. Dec. 339 (SHAW, Ch. J.); although the same doctrine had been a little earlier announced in South Carolina, in the case of *Murray* v. *So. Car. R. Co.*, 1 McMullan, 385; 36 Am. Dec. 268. This doctrine was adopted in *Randall* v. *Baltimore & O. R. Co.*, 109 United States, 484. But although this is the general doctrine, it has not always been unanimously accepted where it prevails, and there are grave and increasing objections to it in many quarters.

A practical relaxation of this rule has been made in more recent days by construction of the phrase "fellow-servants." Most Courts still hold to the definition given in the leading case of *Laning* v. *N. Y. Cent. R. Co.*, 49 New York, 521; 10 Am. Rep. 417: "A master is not liable to those in his employ for injuries resulting from the negligence, carelessness, or misconduct of a fellow-servant engaged in the same general business. Nor is the liability of the master enlarged where the servant who has sustained an injury is of a grade of the service inferior to that of the servant or agent whose negligence, carelessness, or misconduct has caused the injury, if the services of each, in his particular labor, are directed to the same general end. And though the inferior in grade is subject to the direction or control of the superior whose act or omission has caused the injury, the rule is the same. Nor is it necessary to exempt the master from liability, that the sufferer and the one who causes the injury should be at the time engaged in the same particular work. If they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes, the master is not liable."

The same principle is found in *Chicago & Alton R. Co.* v. *Murphy*, 53 Illinois, 336; 5 Am. Rep. 48; *Lawlor* v. *Androscoggin R. Co.*, 62 Maine, 463; 16 Am. Rep. 492. The test is commonly held to be subjection to the same general control, coupled with an engagement in the same common pursuit. If there is a natural connection between the different classes of service, such as necessarily brings the servants into contact with each other in the prosecution of their work, they are co-servants, however dissimilar their occupations may be. Thus a railway brakeman and a train despatcher, a railway fireman and a telegraph operator and the conductor, and a fireman and a locomotive engineer, have been held co-servants. *Robertson* v. *Terre Haute, &c. R. Co.*, 78 Indiana, 77; 41 Am. Rep. 552; *Slater* v. *Jewett*, 85 New York, 61; 39 Am.

Rep. 627; *Tierney* v. *Minneapolis, &c. R. Co.*, 33 Minnesota, 311; 53 Am. Rep. 35; *Darrigan* v. *N. Y., &c. R. Co.*, 52 Connecticut, 285; 52 Am. Rep. 590; *Chicago, &c. R. Co.* v. *Ross*, 112 United States, 377; *Railroad Co.* v. *Baugh*, 149 United States, 368. And that the master is not liable even if the negligence is that of a foreman or superintendent, is held in *Malone* v. *Hathaway*, 64 New York, 5; 21 Am. Rep. 573; *Brothers* v. *Carter*, 52 Missouri, 373; 14 Am. Rep. 424; *Peterson* v. *Whitebreast Mining Co.*, 50 Iowa, 673; 32 Am. Rep. 143, and many other cases, following *Wigmore* v. *Jay*, 5 Ex. 354; *Wilson* v. *Merry*, L. R. 1 Sc. App. 326.

In a considerable number of jurisdictions it is held that the rule is inapplicable where the one servant's duties are entirely distinct and dissimilar from and independent of the other, and especially where the one is subject to the control of the other, whose carelessness effects the injury. *Hankins* v. *N. Y., &c. R. Co.*, 142 New York, 416 (train despatcher and brakeman); *Little Rock, &c. R. Co.* v. *Barry*, 58 Arkansas, 198; 25 Lawyers' Rep. Annotated, 386 (with an elaborate note); *Taylor* v. *Georgia M. Co.*, 99 Georgia, 512; 59 Am. St. Rep. 239 (engineer and brakeman); *Chicago, &c. R. Co.* v. *Moranda*, 93 Illinois, 302; 34 Am. Rep. 168 (track repairer and fireman); *Moon's Adm'r* v. *Richmond, &c. Co.*, 78 Virginia, 745; 49 Am. Rep. 401; *Chicago, &c. Ry. Co.* v. *Swanson*, 16 Nebraska, 254; 49 Am. Rep. 718; *Calvo* v. *Charlotte, &c. R. Co.*, 23 South Carolina, 526; 55 Am. Rep. 28; *Kirk* v. *Atlanta, &c. R. Co.*, 94 North Carolina, 625; 55 Am. Rep. 621; *Madden's Adm'r* v. *Chesapeake, &c. Ry. Co.*, 28 West Virginia, 610; 57 Am. Rep. 695; *Little Miami R. Co.* v. *Stevens*, 20 Ohio, 415; *St. Louis, &c. Ry. Co.* v. *Weaver*, 35 Kansas, 412; 57 Am. Rep. 176. So a "chain-gang boss" is not a fellow-servant of a chain-gang prisoner, and the employer of the "boss" is responsible for wrongful and negligent acts of the latter by which a prisoner is deprived of his life. *Boswell* v. *Barnhart*, 96 Georgia, 521. So a conductor of a railway train is not a fellow-servant with the train hands. *Chicago, &c. R. Co.* v. *Ross*, 112 United States, 377. In this case Mr. Justice FIELD observed, after a review of the leading English cases: "But notwithstanding the number and weight of such decisions, there are in this country many adjudications of Courts of great learning, restricting the exemption to cases where the fellow-servants are engaged in the same department, and act under the same immediate direction; and holding that within the reason and principles of the doctrine, only such servants can be considered as engaged in the same common employment." "There is in our judgment a clear distinction to be made, in their relation to the common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence." But to mark how far from unanimity and how unsettled the judicial mind in this country is upon this subject, it should be noted that in this very authoritative case four Justices dissented.

In the rather recent case of *Anderson* v. *Bennett*, 16 Oregon, 515; 8 Am. St. Rep. 311, the Court said, after citing the *Farwell* case: "The latter has been usually regarded as the leading case in which the doctrine of fellow-

servants was first clearly enunciated, and its principles ingrafted into our law. The rule as there stated by the eminent Judge who delivered the opinion is to the effect that all servants of the same master whose labors tend to the accomplishment of the same general purpose, and engaged in a common employment, are fellow-servants, irrespective of their grade or rank. The rule thus declared was generally accepted by the Courts of the country as a correct exposition of the law, and it has been approved and adopted by the highest Court in England. Within the principle of that rule, all servants, no matter what position they occupied toward each other, or how different and separated the departments of duty in which they were employed, whether operating a mine or factory or railway, were deemed to be fellow-servants."

"But in the progress of society since the decision in *Farwell* v. *Boston & W. R. Co.*, *supra*, such has been the increase in the number and magnitude of the business operations of the country, the great army of servants required to be employed to perform their work, and the necessity of placing over them, and in charge of these vast operations, other servants to direct and control their labor, that there has been wrought in the judicial mind the conviction that the general application of that rule in such cases had often worked manifest injustice and hardship. So that the latter current of judicial decision, and it may be added of legislative action, indicates a marked departure from that rule, and a disposition to so limit and restrict it as shall make the master answerable for his just share of responsibility to his servant for injuries sustained in his employment. And although it may be said that the weight of adjudged cases is, that the relative grade or rank of the servant does not alter the relation of fellow-servants, yet this principle has not always commanded universal recognition, but it has been criticised and denied and a contrary view asserted by the Courts of several of the States, and at least materially limited if not recognized and adopted by the Supreme Court of the United States."

A very excellent review of the leading cases may be found in *Parker* v. *Hannibal, &c. R. Co.*, 109 Missouri, 362; 18 Lawyers' Rep. Annotated, 802, where opinions were written by five Judges, and three Judges dissented from the conclusion of the majority. One of the Judges observed: "The liability being admitted in case a third person is injured, but denied in case a servant is injured by another servant, the denial in the later case must stand on some peculiar relation between master and servant. This peculiar relation cannot be simply the fact that the servants are in a position where one may be injured by the negligence of another, for third persons often occupy the same position, as where they become passengers. The real and only point of distinction, it seems to us, arises out of the fact that the servants are so associated and related in the performance of their work that they can observe and influence each other's conduct, and report any delinquency to a correcting power. To say a clerk engaged in an office making out pay rolls for a railroad company is a fellow-servant, within the rule of exemption, with those engaged in operating trains, is out of all reason. Guided by the real reason of the rule, it seems to us it should be applied, and applied only, in those cases where the servant injured and the one inflicting the injuries are so as-

sociated and related in their work that they can observe and have an influence over each other's conduct, and can report delinquencies to a common correcting power or head. In short, they should be fellow-servants in fact, and not simply in dialectic theory. If in separate and distinct departments, so that the circumstances just stated do not and cannot exist, then they are not fellow-servants within any just or fair meaning of the rule. This conclusion, though not in strict accord with the majority of the adjudged cases, is, it is believed, within the true and only reason for the rule, and has the support of many cases, some of which go much further than has been indicated."

To the aforesaid general rule on this point there are two well-recognized exceptions arising out of delegation of the master's authority. *First*, where the delegation is necessary, as in the case of corporations, which can act only by agents of different grades. There the corporation is liable for negligence or want of proper care in respect to such acts and duties as it is required to discharge and perform as master or principal, without regard to the rank or title of the agent intrusted with the performance. As to such acts the agent occupies the place of the corporation, and the latter is deemed present, and consequently liable for the manner of performance. *Laning* v. *New York Cent. R. Co.*, 49 New York, 529; 10 Am. Rep. 417; *Chicago, &c. R. Co.* v. *Ross*, 112 United States, 377; *Flike* v. *Boston & A. R. Co.*, 53 New York, 549; 13 Am. Rep. 545 (train despatcher sending out train with insufficient number of brakemen); *Dobbin* v. *Richmond, &c. R. Co.*, 81 North Carolina, 446; 31 Am. Rep. 512 (engineer and conductor of a gravel train, with authority to employ and discharge hands); *Harper* v. *Ind. & St. Louis R. Co.*, 47 Missouri, 567; 4 Am. Rep. 353; *Mullan* v. *Phila., &c. S. Co.*, 78 Penn. State, 25; 21 Am. Rep. 2; *Louisville, &c. R. Co.* v. *Collins*, 2 Duvall (Kentucky), 114. *Second*, where the delegation is voluntary and includes the power of employing and discharging servants, and thus the agent becomes *alter ego*. *Corcoran* v. *Holbrook*, 59 New York, 517; 17 Am. Rep. 369; *Mitchell* v. *Robinson*, 80 Indiana, 281; 41 Am. Rep. 812. But *contra*, *Holden* v. *Fitchburg R. Co.*, 129 Massachusetts, 268; 37 Am. Rep. 343; *Lehigh Valley Coal Co.* v. *Jones*, 86 Penn. State, 434.

The foregoing rules and exceptions have been generally followed down to the present time, with a marked tendency to construction in favor of the servant. A considerable number of States have enacted statutes enlarging the liability of the master, and the Courts are inclined, in the absence of statute, to relax the rigor of the doctrine of the old English and American cases first above mentioned. Further elaboration would take us too far afield from the doctrine of the principal Rule in question, but the student can find the subject very intelligently and elaborately treated in the recent text-books, Buswell on Law of Personal Injury, and Bailey on Personal Injuries relating to Master and Servant. The enormous mass of adjudication on this particular point may be appreciated from the fact that the latter author employs some two hundred and fifty pages in a condensation and classification by States of the principal decisions.

At an early day the curious vagary was entertained in Massachusetts (*Albro* v. *Jaquith*, 4 Gray, 99) that a servant was not liable for his careless-

ness toward a fellow-servant, but was never held elsewhere, and has been corrected. *Osborne* v. *Morgan*, 130 Massachusetts, 102; 39 Am. Rep. 437; *Hinds* v. *Overacker*, 66 Indiana, 547; 32 Am. Rep. 114; *Steinhauser* v. *Spraul*, 127 Missouri, 541; 27 Lawyers' Rep. Annotated, 441; *Atkins* v. *Field*, 89 Maine, 281; *Griffiths* v. *Wolfram*, 22 Minnesota, 185.

The exemption of the master from liability for injury to one servant by the act of another was wholly denied in Wisconsin at an early day, in *Chamberlain* v. *Milwaukee, &c. R. Co.*, 11 Wisconsin, 238, on sentimental grounds, citing the Scotch case of *Dixon* v. *Rankin*, as commending itself "to every right-thinking mind and every right-feeling heart;" but this was overruled a little later. This seems to be the sole decision holding the master liable at all hazards, but it is noteworthy that in New York Chief Judge CHURCH and RAPALLO, J., were in opposition to the universally prevalent doctrine. (They dissented in *Malone* v. *Hathaway*, *supra*.)

SECTION III. — *Rights after Determination of Service.*

No. 6. — CARROL *v.* BIRD.

(N. P. 1800.)

No. 7. — GARDENER *v.* SLADE.

(Q. B. 1849.)

RULE.

AN action will not lie against a master for not giving a servant a character.

The answer of a master to inquiries concerning the character of his former servant is a privileged communication.

A statement volunteered by a former master correcting statements in a character previously given is also a privileged communication.

Carrol v. Bird.

3 Esp. 201, 202 (6 R. R. 824).

Master and Servant. — Character.

An action will not lie at the suit of the servant against his master for [201] not giving him a character.

This was an action on the case.

The declaration stated, that the plaintiff's wife having been

retained by the defendant as a servant, was dismissed from the said service; that after she was so dismissed, she had applied to a person of the name of Stewart, for the purpose of being retained and hired as a servant; that Mrs. Stewart was ready and willing to have hired and taken her into her service, if the defendant would have given her a character, and such character was [*202] *satisfactory; that it was the duty of the defendant, by law, to have given her such character as she deserved, and then assigned a breach; that the defendant, not regarding such her duty, wholly refused to give her any character whatever, by reason of which the said Mrs. Stewart refused to hire her into her said service.

Plea of not guilty.

Upon the pleadings being opened, Lord KENYON asked the plaintiff's counsel if they had any precedent for this action, or had ever known of such an action being maintained.

Gibbs said he had no case.

Upon which his Lordship added: There was no case; nor could the action be supported by law. By some old statutes, regulations were established respecting the characters of labourers; but that in the case of domestic and menial servants, there was no law to compel the master to give the servant a character; it might be a duty which his feelings might prompt him to perform, but there was no law to enforce the doing of it.

Gibbs and Woodfal for the plaintiff.

Garrow for the defendant.

Gardener v. Slade and Wife.

18 L. J. Q. B. 334–337 (s. c. 13 Q. B. 796; 13 Jur. 826).

[334] *Master and Servant. — Character. — Privileged Communication.*

The plaintiff, a domestic servant, was engaged by A., on a character given by the defendant; a short time afterwards the defendant, having reason to believe that the character was undeserved, wrote to A. a letter containing an allusion to the plaintiff and to her having been deceived. A. accordingly called on the defendant, and made more inquiries about the plaintiff's char- [*335] acter, in answer to which the defendant imputed dishonesty *to the plaintiff. *Held*, that the whole of the communications were privileged, and that no action could be maintained; and that the defendant was bound, on discovering that the character was undeserved, to state that fact to A.; and that he stood in the same position as if the statement had been made by him in answer to questions asked by A. in the first instance.

No. 7. — Gardener v. Slade and Wife, 18 L. J. Q. B. 335.

Case for slander. Plea, not guilty.

At the trial, before WIGHTMAN, J., at the sittings at Westminster after Trinity Term, 1848, it appeared that the plaintiff, in 1847, went into the service of the defendants as cook, and continued there till August following, when she left them and went into the service of a Mr. Malcolmson with a character given by the defendant, Mr. Slade, his wife being then ill. Subsequently, on the 19th of October, Mrs. Slade, in writing to Mrs. Malcolmson to inquire the character of another servant named Pearce, in the service of the latter lady, used these words: "I wish to know whether your servant is economical and manages well and obeys her orders in not allowing the other servants to eat out of meal time nor help themselves. I mention this particularly, having discovered that I have been much imposed on in this way a short time ago." In consequence of this letter, Mrs. Malcolmson called on Mrs. Slade, and during conversation asked her whether the passage in her letter referred to the plaintiff, to which Mrs. Slade answered that it did. Mrs. Malcolmson then said, "Then you do not consider her honest?" to which Mrs. Slade replied, "Honest, certainly not; indeed I should call it very dishonest." These were the words complained of. On the 20th of November Mrs. Slade wrote to Mrs. Malcolmson as follows: —

"DEAR MADAM, — You will see by the enclosed that my husband is threatened with legal proceedings against him by Gardener in consequence of what I said to you in answer to your questions. The observations which I made to you upon the conduct of Gardener while in my service were strictly in answer to questions put by yourself and in strict confidence; and I cannot think, and I do not suppose you will yourself consider, you were justified in repeating them to Gardener. I cannot for one moment imagine that you called on me for the purpose of entrapping me into expressions against Gardener, or for any other purpose save that of conscientiously informing yourself of her conduct while in my family. I, therefore, confidently anticipate that you will not allow yourself to be put in the painful position of witness against my husband. You will remember that I imputed no dishonesty to Gardener, for of that I had no actual knowledge. I stated that the weekly bills were much higher than usual, which I

attributed to her want of management by allowing the servants to eat either what or when they pleased."

Upon these facts it was contended that this was a privileged communication, and that the plaintiff must be nonsuited. The learned Judge reserved leave to move to enter a nonsuit on that ground, and left the case to the jury to say whether Mrs. Slade believed what she told Mrs. Malcolmson to be true, or whether she spoke it with the intention of injuring the plaintiff. If the words were spoken maliciously they were not protected; but if spoken only with the *bonâ fide* intention of letting Mrs. Malcolmson know facts which she ought to know, that the defendants were not liable. The jury gave a verdict for the plaintiff, with 40*s.* damages.

A rule *nisi* to enter a nonsuit or for a new trial, on the ground of misdirection, and also to arrest the judgment, having been granted, —

Petersdorff showed cause.[1] — It is conceded that if Mrs. Slade had given this answer when the questions as to the plaintiff's character were first asked by Mrs. Malcolmson, that it would have been privileged; but the slanderous statement was made after a lapse of two months, and therefore Mrs. Slade acted as a mere volunteer in making it, and the words are not privileged. But it is doubtful whether any mere words can be so strictly of a privileged nature that a Judge is justified in withdrawing them wholly from a jury.

[COLERIDGE, J. — It is for the jury to find the circumstances under which any communication, whether verbal or other-
[* 336] wise, is * made, and then it is for the Judge to say upon the facts found, whether it is privileged or not. But the real point here is, that it is all part of one transaction.]

The defendants must make out that there is no evidence whatever to be laid before the jury; but Mrs. Slade's letter admits that she never knew of any dishonesty in the plaintiff, that therefore was properly left to the jury as evidence from which they might infer malice. *Pattison* v. *Jones*, 8 B. & C. 578, 7 L. J. K. B. 26 (32 R. R. 490); *Fountain* v. *Boodle*, 3 Q. B. 5; *Coxhead* v. *Richards*, 2 C. B. 569, 15 L. J. C. P. 278; *Bennett* v. *Deacon*,

[1] January 27, before Lord DENMAN, Ch. J., PATTESON, J., COLERIDGE, J., and WIGHTMAN, J.

2 C. B. 628, 15 L. J. C. P. 289, *Blackham* v. *Pugh*, 2 C. B. 611, 15 L. J. C. P. 290.

Petersdorff (June 14) was heard against the rule to arrest the judgment, but the Court gave no decision on that ground.

Crowder (Taprell was with him), in support of the rule, cited *Child* v. *Affleck*, 9 B. & C. 403, 7 L. J. K. B. 272 (33 R. R. 216), and was then stopped by the Court.

Lord DENMAN, Ch. J. — The only doubtful part of the case is, that the conversation complained of begins with Mrs. Slade herself. The letter was probably the initiation of the matter, but there is a question asked by Mrs. Malcolmson, and answered by Mrs. Slade, as I think she was at liberty to do. It is admitted that this answer would have been privileged if given in the first instance, and the privilege attaching to answers given to questions of this sort must continue as long as anything remains unknown on the part of the person requiring the knowledge, and which she could not find out before. If a servant gets a good place on a character given by you, but which you afterwards discover to be undeserved, you are bound, in my opinion, to say you have been deceived in what you previously asserted. I think, therefore, that Mrs. Slade was bound to answer the questions put to her on the second occasion, and that the whole of the transaction was privileged. There was, therefore, no evidence, either from the words of the letter, or from those used at the interview, to negative this being a privileged communication, and therefore a nonsuit should be entered.

COLERIDGE, J. — I will only add that there is no evidence of malice here, except what might be inferred from the words themselves. If all that was said and done was perfectly consistent with the duty of the party making the communication, it cannot be imputed that it was said or done maliciously; and I agree with my Lord that it was within the duty of Mrs. Slade to make this statement. If I have given a servant a good character, and I afterwards find that I have been deceived, and that the servant is dishonest, I am bound to make the same communication then as I should have made before if the facts had been known to me. If I answer a question asked of me incorrectly from ignorance, it is my duty as an honest man to set it right directly I have the means of doing so. Here Mr. Slade was ignorant of what was the truth when he gave the plaintiff her character; and when Mrs. Slade

found out that the character given was, as she believed, undeserved, it may be conceded that she threw out the words used for the purpose of being asked the very question which she was asked; and in giving her answer she stands just in the same position as she would have done had she used the same words on the first occasion.

WIGHTMAN, J. — I quite agree. It is a mistake to treat the protection which ought to be given to communications of this kind, as being peculiarly the privilege of the person giving the character, for there are two other classes of persons quite as much interested: parties who receive servants on the faith of characters, and servants themselves, for whose benefit it clearly is that characters should be given with impunity — otherwise it would be very difficult for them to get any character given to them. I quite agree that if a master were capriciously to volunteer a false statement from motives of malice towards the servant, no privilege would exist, because of the express malice. I find, however, no evidence of Mrs. Slade being actuated by any motives of malice. She was bound, if asked by Mrs. Malcolmson, in the first instance, to answer the question put to her. But Mr. Slade was first seen, and gave the character, and after the servant [*337] *had left, Mrs. Slade discovered circumstances from which she infers that the servant was not entitled to the good character she had received. She was not able to prove this in Court, undoubtedly, but still she was bound to tell her belief on the subject. She accordingly writes a letter, and Mrs. Malcolmson comes in consequence, and makes a further inquiry as to the servant's character. It is just the same as if all this had occurred in the first instance; and if it had been so, there could have been no question at all. I think, therefore, that this is a privileged communication, and that there is nothing to take it out of the rule applicable to such communications. *Rule absolute.*

ENGLISH NOTES.

The first principal case has been recognised as correctly stating the law in *Handley* v. *Moffatt* (1872), 7 Ir. R. C. L. 104.

The right of a servant who has obtained a situation on the faith of a written character, to claim that document at the termination of the service, was the subject of extra-judicial observation by Lord ABINGER, C. B., in *Taylor* v. *Rowan* (1835), 1 Car. & P. 70, and of HAWKINS and

CHANNELL, JJ., in *Moult* v. *Halliday*, 1898, 1 Q. B. 125, 67 L. J. Q. B. 451, 77 L. T. 794, 46 W. R. 318. Lord ABINGER expressed the opinion that the master might write upon it that the person was afterwards in his service and dismissed for misbehaviour. In the latter case the opinion is expressed that the master is justified in retaining a written character, at all events where he believes that the character is not deserved. Metropolitan cabmen have a right to have their licenses endorsed by their late employers, the dates of entering and leaving service, as required by the statute, and the employer is liable in damages if he enters anything not authorised by the statute, which may prejudice the cabman. *Norris* v. *Birch*, 1895, 1 Q. B. 639, 64 L. J. M. C. 91, 72 L. T. 491, 43 W. R. 271.

If an action is brought against the master for defamatory statements contained in a letter written in answer to inquiries respecting the character of a servant, the defendant must produce the draft or copy of the letter. Though privileged in the sense that the statements if *bonâ fide* made are not actionable, the communications are not privileged in a question of production of documents in the action. *Webb* v. *East* (C. A. 1880), 5 Ex. D. 108, 49 L. J. Ex. 250, 41 L. T. 715, 28 W. R. 336.

In *Nichol* v. *Martyn* (1799), 2 Esp. 732, 5 R. R. 770, Lord KENYON, Ch. J., ruled at Nisi Prius that a servant, while in his master's service, might solicit the custom of persons in the habit of dealing with his master in a competing business which the servant intended to set up for himself after the determination of his period of service. This ruling has been much criticised, and is perhaps overruled, by a series of decisions of the Court of Appeal. It is clear, at all events, that a servant employed in a business is not entitled to copy lists of customers or collect other materials which come into his possession in the course of that employment, for the purpose of setting up a rival business on the determination of the service. See *Lamb* v. *Evans* (C. A.), 1893, 1 Ch. 218, 62 L. J. Ch. 404, 68 L. T. 131, 41 W. R. 405; *Robb* v. *Green* (C. A.), 1895, 2 Q. B. 315, 64 L. J. Q. B. 593, 73 L. T. 15, 44 W. R. 25; *Lewis* v. *Smellie* (C. A. 1895), 73 L. T. 226.

AMERICAN NOTES.

Carrol v. *Bird* is cited in Browne on Domestic Relations, p. 128, and *Gardener* v. *Slade* in Wood on Master and Servant, sect. 164, Townshend on Slander and Libel, pp. 424, 428. In *Fowles* v. *Bowen*, 30 New York, 20, it was held that if an employer has given a former clerk a general letter of recommendation, but is subsequently led to believe him dishonest, a communication to that effect to the present employer is privileged, the Court observing: "There can be no doubt of his right and duty to make such a

No. 8. — Mitchell v. Crassweller, 22 L. J. C. P. 100, 101. — Rule.

communication if it was true," &c. The like was held in *Dale* v. *Harris*, 109 Massachusetts, 193, of a charge of theft made to police officers. See *Hatch* v. *Lane*, 105 Massachusetts, 394. Where a railroad company "black-lists" a discharged employee, stating that he has been guilty of theft, it is liable in damages if the charge was unfounded. *Obiter*, *Bacon* v. *Mich. Cent. R. Co.*, 55 Michigan, 224; 54 Am. Rep. 372. But *contra*, *Missouri Pac. Ry. Co.* v. *Richmond*, 73 Texas, 568; 15 Am. St. Rep. 794, holding that the communication is privileged in the absence of proof of malice. The Rule is sustained by *Fresh* v. *Cutter*, 73 Maryland, 87; 10 Lawyers' Rep. Annotated, 67, a very good review of English and American authorities.

SECTION IV. — *Respondeat Superior.*

No. 8. — MITCHELL *v.* CRASSWELLER.

(C. P. 1853.)

No. 9. — LIMPUS *v.* LONDON GENERAL OMNIBUS CO.

(EX. CH. 1862.)

RULE.

THE liability of a master for the acts or defaults of his servant is confined to cases in which the matter complained of flows from something incident to the employment for which the servant is hired, or where the servant is acting in furtherance of his master's interest.

Mitchell v. Crassweller.

22 L. J. C. P. 100–104 (s. c. 13 C. B. 237).

[100] *Master and Servant. — Negligent Driving. — Course of Employment.*

It was the duty of the defendants' carman, after having delivered his masters' goods for the day, to return to their house, get the key of the stable, and put up their horse and cart in a mews in an adjoining street. On his return one evening he got the key, but instead of going to the mews, and without the defendants' leave, he drove a fellow-servant in an opposite direction, and on his way back injured the plaintiff by his negligent driving. *Held*, that the defendants were not liable.

[101] The declaration stated that on the 8th of September, 1852, the defendants were possessed of a certain cart and horse, which was being driven by and under the care and direction

of the defendants' servant, and that whilst the plaintiff Dorothy was crossing a street in London called Grafton Street, the defendants, by their servant, so negligently and improperly drove and directed the said cart and horse along the said street, that the said cart and horse ran against and struck the said plaintiff Dorothy with great violence and threw her down, and the wheel of the said cart passed over her, by reason whereof the said last-mentioned plaintiff was very much hurt and injured, and was confined to her bed several weeks, and during that time underwent and still continues to undergo a great deal of pain and suffering; and the plaintiff in right of the said plaintiff Dorothy claims £100.

The second count was similar, excepting that it concluded with a statement of special damage to the plaintiff Richard Mitchell.

Pleas: first, not guilty; secondly, not possessed of the horse and cart. A third plea was added at Nisi Prius by leave of the Judge: that at the time when the injury was sustained by the said Dorothy the said horse and cart were not being used in the employ of the defendants, but were improperly used by the persons driving themselves, for other and different purposes.

The cause was tried, before JERVIS, Ch. J., at the sittings for London, after last Michaelmas Term, when it appeared that the defendants, who were ironmongers in Welbeck Street, kept a cart for the purposes of their business, and that it was the duty of their carman after delivering their goods during the day to return at night to Welbeck Street, and get the keys of the stable from the defendants' house, and put up the horse and cart in a mews five hundred yards distant. Upon the evening in question, after getting the key, he was requested, by the defendants' foreman, to drive him part of his way home, upon which he went to ask his masters' leave, and not being able to find them, said, "that he would chance it;" and accordingly he drove their foreman as far as Euston Square; and as he was coming back he drove over the plaintiff Dorothy, and caused the injury complained of in the declaration. It was objected, at the trial, that the defendants could not, under the first or second plea, show that the carman was not acting at the time of the accident as their servant. The LORD CHIEF JUSTICE being of that opinion permitted the third plea to be added, under the 222nd section of the Common Law Procedure Act, 15 & 16 Vict., c. 76.

The jury, in answer to questions put by his Lordship, found that the accident happened through the carman's negligent driving, and they assessed the damages for the plaintiffs at £40. The verdict was, by the direction of the LORD CHIEF JUSTICE, entered for the defendants, and leave was reserved to the plaintiffs to move to enter it for them for £40, on two grounds: first, that the defence raised by the third plea was not admissible under the original pleadings, and that the Judge had no power to allow the additional plea; secondly, that the defendants were liable for the negligence of their servant.

Shee, Serjt., having obtained a rule *nisi* accordingly,

Byles, Serjt., now showed cause. — The defendants are not liable. The rule to be deduced from the cases upon this subject is, that where the servant is engaged upon his master's business, but performs it negligently, the master is responsible; but where he is not engaged in the master's business his master is not responsible. It is conceded that a mere act of disobedience committed by the servant while executing his master's orders will not relieve the latter from liability; as, for instance, if the servant takes one route, when he was directed to take another, or drives fast, when he was ordered to drive slow, or the like. The distinction is very clearly laid down by PARKE, B., in *Joel* v. *Morrison*, 6 Car. & P. 501: "If the servant was going out of his way, against his master's implied commands, when driving in his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master wil not be liable." That case was recognised [*102] in *Sleath* v. *Wilson*, 9 Car. & P. 607, and in *Lamb* v. *Palk*, 9 Car. & P. 629. In the present case the servant had business to do for his master, but he was not doing it. Suppose he had been employed to drive into the city, and instead of doing so he had driven to York, and remained there a week, and then returned to execute his masters' orders, it cannot be said that the defendants would have been liable for an injury caused by his negligent driving on his way back.

Shee, Serjt., and Garth, in support of the rule. — The principle upon which the defendants' argument proceeds is not denied; the only question is, how it is to be applied to the present case. *Joel* v. *Morrison* is in the plaintiffs' favour, and the facts of *Sleath* v. *Wilson* were precisely similar to the present. The servant

there, instead of driving to Castle Street as he was ordered, drove in a different direction, to deliver a parcel of his own, and as he returned the accident happened. ERSKINE, J., there says: "It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable; and on this ground, that the master has not intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. And in this case I am of opinion that the servant was acting in the course of his employment, and till he had deposited the carriage in the Red Lion Stables in Castle Street, in Leicester Square, the defendant was liable for an injury which might be committed through his negligence." So here, the defendants, having intrusted the carman with their cart, are liable for his negligence until he had completed his duty by depositing the cart in the mews.

[MAULE, J. — The question raised by this declaration is not a question of trust, but whether the defendants, by their servant, negligently drove. The servant started from Welbeck Street, not for the purpose of going to the stable, but of going to another and a different place, not on his masters' business, but on his own.]

The mere going out of his way does not constitute a breach of orders so as to exonerate the defendants. Extreme cases may be put either way. Suppose, instead of going to York, as has been suggested, the carman had only gone a few yards out of his road, can it be said that the defendants would not have been liable for his negligent driving those few yards? The true principle applicable to these cases is, that the master is responsible to the public for employing a negligent servant. *M'Manus* v. *Crickett*, 1 East, 106 (5 R. R. 518). As to the other question, a special plea was necessary. There is a distinct allegation, by way of inducement, in the declaration, that the defendants' horse and cart was being "driven by and under the care of the defendants' servant. This is not put in issue by not guilty, and not being specially traversed, is admitted. *Taverner* v. *Little*, 5 Bing. N. C. 678, 9 L. J. (N.S.) C. P. 59; *Dunford* v. *Trattles*, 12 M. & W. 529, 13 L. J. (N.S.) Ex. 124; *Woolf* v. *Beard*, 8 Car. & P. 373; and *Hart* v. *Crowley*, 12 Ad. & E. 378. It is compulsory on the Judge to exercise the power, whatever it may be, conferred by the 222nd

section of the Common Law Procedure Act. If he must allow pleas to be added at the discretion of the party applying, an order to plead several matters will never be requisite.

[JERVIS, Ch. J. — The Judge will exercise the power, and impose such terms as he thinks just.]

It is submitted that the "defects and errors" mentioned in that section must be confined to causes of action and defences on the record.

[WILLIAMS, J. — The inducement does not state that the cart was under the direction of the defendants' servant at the time of the accident. The defendants may well admit, what the general issue does not deny, that the driver was their servant as stated in that allegation; but not admit that he was their servant whilst the plaintiff was crossing the street, as is subsequently averred.]

Reading the whole declaration together, the driving mentioned in the inducement and in the statement of the grievance must be taken to be contemporaneous.

[* 103] * JERVIS, Ch. J. — I am of opinion that this rule should be discharged. It is not necessary to give any opinion on the question whether I was right in allowing the third plea to be added, or to decide what is meant by "defects and errors" in section 222 of the Common Law Procedure Act. Before giving an opinion, I should wish for further consideration, and also to see a case which I understand has been decided in the Court of Queen's Bench upon the point. My first impression is, that the power conferred upon the Judge by that section is not merely to remedy formal errors in pleadings upon the record, but to allow such amendments to be made as will ultimately bring the real matter at issue between the parties before the jury. It is, however, unnecessary to go into that, because I think that the defence was admissible on the record as it originally stood. The first allegation of the declaration is, "that the defendants were possessed of a certain cart and horse, which was being driven by the defendants' servant," without saying when or under what circumstances, so that any innocent driving would satisfy that allegation. It is, therefore, immaterial and could not be traversed. The time is fixed, though loosely, by a subsequent allegation, which charges the grievance, that "while the plaintiff Dorothy was crossing the street, the defendants, by their servant, negligently drove." That is put in issue by not guilty, and the ques-

tion is raised whether at that time the defendants did, by their servant, negligently drive. This brings me to the substantial question at issue, whether the defendants are liable. Each case must depend upon its own particular circumstances, and no doubt there may be cases in which the master is liable if the servant drives *extra viam*, but I do not think this is one of them. It cannot be denied that, although the servant was on his masters' service up to the time that he arrived first in Welbeck Street, he started from thence on a new journey, and not with the intention of performing his masters' business, but, as it were, upon a frolic of his own; in which case, as said by PARKE, B., in *Joel* v. *Morrison*, his masters would not be liable. If he had started to go to the stables, and had merely deviated from the direct road to them, possibly, the defendants would have been liable for his negligent driving during the deviation. But I think that to make them liable, he must have originally started upon, and have been at the time of the committing the grievance in the course of following, his masters' employment. Here the driver did not start upon his masters' business, and was in no way in the course of following it, but the contrary. I think, therefore, that the defendants are not liable.

MAULE, J. — I am of the same opinion. As to the last point argued, it is clear that the first allegation, that the defendants were possessed of a cart which was being driven by their servant, without saying when, is perfectly immaterial, and therefore not traversable, and that the question put in issue by not guilty is, whether the defendants at the time of the accident were, by their servant, driving. This is not a case in which the servant went a roundabout way to perform his masters' business; it cannot be said that his journey to Euston Square was a mere *détour* from Welbeck Street to the stable, any more than a man ordered to go from Dover to Calais would be said to make a *détour* if he were first to go from Dover to Australia and then return to Dover and go to Calais. The servant here did something contrary to, and inconsistent with, his masters' business; the journey to Euston Square had no connexion with it whatever, and the servant only, not his masters, is liable. The cases are consistent, and reconcilable with this decision; and they only show that the master is liable, if the servant be guilty of negligence whilst on his master's business. Here the servant was not on his masters' business.

CRESSWELL, J. — I am entirely of the same opinion, for the reasons given by my Lord and my Brother MAULE. Evidence to show that the driver was not, at the time of the committing the grievance, the defendants' servant, was clearly admissible under the general issue. I do not say that the LORD CHIEF JUSTICE was wrong in allowing the third plea to be added; but I should wish for further time to consider the matter before deciding what construction is to be put upon the 222nd section. With reference to the main point, the servant was not, at the time of the [* 104] accident, * at all in the course of discharging any employment of his masters. No doubt if a servant does what his master employs him to do in a negligent, improper, or roundabout way, his master is liable. But here the servant was acting, and knew that he was acting, contrary to his trust and to his masters' employment, for he goes to ask his masters' leave, and not being able to find them, he says that "he will chance it."

WILLIAMS, J. — I am of the same opinion; and I should have been very sorry if any authority had been found which compelled us to hold that the servant, on this occasion, was about his masters' employment. As to the other point, if the allegation that the defendants were possessed of a cart, which was being driven by their servant, had pointed to the particular time of the committing the grievance, it would have been traversable, and being matter of inducement would not have been put in issue by not guilty. But as it stands, it is a perfectly immaterial allegation, and not traversable. *Rule discharged.*

Limpus v. London General Omnibus Company.

32 L. J. Ex. 34–42 (s. c. 1 Hurl. & Colt. 526; 9 Jur. (N. S.) 333).

[34] *Master and Servant. — Act done in Course of Employment. — Liability of Master for Servant's Act.*

A servant employed by the defendants to drive their omnibus drew his omnibus across the road, in front of a rival omnibus of the plaintiff, to obstruct the passage of the latter, and in so doing ran against and injured the plaintiff's omnibus. The defendants' servant had express directions from his masters not to obstruct other omnibuses, or to annoy their drivers or conductors. [* 35] * The defendants' servant said that he did it on purpose, and to serve the plaintiff's driver as the latter had served him. On the trial of the action for the injury, the Judge directed the jury that if the defendants' driver, being irritated, acted carelessly, recklessly, wantonly, or improperly, but in the course of his employment, and in doing that which he believed to be for the

No. 9. — Limpus v. London General Omnibus Co., 32 L. J. Ex. 35.

interests of the defendants, then the defendants were responsible for the act of their servant; that the instructions given by the defendants to the driver, not to obstruct other omnibuses, if he did not pursue them, were immaterial as to the question of the masters' liability, but that if the true character of the driver's act was that it was an act of his own, and in order to effect a purpose of his own, then the defendants were not responsible. *Held*, by the Court (*dissentiente* WIGHTMAN, J.), that the direction was proper.

This was a bill of exceptions to the ruling of MARTIN, B.

The declaration stated that the plaintiff and defendants were each possessed of an omnibus, which was being driven by their respective servants along a public highway, and charged that "the defendants, by their servant, so carelessly, negligently, and improperly drove, governed, and directed their said omnibus and horses, that by and through the mere carelessness, negligence, and improper conduct of the defendants, by their said servant, the omnibus of the defendants ran against the horses and omnibus of the plaintiff, and overturned it."

Plea, not guilty.

At the trial, the driver of the plaintiff's omnibus stated, in evidence, that as he was driving from Sloane Street to Kensington he stopped to take up two passengers; that then the defendants' omnibus passed his; that after passing, the defendants' driver eased his pace; that the witness went on at his regular pace and overtook the defendants' omnibus; that there was room on the road then for five or six omnibuses abreast; that when the witness got up to the defendants' omnibus the latter was rather on the off side of the road, but that there was plenty of room to pass; that as the witness was going to pass, the defendants' driver pulled across the road, and one of his hind wheels touched the shoulder of one of witness's horses; that the defendants' driver threw the witness's off horse on to the bank; that the wheels also went up the bank, and the plaintiff's omnibus was upset. On cross-examination, he stated that the defendants' driver pulled his horses towards the witness's horses to prevent his passing.

Other witnesses stated that the defendants' driver pulled across the road for the purpose of preventing the plaintiff's omnibus passing on the off side; and that it was a reckless piece of driving on the part of the defendants' driver.

Some evidence was also given as to something that had taken place between the two drivers on a preceding day.

The defendants' driver, Whitechurch, swore that he passed plaintiff's omnibus as he took up the two passengers; that afterwards the plaintiff's driver put his horses into a gallop to pass defendants' again; that as soon as he got up, he, the defendants' driver, pulled across to keep the plaintiff's omnibus from passing him, to serve him as he, the plaintiff's driver, had served the witness; and that he, the witness, pulled across him on purpose. He stated further, that he was presented with the following regulations by the company, and that every driver was directed to act in accordance therewith: "During the journey he must drive his horses at a steady pace, endeavouring as nearly as possible to work in conformity with the time list, and not on any account to race with or obstruct other omnibuses, or hinder or annoy the driver or conductor thereof in his business, whether that omnibus be one belonging to the company or otherwise."

Another witness for the defendant said that the defendants' driver maliciously and spitefully drove his horses suddenly to the footpath.

MARTIN, B., directed the jury "that where the relation of master and servant existed, the master was responsible for the reckless and improper conduct of the servant in the course of the service, and that if the jury believed that the real truth of the matter was, that the defendants' driver, Whitechurch, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in [* 36] that state of mind acted carelessly, * recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant; that if the act of Whitechurch, the defendants' driver, in driving, as he did, across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was, nevertheless, an act done by him in the course of his service, and to do that which he thought best to suit the interests of his employers, and so to interfere with the trade and business of the plaintiff's omnibus, the defendants were responsible; that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment, and that the instructions given to the said Thomas Whitechurch, and read in evidence to the jury, were immaterial if the said

Thomas Whitechurch did not pursue them, and that what had occurred between the drivers of the plaintiff's and defendants' omnibuses on the day previous to the occurrence complained of was immaterial and irrelevant. But that if the true character of the act of the defendants' servant was that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible."

The defendants' counsel excepted to the direction, and said that the learned Baron misdirected the said jury in telling and directing them as aforesaid, and, further, that the learned Baron ought to have told the jury that if they believed that the defendants' driver wilfully drew across the road as aforesaid, even for the purpose of merely obstructing the plaintiff's omnibus, the defendants were not responsible; and that he ought to have told and directed the jury that for an act wilfully done by the servant of the defendants, against the orders of his employers contained in the said paper or card, even though at the time of doing it he was in the course of driving for his employers, the defendants were not responsible; that the learned Baron ought to have told the jury that there was no evidence to justify them in finding that the driver of the defendants' omnibus, in doing the act complained of, was acting in the course of his employment; and that he ought to have told them that there was no evidence to warrant them in finding for the plaintiff, and ought to have directed them to find their verdict for the defendants. The jury found for the plaintiff, £35 damages.

Mellish, for the plaintiffs in error, the defendants below (June 23, 1862). — This direction is wrong. It is put as an essential part of the direction, whether the defendant's servant was doing what he thought was for the benefit of his master. The question should have been, whether he was doing what he thought best to carry out the orders of his master. The true rule is laid down in *Croft* v. *Alison*, 4 B. & Ald. 590 (23 R. R. 407): "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strike, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment. *Greenwood* v.

Seymour, 7 Hurl. & N. 355, 30 L. J. Ex. 327, is to the same effect. Here it is clear that the defendants' driver wilfully and purposely obstructed the plaintiff's omnibus. That was not an act within the scope of his employment, and was decidedly contrary to the orders given to him by his masters. The masters, therefore, are not liable. Every purpose of the driver is a purpose of his own, except that which his master has ordered him to carry out.

[CROMPTON, J. — Is it not carrying out the masters' purpose to get before the other omnibus, and get the run of the road?]

The driver's business was to drive to Hammersmith.

[BLACKBURN, J. — The object of the defendants was not simply that the driver should drive to Hammersmith, but that he should pick up traffic on the way. Was not that which the driver did a step for the purpose of picking up passengers?]

The driver drove across the plaintiff's omnibus not for the purpose of picking up passengers, but for the purpose of
[* 37] obstructing the other, and, as he says, to serve the * plaintiff's driver as the plaintiff's driver had served him before.

[WILLIAMS, J. — There is a great distinction between the scope of a servant's employment and the particular orders given him by the master. You must admit that if the master gave his servant directions not to get drunk and drive, and he did get drunk and drove, his master would be liable.]

The particular orders point out what was the scope of the servant's employment.

[WIGHTMAN, J. — Would the master have been liable if the servant had thought it best for his master's interest to run against and overturn the other omnibus, and had done so intentionally?]

Lyons v. *Martin*, 8 Ad. & E. 512, 7 L. J. (N. S.) Q. B. 214, shows that he would not, and that a master will not be liable for an act of the servant merely because he does it believing it to be for his master's benefit. In that case PATTESON, J., says, "A master is liable where his servant causes injury by doing a lawful act negligently, but not when he wilfully does an illegal one." Here the defendant's driver wilfully did an illegal act. To render the master liable for such an act, a special authority from the master must be proved, which cannot be done in this case. It was not here put to the jury whether the defendant's driver did the act in "pursuance" of his employment.

No. 9. — Limpus v. London General Omnibus Co., 32 L. J. Ex. 37.

Lush, for the defendant in error, the plaintiff below. — The direction was perfectly right. The test in these cases is, whether the servant in doing what he did lost sight of his character as servant and the duty he had to perform, and did the act not for the master's interest, but for his own purposes. If the defendant's driver had driven wilfully against the other omnibus, the jury could not have found that he did it in the course of his employment for the benefit, or supposed benefit, of his master. The object of the defendants was to get as much traffic as they could upon the road. The omnibus which is first gets the passengers. The evidence shows that the pulling across the road was not for the purpose of striking or injuring the plaintiff's omnibus, but to prevent it passing, and that the defendants' omnibus might keep the lead of the road. The fair meaning of the direction is, that the master would not be liable for an act done by the servant for his own purposes, but that he would be responsible for an act done in pursuance of his employment for the interest of his master in the course of that employment. This is correct in law. A master who intrusts a servant to drive, gives him, in law, a certain discretion as to pace and manner of driving, and though he adds a direct injunction to his servant, for instance, not to drive faster than six miles an hour, he will nevertheless be responsible, if the servant, by driving faster, negligently inflict an injury; for though the servant disobeys the special orders of his master, he is acting in the scope and course of his employment. According to the contention of the defendants, a master is never to be held liable for a wilful illegal act of his servant unless a particular authority be proved. *Lyons* v. *Martin*, which is relied on in support of that proposition, merely decided that trespass would not lie against the master. The case turned on the form of action. It did not decide that an action on the case could not be maintained. In *Greenwood* v. *Seymour* the master was held liable for the wilful illegal act of his servant. He referred to *Kyle* v. *Jeffries*, 3 Macq. 611, as to the form of the exceptions.

Mellish replied. *Cur. adv. vult.*

Their Lordships (June 25) delivered their judgments as follows: —

WIGHTMAN, J. — It appears by the evidence in this case that the defendants were the proprietors of an omnibus plying between

Piccadilly and Kensington, which at the time in question was driven by a coachman in their service; that whilst upon the road in the course of his employment to drive the defendants' omnibus from Piccadilly to Kensington, he wilfully and on purpose, and contrary to the express orders of the defendants, endeavoured to hinder and obstruct the passage along the road of another omnibus belonging to the plaintiff; and that for that purpose he, [* 38] who was ahead of the plaintiff's omnibus * eighty or ninety yards, slackened his pace until the plaintiff's omnibus came up and was about to pass, and that then he purposely pulled across the road in order to prevent and obstruct his progress, and that in so doing he ran against one of the plaintiff's horses with his (the defendants') omnibus, thereby causing considerable damage. The reasons assigned by the defendants' coachman for this wrongful proceeding was, that he pulled across the plaintiff's coachman to keep him from passing, in order to serve him (the plaintiff's coachman) as he had served him (the defendants' coachman). It seems to me clear upon the evidence, that this was only a wilful and unjustifiable act on the part of the defendants' coachman, and not in the lawful prosecution of his master's business. A master is undoubtedly responsible for any damage occasioned by the negligence or carelessness of his servant whilst employed upon his master's business. In the present case it was no part of the defendants' driver's employment to obstruct or hinder the passing of other omnibuses or carriages; on the contrary, he was directed not to do so. The case appears to me to fall within the principle of the decision in the case of *Croft* v. *Alison*, cited on the argument. In that case the Court said that the distinction was this, that "if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strike, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." In the case of *Lyons* v. *Martin*, PATTESON, J., in his judgment says: "*Brucker* v. *Fromont*, 6 T. R. 658 (3 R. R. 303), and other cases where the master has been held liable for the consequences of a lawful act negligently done by his servant, do not apply. Here the act was

utterly unlawful. A master is liable where a servant causes injury by doing a lawful act negligently, but not where he wilfully does an illegal one." There are other cases, some of which were cited upon the argument, to the same effect. In the present case the defendants' coachman wilfully did an illegal act contrary to his master's orders, and quite beyond the scope of his employment. In this view of the case it appears to me that if the evidence of the defendants' coachman was believed as well as that of the other witnesses in the case, the verdict ought to have been for the defendants. The question, however, before us is, whether the direction of the learned Judge to the jury, as it appears upon the bill of exceptions, was right in point of law upon the case as it appears in evidence. I entertain the very highest and most sincere respect for the opinion of my Brother MARTIN, but it does appear to me that the mode in which the questions were put to the jury was such as might mislead them, and induce them to find that verdict, which I cannot but think was wrong. He appears to have told them "that if the act of the defendants' driver in driving, as he did, across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was, nevertheless, an act done by him in the course of his service, and to do that which he thought best to suit the interests of his employers, and so to interfere with the trade and business of the plaintiff's omnibus, the defendants were responsible; and that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment, and that the instructions given to the coachman [not to obstruct another omnibus or hinder or annoy the driver in his business] were immaterial." It certainly appears to me that the wilfully and wrongfully attempting to obstruct the progress of another omnibus contrary to the express directions of the defendants, though done by their coachman whilst employed in their service, cannot be considered an act done by him in the course of his service. It was quite beside the course of the service in which he was employed; and I cannot consider that the express prohibition to the coachman to do what he did was immaterial in considering what was the course of his service in that respect. This was not a case of reckless or careless driving, but a wilfully and wrongfully attempting to obstruct the passage of another omnibus, *and in so doing running [*39] against one of the horses. This cannot, I think, under

the circumstances, be considered as an act done in the course of his service, even though the coachman might think it for his master's interest by such wrongful means to obstruct the business of another omnibus. The defendants' coachman was not employed to obstruct or hinder the plaintiff's omnibus, nor was it in the course of his service, in the proper sense, to do so. Upon the evidence it was certainly his own wrongful and wilful act, for which I think, according to the distinction taken in the cases to which I have referred, the defendants are not responsible. The jury, upon the direction to which I have referred, might well have thought that if the act was done during the time that the defendants' coachman's employment was to drive their omnibus, and he thought it for their benefit to obstruct the other omnibus, the defendants would be liable. This, I think, was wrong, for the reasons I have given; and I am of opinion that there should be a *venire de novo.*

WILLIAMS, J. — I am of opinion that the judgment should be affirmed. If a master employs a servant to drive and manage a carriage, the master is, in my opinion, answerable for any misconduct of the servant in driving or managing it, which can fairly be considered to have resulted from the performance of the functions intrusted to him, and especially if he was acting for his master's benefit, and not for any purpose of furthering his own interest, or for any motive of his own caprice or inclination. I think the summing up of my Brother MARTIN was substantially in accordance with this doctrine, and therefore that there is no foundation for the appeal.

CROMPTON, J. — I must say that my mind has fluctuated very much during the course of the discussion. I at first rather felt inclined to take the view my Brother WIGHTMAN has expressed at length; but my present impression is in favour of that of my Brother WILLIAMS, that this may be taken to be an act done in the course of the management and driving of this omnibus. I do not quite follow my Brother WIGHTMAN'S statement in one respect — a statement for which he has the authority of PATTESON, J., as to its being necessarily a lawful act done by the servant to render the master responsible, because I think the later cases tend to show that it need not be a lawful act; but still my doubt has been whether my Brother WIGHTMAN'S view is not right as to whether this was an act done within the scope of the authority of the

coachman; in other words, whether it was in the course of the management or driving of the omnibus. Now the coachman says that he was driving this omnibus for a proper object, but that he was driving it in an improper way; and I think, on the evidence, it may be fairly taken, that without intending to touch the plaintiff's horses or to drive against them, he did drive so near, for the purpose of crossing them, that that caused the accident. It is not necessary to go so far as to say what would have been the case if the defendants' coachman had used his omnibus entirely to block up and had blocked up the passage, though I am not sure that that act would not have been within the management. It may be that if this had been a question of a rule for a new trial, I should have been very much inclined to agree with my Brother WIGHTMAN. The matter might have been presented in a way which might have brought the exact question more clearly before us, as it is possible that some expressions may have led the jury to a wrong conclusion. But I do not think that that is the question. The question is, whether there is any exception taken, to show that the ruling was wrong in point of law. Throughout his summing up the learned Judge put it to the jury to decide whether the act was done in the course of the service, and for the master's purpose. And that is really the criterion, as I think my Brother WILLIAMS has rightly taken it, whether it was done by the servant in the course of his service and for the master's purposes, and not for his own particular purposes. I cannot say there is anything distinctly and necessarily wrong in the ruling of my Brother MARTIN which is excepted to. Therefore, though with considerable doubt, I think that we ought not to overturn or reverse the judgment of the Court below, founded upon his ruling.

WILLES, J. — I am of opinion that the judgment ought to be affirmed. It appears to me that the direction given by
* my Brother MARTIN at the trial was a direction which is [* 40]
in accordance with principle, and which is sanctioned by authority. It is perfectly well known that there is no remedy whatever against a driver of an omnibus, and therefore it is necessary that for what the driver of an omnibus does in the course of his master's service, the master should answer. There should be some person who is capable of paying damages, and who may be sued by people who are injured by improper driving. It appears

clearly to me that this was (and it was treated by my Brother MARTIN as) a case of improper driving, and not a case in which the servant did anything altogether inconsistent with the discharge of his duty to his master and out of the course of his employment — a fact upon which it appears to me that the case turns. This omnibus of the defendants was driven in before the omnibus of the plaintiff. Now of course one may say that it is no part of the duty of a servant to obstruct another omnibus, and that in this case the servant had distinct orders not to obstruct the other omnibus. I beg to say, in my opinion those instructions were perfectly immaterial. If they were disregarded, the law casts upon the masters the liability for the acts of his servants in the course of his employment, and the law is not so futile as to allow the master, by giving secret instructions to a servant, to set aside his liability. I hold it to be perfectly immaterial that the masters directed the servant not to do the act which he did. As well might it be said that if a master employing a servant told him that he should never break the law, he might thus absolve himself from all liability for any act of the servant, though in the course of the employment. But there is another construction that may be put upon the act of an omnibus-driver in cutting in before another omnibus, and it is this, that he intended to get before it. That clearly was an act in the course of the employment. He was employed not only to drive the omnibus, which alone would be sufficient to uphold this summing up, but also to get as much money for his master as he could, and to do it in rivalry with other omnibuses driving along the road. It is not shown that the act of driving before the other omnibus was inconsistent with the employment, when it is capable of being explained by the desire to get before the other omnibuses in the course of the traffic. I do not speak without authority when I treat that as the proper test, because I take the ordinary case of the master of a vessel, who, it must be assumed, is not instructed to do that which is unlawful, and who receives distinct instructions not to sell the cargo under any circumstances whatever; if the master in the course of his employment does necessarily sell a portion of the cargo under circumstances not altogether inconsistent with the master's employment, the shipowner is liable in damages to the person whose goods have been so sold. It appears to me, therefore, that the summing up is in accordance with the prin-

ciple that the master should be liable for the acts done by the servant in the course of his employment. And it is also consistent with authority. I need do no more than refer to the authority of Lord HOLT, in *Turberville* v. *Stamp*, 1 Ld. Raym. 264, and the authority of Lord WENSLEYDALE in *Huzzey* v. *Field*, 2 Cr., M. & R. 432, 4 L. J. (N. S.) Ex. 239. It is part of the history of the law, that the judgment delivered by Lord ABINGER, and apparently his, was a judgment prepared by Lord WENSLEYDALE: and there, in Cr., M. & R., p. 440, that learned person lays down that the proper question for the jury to determine is, whether what was done was in the course of the employment, and for the benefit of the master. These are the terms in which the learned Judge laid down the law in the present case; and it appears to me, in so laying down the law, he was strictly accurate, as I feel bound to say, because it is the interest of every person who has to deal with servants, and is liable to be injured by them, that he should not be left without remedy by the law being loosely administered. I do not entertain a doubt but that the direction was perfectly correct.

BYLES, J. — I also am of opinion that my Brother MARTIN'S direction in this case was correct. He uses the words "in the course of his employment," which, as my Brother WILLES has pointed out, are expressions directly justified by the decisions. His direction, as I understand it, amounts to * this, [*41] that if a servant acts in the prosecution of his master's business with the intention of benefiting the master, and not to benefit or gratify himself, then the master is responsible, although it were in one sense a wilful act on the part of the servant. Now, it is said that this was contrary to the master's instructions. That might be said in ninety-nine cases out of one hundred, where actions are brought against the master to recover damages for the reckless driving of a servant. It is said that it was an illegal act. So in almost every case of an action against a master for the negligent driving of a servant, an illegal act is imputed to the servant. And that this direction is right seems to me to be proved from another consideration. If we were to hold that this direction was wrong, a change, of course, at Nisi Prius would follow, and the consequence would be that in almost every case a driver would come forward and exaggerate his own negligence or misconduct, he not being worth one farthing, and say, "I did

it wilfully and unnecessarily," and so the master would be absolved. Looking at what is a reasonable direction in the common understanding of the law, as well as what has been held before, I think this direction was perfectly correct.

BLACKBURN, J. — I am also of opinion that the direction excepted to is a sufficient direction to have given to the jury a proper guide in the particular case, which is all that a learned Judge in directing a jury is called upon to do. It is agreed upon by all (I do not think there is any difference of opinion upon that) that a master is responsible for the improper act of his servant, even if it be wilful, reckless, or improper, provided the act is the act of the servant in the scope of his employment, and in executing the matter for which he was engaged at the time. In the present case, the learned Baron, in directing the jury, tells them that, and tells them that perfectly accurately; but that alone would not have guided the jury, or assisted them in determining the case. It was, therefore, right that he should go on to give the jury a sufficient guide for the purpose of enabling them to understand what were the principles which they were to apply, in order to see whether the act was done in the course of the employment of the servant on this particular occasion. It is upon that part of the summing up that Mr. Mellish, in arguing here against the direction, has principally pointed his argument, saying, it gave the jury a wrong guide in the particular case. Now, we must look to what the particular employment was, in order to see what was the meaning that was said to be understood by the jury in reference to the particular act in the particular case before them. The defendants' servant was employed as the driver of an omnibus, and as such the scope of his employment was, not merely to carry the omnibus from one terminus to the other, but to guide it and to stop it, and to use it in every way that would be right and proper, exercising his discretion for the picking up of traffic, and forwarding his master's interests in the trade. During the course of such a drive the driver of the omnibus cut in before another omnibus under circumstances from which the jury might have thought that he did it, not at all to further his master's interests, but for the purpose of wreaking a private spite against the driver of a rival omnibus, so doing an act quite unconnected with his service and employment. The learned Judge, having to tell the jury what was the test by which they would know whether it was

in the service or not, used language that has been criticised in the course of the argument, in which he tells them, and perfectly rightly, that if it was done in the scope of the servant's employment in the course of the service, the defendant would be responsible; and he says, "That if the jury believed that the real truth of the matter was that the defendant's driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted carelessly, recklessly, wantonly, and improperly, but in the course of his service and employment, and doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant." Now it is perfectly correct, what Mr. Mellish said, that it is not by any means universally true, that every act supposed to be done for the interest of the master is done in the course of his employment. A footman might think, and rightly, that it was for the interest of *his master that he should get on the box and [*42] drive the coach; but no one would say that to do so was in the scope of the footman's employment, and that the master was responsible for the wilful act of the footman in taking charge of the horses. But when you take it in relation to such a case as this, where the driver driving an omnibus cuts in before a rival omnibus, I think the test thus given by the learned Judge to the jury was a perfectly sufficient guide to enable them to see whether the particular act was done in the course of the employment. He then goes on to say, if that were so, it was utterly immaterial if the driver did it contrary to instructions given by the master. I believe we are all perfectly agreed that as to that point the direction was quite unimpeachable. He then proceeds at the end of his direction to some questions that might have occurred to the jury, and to point out that if they were of opinion that the true character of the act of the defendants' servant was, that it was an act of his own, that he did this act not in consequence of his desire to further the interests of his employers, but that he did it entirely of his own act, and as master of his own acts, then the defendants, his masters, were not responsible. That meets the case I have already alluded to; if the jury came to the conclusion that he did it, not to further his masters' interests, not in the course of his employment as an omnibus driver, but from private spite, with an object to injure his enemy, who may be

supposed to be the driver of the rival omnibus, that would be out of the course of his employment. This seems to me to cure all possible objections, and to meet the suggestion, that the jury may possibly have been misled by the previous part of the summing up. Under the circumstances, I am of opinion that the direction was sufficiently accurate to guide the jury, and, consequently, that there should be no *venire de novo.*

Judgment affirmed.

ENGLISH NOTES.

It was at one time a matter of importance to consider whether the master should be sued in trespass or case for a tort committed by his servant. *Morley* v. *Gaisford* (1795), 2 H. Bl. 441, 3 R. R. 432; *McManus* v. *Crickett* (1800), 1 East, 106, 5 R. R. 518; *Gregory* v. *Piper* (1829), 9 B. & C. 591, 33 R. R. 268.

The rule must be read subject to the limitation in *Gregory* v. *Piper, supra,* that if the servant is acting in obedience to the express orders of his master, the latter must be held to have contemplated the necessary or obvious consequences of obeying the order. An analogous decision was come to in *Betts* v. *De Vitre* (1868), L. R. 3 Ch. 429, 37 L. J. Ch. 325. There, in defence to an action for infringing a patent, it was contended that the infringement, if any, was contrary to the express orders of the directors of a company; and that the directors were not personally liable. This contention was overruled. Lord CHELMSFORD, L. C., in his judgment observed: "Those who have the control of the working-men are responsible for the acts of their subordinates, and it is not sufficient for them to order that the work shall be so done that no injury shall be occasioned to any third person . . . the defendants were bound to take care that their orders were obeyed; and if there was a violation of them, whether openly or secretly, they are liable for the consequences."

It may be stated as a general proposition that the master is not responsible criminally for the act of his servant. Criminal responsibility depends as a rule on the presence of a *mens rea.* See *Reg.* v. *Tolson* (C. C. R. 1889), 8 R. C. 16, 23 Q. B. D. 168, 58 L. J. M. C. 97. This may be implied from the circumstances. The rule respecting the criminal responsibility of the master seems to rest on this, that if his order may be executed in an innocent and proper manner, he is not liable: but if it may only be executed in such a way as to involve a criminal act, he is liable. *Peachey* v. *Rowland* (1853), 13 C. B. 182, 22 L. J. C. P. 81; *Reg.* v. *Stephens* (1866), L. R. 1 Q. B. 702, 35 L. J. M. C. 251, 14 L. T. 593, 14 W. R. 859. The criminal responsibility of a master for libel is now assimilated to the general law. *Reg.* v. *Hol-*

brook (1878), 4 Q. B. D. 42, 48 L. J. Q. B. 113, 39 L. T. 536, 27 W. R. 313. The case of *Rex* v. *Dixon* (1814), 3 M. & S. 11, 4 Camp. 12, 15 R. R. 381; when attentively perused, will be found not to conflict with this view. That was an indictment at common law for selling bread mixed with alum. There the person who was responsible for the making and the selling of the bread was the defendant's foreman. It is clear from the report of the proceedings at the trial that the question was left to the jury in such a form that one issue presented to them was whether the defendant knew that alum was being used in preparing the bread. The judgment, in effect, was, that if the defendant knew that the alum was being used, then a duty was cast upon him to see that the alum was not introduced in such large quantities as to be injurious to health. The case was followed, as in point, in an information for penalties for breach of the revenue laws. *Attorney-General* v. *Siddon* (1830), 1 Cr. & J. 220, 1 Tyrwh. 41, 35 R. R. 701. There a revenue officer had found some tobacco concealed in a cellar. The servant thereupon stated that he had a permit, but that it was locked up in a desk of which he had not the key. The servant then procured a permit, which did not tally with the facts or the dates. The master was held liable for a penalty attached to the offence of unduly using a permit. In the course of the judgments, the Judges of the Court of Exchequer stated that the proceedings were not criminal, but penal. In *Coleman* v. *Riches* (1855), 16 C. B. 104, 24 L. J. C. P. 125, — where a wharfinger was charged on a receipt fraudulently given by his agent for goods which had not been received, — these two last-mentioned cases were distinguished, and considered to have been decided on the ground that the servant might on the evidence be presumed to have acted within the authority given by the master.

The master is liable civilly for the tortious act of a servant in the course of his employment, although the act amounts to a criminal offence, and the servant has been punished for the crime. *Dyer* v. *Munday* (C. A.) 1895, 1 Q. B. 742, 64 L. J. Q. B. 448, 72 L. T. 448, 43 W. R. 440.

The master has been held liable for the acts of a servant in cases of assault and false imprisonment: *Eastern Counties Railway Co.* v. *Broom* (Ex. Ch. 1851), 6 Ex. 314, 20 L. J. Ex. 196, 15 Jur. 297; and malicious prosecution: *Rayson* v. *South London Tramways Co.* (C. A.), 1893, 2 Q. B. 304, 62 L. J. Q. B. 593, 69 L. T. 491, 42 W. R. 21; also for the use of excessive violence by the servant: *Greenwood* v. *Seymour* (Ex. Ch. 1861), 7 Hurl. & N. 359, 30 L. J. Ex. 327; *Bayley* v. *Manchester, Sheffield, & Lincolnshire Railway Co.* (Ex. Ch. 1873), L. R. 8 C. P. 148, 42 L. J. C. P. 78, 28 L. T. 366. The master has been held liable in an action of trover. *Taff Vale Railway Co.* v. *Giles* (Ex.

Ch. 1853), 2 Ell. & Bl. 822, 23 L. J. Q. B. 43. The servant of a corporation need not be appointed by deed in order to render the corporation liable. *Eastern Counties Railway Co.* v. *Broom, supra.* The cases regarding the liability of masters for the negligence of servants are extremely numerous. The cases of *Morley* v. *Gaisford*, *McManus* v. *Crickett*, *Gregory* v. *Piper*, cited at the commencement of this note, and the second principal case sufficiently illustrate the law on this subject. The registered owner of a hackney carriage in the metropolis is liable for the negligence of the driver to whom he has intrusted the cab, whether the relation between the parties is strictly that of master and servant, or bailor and bailee. *King* v. *London Improved Cab Co.* (C. A. 1889), 23 Q. B. D. 281, 58 L. J. Q. B. 456, 61 L. T. 34, 37 W. R. 737; *Keen* v. *Henry* (C. A.) 1894, 1 Q. B. 292, 63 L. J. Q. B. 211, 69 L. T. 671, 42 W. R. 214.

The owner of land who authorises operations upon it which require precautions to avoid danger to a neighbouring owner, is bound to use such precautions, and is not exonerated by having employed a contractor to do the work. *Hughes* v. *Percival* (H. L. 1883), 8 App. Cas. 443, 52 L. J. Q. B. 719, 49 L. T. 189, 31 W. R. 725; *Black* v. *Christ-church Finance Co.* (P. C.), 1894, A. C. 48, 63 L. J. P. C. 32, 70 L. T. 77.

The liability of a person for the acts of another, who has given his services either to assist the servants or to act as a substitute, have given rise to many questions. A very recent case is *Gwilliam* v. *Twist* (C. A.), 1895, 2 Q. B. 84, 64 L. J. Q. B. 474, 72 L. T. 579, 43 W. R. 566. There the police refused to permit a driver in the defendants' employ to drive an omnibus belonging to the defendants, on the ground that he was not sober. A bystander then volunteered to drive the omnibus back to the yard, and his offer was accepted by the driver and conductor, but no effort was made to communicate with the proprietors. The negligence and want of skill on the part of the volunteer caused injuries to the plaintiff; but the masters were held not liable, as there was no evidence upon which it could be held that any necessity to delegate the duty of driving to a bystander had arisen. In the course of his judgment Lord Esher, M. R., was disposed to limit the principle of agency of necessity to those of the master of a ship, of the acceptor of a bill of exchange for the honour of the drawer, and of salvors. As to whether a person volunteering assistance can hold the master responsible for the negligence of his own servants, the question may depend upon whether that person can or cannot be considered as being, *pro hac vice*, in the service of the master. If he is in the position of a servant, then his right to compensation by common law is gone, as there would be a common employment; if the facts point to a contrary conclusion, the stranger may recover. *Potter* v. *Faulkener* (Ex. Ch. 1861), 1 B. &

S. 800, 31 L. J. Q. B. 30, 5 L. T. 455, 10 W. R. 93; *Holmes* v. *North Eastern Railway Co.* (Ex. Ch. 1871), L. R. 6 Ex. 123, 40 L. J. Ex. 121, 24 L. T. 69; *Wright* v. *London and North Western Railway Co.* (C. A. 1876), 1 Q. B. D. 252, 45 L. J. Q. B. 570, 33 L. T. 830.

Servants have no general authority to pledge the master's credit. *Stubbing* v. *Heintz* (1791), 1 Peake, 66, 3 R. R. 651. Where, however, the master has paid for goods which have been supplied to the servant on credit, he will be liable; as an authority to pledge his credit with the particular tradesman may be inferred. *Summers* v. *Solomon* (1857), 7 Ell. & Bl. 879, 26 L. J. Q. B. 301. Where a person dealing with a servant is entitled to assume that he may treat the servant as the master's agent, the knowledge of the withdrawal of the authority from the servant must be brought home to that person. *Summers* v. *Solomon, supra; Gratland* v. *Freeman* (1800), 3 Esp. 85. The subject of the liability of a master rests upon the principles discussed in *Whitehead* v. *Tuckett* (1812), 2 R. C. 357 (s. c. 15 East, 400, 13 R. R. 509), and in the notes. A railway company has been held liable for medical services rendered to injured passengers at the request of a general manager. *Walker* v. *Great Western Railway Co.* (1867), L. R. 2 Ex. 228, 36 L. J. Ex. 123, 15 W. R. 769. A sub-inspector of railway police has been held entitled to pledge the credit of a railway company for board, lodging, necessaries, and goods supplied to injured persons. *Langan* v. *Great Western Railway Co.* (Ex. Ch. 1873), 30 L. T. 173.

AMERICAN NOTES.

These cases have been much cited in this country, and the doctrine in question has been very greatly considered. The strict reading of the Rule has been considerably departed from by our Courts, and a large degree of relaxation has been indulged. "The course of the employment" has proved an elastic phrase, and so far from meaning strictly that which promotes the objects of the employment, it has been construed to mean anything done while the employment is subsisting and in the general course of action therein, although it may be unnecessary, subversive, wanton, and wilful, or even contrary to express orders, so long as it is not done clearly and exclusively outside and independent of the business and solely to gratify the servant's malice. The American doctrine is well expressed in *Rounds* v. *Delaware, &c. R. Co.*, 64 New York, 129; 21 Am. Rep. 597: "The master who puts a servant in a place of trust or responsibility, or commits to him the management of his business or care of his property, is justly held responsible, when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty and authority and inflicts an unjustifiable injury upon another." The mass of American adjudication on this subject is immense, but in 1890 the present writer essayed to state the sub-

stance of them, and in Browne on Domestic Relations (p. 139) said: "*As to Negligent Acts.* — Although the master would be liable for an injury through the negligence of the driver of his street car to a passenger riding without paying fare, by invitation of the driver (*Wilton* v. *Middlesex R. Co.*, 107 Massachusetts, 108; 9 Am. Rep. 11; *Brennan* v. *Fairhaven & Westville R. Co.*, 45 Connecticut, 284; 29 Am. Rep. 679), because those in charge of the cars are employed to solicit passengers and carry them; yet he would not be liable for an injury to a bystander at a railway station, received while helping the fireman take in water, at his request (*New Orleans, &c. R. Co.* v. *Harrison*, 48 Mississippi, 112; 12 Am. Rep. 356); nor for an injury received by a bystander while uncoupling cars at the conductor's request: (*Flower* v. *Penn. R. Co.*, 69 Penn. State, 210; 8 Am. Rep. 251), because these servants are not authorized to solicit such aid in their duties. (But a *passenger*, assisting the railroad company's servants, at their request, and injured in that service, may recover of the company. *Street Railway Company* v. *Bolton*, 43 Ohio State, 224; 54 Am. Rep. 803; *Eason* v. *Railway Company*, 65 Texas, 577; 57 Am. Rep. 606.)

"If the third person knows the servant's act is contrary to his employment, he is without remedy; as where he rides on a freight train with the conductor's assent, knowing it to be against the master's rules or orders: *Houston & Texas Cent. R. Co.* v. *Moore*, 49 Texas, 31; s. c. 30 Am. Rep. 98; but otherwise, if he were ignorant of the regulations: *Creed* v. *Pennsylvania Railroad Co.*, 86 Penn. State, 139; s. c. 27 Am. Rep. 693. Again: the master is not liable if the servant's act is so manifestly outside his employment as to carry with it presumptive notice of his want of authority, as where a third person was permitted by railway section-hands to ride on a hand-car, and there received injury. *Hoar* v. *Maine Central Railroad Company*, 70 Maine, 65; s. c. 35 Am. Rep. 299. And so in respect to acts of mere passive negligence resulting in injury to property, the master is not liable where the act cannot under any circumstances have been within the employment; as where a carpenter, using the plaintiff's shed for his master's work, accidentally sets it on fire in lighting his pipe. *Woodman* v. *Joiner*, 10 Jurist (N. S.), 852; *Williams* v. *Jones*, 3 Hurlstone & Coltman, 256.

"*As to Wilful Acts.* — The master is not liable for a wrongful, wilful, and unlawful act of his servant toward a third person, although the servant professes to be acting in the master's employment, if the act is entirely independent and outside of, and having no proper connection with, the employment. *McManus* v. *Crickett*, 1 East, 106; *Croft* v. *Alison*, 4 Barn. & Ald. 590. See *Limpus* v. *General Omnibus Company*, 1 Hurlstone & Coltman, 528.

"To illustrate this distinction: Suppose it to be the duty of a servant to unload a locomotive tender by throwing the wood overboard, and in so doing he accidentally or purposely hits and wounds a bystander, the master will be liable. But if this unloading were no part of his duty at the time, and he should purposely throw a stick at and injure a bystander, the master would not be liable. So if a hod-carrier, employed on a third person's house, wilfully bespattered the walls, his master would not be liable: *Garvey* v. *Dung*, 30 Howard's Practice, 315; but if a painter, employed to paint the walls, should

wilfully bespatter them with paint, the master would be liable. So where the crew of a vessel, without the master's knowledge or authority, fired a salute with a cannon on board, and thereby injured a third person, the master was held not liable: *Haack* v. *Fearing*, 4 Abbott's Practice, N. S. (N. Y.), 297; but if they had been instructed to fire the salute, and in so doing had accidentally or purposely inflicted the injury, so long as it was not purely felonious, the master would have been liable. So where a general farm-servant, undertaking to drive out a trespassing cow from his master's field, struck her with a stone and killed her, the master was held liable. *Evans* v. *Davidson*, 53 Maryland, 245; 36 Am. Rep. 400. And so where a toll-gate keeper, not required to collect toll after nine o'clock at night, let the beam of the gate down upon the plaintiff, who was endeavoring to pass after that hour, and injured him, the company was held liable. *Noblesville, &c. Co.* v. *Gause*, 76 Indiana, 142; 40 Am. Rep. 224. So where a ferry pilot took on a boatman, agreeing to put him on his tow in the river without compensation, and diverging from his regular course to do so, collided with a canal-boat and killed a man, the employer was held liable. *Quinn* v. *Power*, 87 N. Y. 535; 41 Am. Rep. 392. So where a railway company had ordered its gate-keepers not to allow passengers to go out unless they surrendered tickets or paid fares, and a passenger having lost his ticket refused to pay his fare, and the gate-keeper caused his arrest by the police, the company was held liable. *Lynch* v. *Metropolitan Elevated Railway Company*, 90 New York, 77; 43 Am. Rep. 141. See *Stewart* v. *Brooklyn Crosstown Railroad Company*, 90 New York, 588; *Mulligan* v. *New York, &c. Ry. Co.*, 129 New York, 506; 26 Am. St. Rep. 539.

"But in respect to public carriers it is held that the master owes the duty of protection of his passengers against even wanton assaults by his servants, entirely disconnected from the employment. As where a railway conductor kissed a female passenger against her will: *Croaker* v. *Chicago, &c. Railway Company*, 36 Wisconsin, 657; 17 Am. Rep. 504; or assaulted a passenger on demanding his ticket: *Goddard* v. *Grand Trunk Ry. Co.*, 57 Maine, 202; 2 Am. Rep. 39; or brakemen unlawfully ejected a passenger by the conductor's order: *Passenger R. Co.* v. *Young*, 21 Ohio State, 518; 8 Am. Rep. 78; or officers of a steamboat assaulted a passenger: *Bryant* v. *Rich*, 106 Massachusetts, 180; 8 Am. Rep. 311; *Sherley* v. *Billings*, 8 Bush (Kentucky), 147; 8 Am. Rep. 451; or an engineman maliciously sounded a locomotive whistle: *Chicago, &c. Ry. Co.* v. *Dickenson*, 63 Illinois, 151; 14 Am. Rep. 114; *Nashville, &c. Ry. Co.* v. *Starnes*, 9 Heiskell (Tennessee), 52; 24 Am. Rep. 296; or a street-car driver threw one off the car platform who had stepped on it to cross the street: *Shea* v. *Sixth Avenue R. Co.*, 62 New York, 180; 20 Am. Rep. 480; or a brakeman kicked a trespasser from the platform of a baggage car in motion: *Rounds* v. *Delaware, &c. R. Co.*, 64 New York, 129; 21 Am. Rep. 597; *Hoffman* v. *New York, &c. R. Co.*, 87 New York, 25; 41 Am. Rep. 337; or a brakeman assaulted a passenger, who, resenting the ejection of his dog from a car, first laid hands on the brakeman: *Hanson* v. *European & N. A. Ry Co.*, 62 Maine, 84; 16 Am. Rep. 404; even for a malicious and criminal assault by the servant on a passenger in carrying out a supposed order of the master: *McKinley* v. *Chicago, &c. Ry. Co.*, 44 Iowa, 314; 24 Am. Rep. 748; or

when a passenger accused a brakeman of having stolen his watch, and the brakeman thereupon struck him: *Chicago, &c. Ry. Co.* v. *Flexman*, 103 Illinois, 546; 42 Am. Rep. 33; or where the brakeman in washing out a car directed a jet of water purposely upon a passenger: *Terre Haute, &c. R. Co.* v. *Jackson*, 81 Indiana, 19. On the other hand it has been held that the employer was not liable where a street-car conductor pushed a passenger off who was about to alight. *Isaacs* v. *Third Avenue R. Co.*, 47 New York, 122; 7 Am. Rep. 418 (substantially overruled by later cases). So where a brakeman put a trespasser off a freight train in motion without orders from the conductor. *Marion* v. *Chicago, &c. Railroad Company*, 59 Iowa, 428. So where a baggagemaster struck with a hatchet a passenger in a quarrel about baggage. *Little Miami Railroad Company* v. *Wetmore*, 19 Ohio State, 110; 2 Am. Rep. 373. So where a railway conductor had a passenger wrongfully arrested for giving him counterfeit money for his fare. *Galveston, &c. R. Co.* v. *Donahoe*, 56 Texas, 162. And so where a railway conductor stopped his train near the plaintiff's house, entered the premises, seized the plaintiff's minor son, and carried him off on the train by force. *Gilliam* v. *Southern, &c. R. Co.*, 70 Alabama, 268. So where a street-car driver followed a passenger and assaulted him. *Central Railway Company* v. *Peacock*, 69 Maryland, 257. And see *Gabrielson* v. *Waydell*, 135 New York, 1; *Mulligan* v. *New York, &c. Ry. Co.*, 129 New York, 506; 26 Am. St. Rep. 539; *Palmeri* v. *Manhattan Ry. Co.*, 133 New York, 261; 28 Am. St. Rep. 632; *Staples* v. *Schmidt*, 18 Rhode Island, 224; *New Orleans & Northeastern R. Co.* v. *Jopes*, 142 United States, 18."

"Even if the third person is a trespasser, the master is liable for any excess of force used by the servant, or any improper execution of his order; as when an intruder was pushed off a train in a violent manner at a dangerous place. *Coleman* v. *N. Y. & N. H. R. Co.*, 106 Massachusetts, 160; *Rounds* v. *Delaware, &c. R. Co.*, 64 New York, 129; 21 Am. Rep. 597; *Carter* v. *Louisville, &c. Ry. Co.*, 98 Indiana, 552; 49 Am. Rep. 780.

"But for the servant's criminally malicious and wilful act the master is not liable (*Frazer* v. *Freeman*, 43 New York, 566; 3 Am. Rep. 740); as for an intentional killing or larceny. *Searle* v. *Parke*, — New Hampshire — ; 34 Atlantic Reporter, 744" (but see *Nieto* v. *Clark*, *infra*).

"So where a railroad conductor shoots a passenger under a belief, reasonably warranted by the passenger's manner, attitude, and conduct, that an immediate assault upon him with a deadly weapon is intended, the company is not liable, although there was no actual danger. *Railroad Co.* v. *Jopes*, 142 United States, 18. But where a station agent shot and killed a passenger in the act of taking out his luggage, on account of abusive language used by the passenger to the agent, the jury finding that the agent was acting in the line of his employment, the company was held liable. *Daniel* v. *Railroad Co.*, 117 North Carolina, 592.

"The test of the master's responsibility is not whether the act was done according to his instructions, but whether it was done in the prosecution of the business that the servant was employed by the master to do. *Cosgrove* v. *Ogden*, 49 New York, 255; 10 Am. Rep. 361; *King* v. *N. Y. Cent., &c. R. Co.*, 66 New York, 181; 23 Am. Rep. 37. As where the superintendent of a lum-

ber yard, in violation of his employer's direction, piled lumber on a sidewalk, where it fell and injured a person, the master was held liable. *Garretzen* v. *Duenckel*, 50 Missouri, 104; 11 Am. Rep. 405.

"In regard to the matter of disobedience, this distinction must be observed: If the servant, in doing a particular act in a particular manner, departs from the appointed mode of performance to inflict a wanton injury on a third person, the master will not be liable. As where the owner of a building instructs his servant to throw the snow from the roof into a vacant adjoining lot, where no one would be endangered, and the servant, disregarding the direction, carelessly throws it into the street and injures a person, the master will be liable; but if the servant intentionally threw it on the passer, the master would not be liable, for he had not engaged the servant to throw snow into the street. *Cosgrove* v. *Ogden*, *supra*.

"If the master vests the servant with any discretion, the master is liable to third persons for the consequences of the servant's abuse or mistake in its exercise. *Limpus* v. *Gen. Omnibus Co.*, 1 H. & C. 526; *Chicago, &c. Ry. Co.* v. *McMahon*, 103 Illinois, 485; 42 Am. Rep. 29 (where a clerk, intrusted with the general duty of getting up evidence for a company when sued, without authority offers a bribe to a hostile witness, evidence of that fact is competent)."

Other cases of master's liability for acts in disobedience of his orders are *Powell* v. *Deveny*, 3 Cushing (Mass.), 300; 50 Am. Dec. 738; *International, &c. Ry. Co.* v. *Anderson*, 82 Texas, 516; 27 Am. St. Rep. 902, and notes; *McMann* v. *Consolidated T. Co.*, 59 New Jersey Law, 481; *McClung* v. *Dearborne*, 134 Penn. State, 396; 19 Am. St. Rep. 708; *Golden* v. *Newbrand*, 52 Iowa, 59; 35 Am. Rep. 257; *New Orleans, &c. R. Co.* v. *Harrison*, 48 Mississippi, 112; 12 Am. Rep. 356; *Louis* v. *Schultz*, 98 Iowa, 341. The United States Supreme Court, in *Phil., &c. R. Co.* v. *Derby*, 14 Howard, 468, say: "Although among the numerous cases on this subject some may be found in which the Courts have made some nice distinctions, which are rather subtile and astute, as to when the servant may be said to be acting in the employ of his master, yet we find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act of causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim *respondeat superior* would in a measure nullify it. A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders is itself an act of negligence, — the *causa causans* of the mischief, — while the proximate cause, or the *ipsa negligentia* which produces it, may truly be said in most cases to be the disobedience of orders by the servants so intrusted. If such disobedience could be set up by a railroad company as a defence, when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to life and limb of the traveller greatly enhanced."

It seems that the New York Court has gone to the extreme verge in *Stewart* v. *Brooklyn, &c. R. Co.*, 90 New York, 588; 43 Am. Rep. 185. Here the driver of a street horse-car was in sole charge, acting also as conductor. A newsboy had intruded, was ordered off and got off, when the driver stopped his car, ran after him, caught him and beat him. The passengers interfered to protect him. On his return he abused the passengers, calling them foul names, and entered the car and committed a cruel assault on the plaintiff. It was held that the defendant was liable, because it had undertaken to carry the plaintiff safely and to treat him respectfully. (The Court cited *Nieto* v. *Clark*, 1 Clifford (U. S. Circ. Ct.), 145, where the owner of a vessel was held for an attempt by one of his seamen to commit a rape on a passenger.) The Court observed that there could be no doubt of the master's liability for an injury arising from mere negligence of the servant, and ask: "Can it be less a breach of the contract that the injury was intentionally inflicted?"

In *Henderson* v. *Dale Coal Co.* (Georgia), 40 Lawyers' Reports Annotated, it was held that an employer of a convict laborer is not liable for his rape.

As to arrest of passengers: In *Central R. Co.* v. *Brewer*, 78 Maryland, 394, 27 Lawyers' Rep. Annotated, 63, it was held that the superintendent of a street-railway company has no implied authority to cause the arrest of a passenger for placing in the fare-box a counterfeit coin in payment of fare, so as to make the company liable for false imprisonment in case of such arrest without proof of precedent authority or subsequent ratification of his act. This was grounded on *Carter* v. *Howe Machine Co.*, 51 Maryland, 290; 34 Am. Rep. 311. The Court cited many English cases, and *Mali* v. *Lord*, 39 New York, 381; 100 Am. Dec. 448; *Brokaw* v. *New Jersey R. & Transp. Co.*, 32 New Jersey Law, 328; 90 Am. Dec. 659; *Vanderbilt* v. *Richmond Turnp. Co.*, 2 New York, 479; 51 Am. Dec. 315. In *Little Rock Traction & Electric Co.* v. *Walker*, Supreme Court of Arkansas (45 S. W. Rep. 57), it was held that a street-car company is not liable for the act of its conductor in prosecuting a passenger for violation of a city ordinance making it a misdemeanor for any person to ride on a street car without paying his fare, in the absence of express authority from the company to the conductor to institute such prosecution. To these may be added *Mulligan* v. *N. Y., &c. R. Co.*, 129 New York, 506; 26 Am. St. Rep. 539; 13 Lawyers' Rep. Annotated, 791 (two Judges dissenting). Somewhat to the contrary: *Palmieri* v. *Manhattan R. Co.*, 133 New York, 261; 28 Am. St. Rep. 632; 16 Lawyers' Rep. Annotated, 136; *Staples* v. *Schmid*, 18 Rhode Island, 224; 19 Lawyers' Rep. Annotated, 824; *Gillingham* v. *Ohio R. Co.*, 35 West Virginia, 588; 29 Am. St. Rep. 827; 14 Lawyers' Rep. Annotated, 798; *Eichengreen* v. *Louisville, &c. R. Co*, — Tennessee, —; 31 Lawyers' Rep. Annotated, 702; not on account of difference in principle, but in circumstances showing authority or ratification.

In *Gabrielson* v. *Waydell*, 135 New York, 1; 31 Am. St. Rep. 793; 17 Lawyers' Rep. Annotated, 228, it was held (three Judges dissenting) that an assault by a captain on a seaman, for refusing to work on account of illness, does not render the owner of the vessel liable. So a railroad company is not liable for an injury to a passenger from a playful scuffle between its employees. *Goodloe* v. *Memphis, &c. R. Co.*, — Alabama, —. A pastor of a church,

instructing a door-keeper to admit only ticket-holders, is liable for excess of force in ejecting an intruder, but not for the door-keeper's procuring of his arrest by the police: *Barabasz* v. *Karat*, — Maryland, —. Nor for the act of a bill-poster in leaving a pile of bills in a road fifteen miles from the bill-boards, whereby a horse was frightened to death: *Smith* v. *Spitz*, 156 Massachusetts, 319. Nor where a motorman jumps off his car and beats one who was obstructing the track with his wagon: *Rudgeair* v. *Reading Traction Co.*, — Penn. —; 36 Atlantic Reporter, 859. Nor where a brakeman pushed a trespasser off a moving train for refusing to give him fifty cents for his own use: *Railroad Co.* v. *Latham*, 72 Mississippi, 32. Nor where a servant invites a boy to ride in the master's cart: *Driscoll* v. *Scanlon*, 165 Massachusetts, 348; 52 Am. St. Rep. 523; or in a railroad dump-car: *Morris* v. *Brown*, 111 New York, 318; 7 Am. St. Rep. 751. Or a railroad employee throws articles from a car, solely to accommodate a friend, and hits another: *Walker* v. *Hannibal & St. J. R. Co.*, 121 Missouri, 575; 42 Am. St. Rep. 547; 24 Lawyers' Rep. Annotated, 363. Or a boy servant invites another boy to ride a colt for fun: *Bowler* v. *O'Connell*, 162 Massachusetts, 319; 44 Am. St. Rep. 359; 27 Lawyers' Rep. Annotated, 173 (citing *Mitchell* v. *Crassweller*). Or a laborer pushes a brick from the top of a wall without authority to touch it: *Mayer* v. *Thompson-H. B. Co.*, 104 Alabama, 611; 28 Lawyers' Rep. Annotated, 433. Or a porter of a sleeping-car threw from a moving train a package of his soiled linen, by arrangement with a third person to take charge of it, and hit and injured the plaintiff: *Walton* v. *N. Y. Cent. R. Co.*, 139 Massachusetts, 556. Or a minor, directed by his father to go shooting crows, went hunting squirrels instead, and therein injured plaintiff: *Winkler* v. *Fisher*, 95 Wisconsin, 355. Nor for damage done by a fire kindled by railroad section-men for the purpose of cooking their meals: *Morier* v. *St. Paul, &c. Ry. Co.*, 31 Minnesota, 351; 47 Am. Rep. 793 (citing the *Mitchell* case). Nor where the master of a ferry-boat took a burning barge in tow: *Aycrigg* v. *N. Y., &c. R. Co.*, 30 New Jersey Law, 460. Nor where a servant employed to keep boys away from public lamps kills a boy by throwing a stone at him: *Kaiser* v. *McLean*, 20 App. Div. (N. Y.) 326.

An express company is liable in damages to one who demands back an excess of payment made by him to it, where the servant curses, abuses, and insults him: *Richberger* v. *Am. Ex. Co.*, 73 Mississippi, 161; 55 Am. St. Rep. 522 (a learned opinion, stating that the old doctrine of *McManus* v. *Crickett*, 1 East, 106, "has long since been repudiated," and speaking of Lord KENYON'S reasoning as "fantastic" in making "a certain mental condition of the servant the test by which to determine whether he was acting about his master's business or not"). A railroad company is liable where its brakeman kicked a boy off the train for refusing to pay fare: *Smith* v. *Louisville & N. R. Co.*, 95 Kentucky, 11; 22 Lawyers' Rep. Annotated, 72. So where the engineman struck and cursed a passenger: *White* v. *Norfolk, &c. R. Co.*, 115 North Carolina, 631; 44 Am. St. Rep. 489. So where the master and crew of a vessel sportively shaved and ducked a passenger, according to custom, on sighting Newfoundland: *Duffie* v. *Matthewson*, 1 City Hall Recorder, 167 (New York). So where a ferry pilot diverged from the usual route to land a friend, and in

so doing collided with another vessel, the master was held liable: *Quinn* v. *Power*, 87 New York, 535; 41 Am. Rep. 392. So where a railway ticket-agent assaulted a passenger in a dispute about change: *Fick* v. *Chicago, &c. Ry. Co.*, 68 Wisconsin, 469; 60 Am. Rep. 878. So where a detective employed by a company to prosecute persons obstructing its track, arrests an innocent person: *Evansville, &c. R. Co.* v. *McKee*, 99 Indiana, 519; 50 Am. Rep. 102. So where a brakeman orders a trespasser to jump off a moving train, and he obeys: *Kansas City, &c. R. Co.* v. *Kelly*, 36 Kansas, 655; 59 Am. Rep. 596; *Carter* v. *Louisville, &c. Ry. Co.*, 98 Indiana, 552; 49 Am. Rep. 780. So where a shipper of freight gets on an engine by direction of the driver to ride to stock-yards: *Lake Shore, &c. R. Co.* v. *Brown*, 123 Illinois, 162; 5 Am. St. Rep. 510. Or where servants on a locomotive engine maliciously sound the whistle to frighten a horse: *Texas, &c. R. Co.* v. *Scoville*, 62 Federal Reporter, 730; 23 U. S. App. 506; 27 Lawyers' Rep. Annotated, 179 (disapproving *McManus* v. *Crickett*).

In *Dean* v. *St. Paul Union Depot*, 41 Minnesota, 360; 5 Laywers' Rep. Annotated, 442, a union depot company was held liable for an assault upon a passenger by a vicious employee of a tenant who had charge of a check-room, and was known to the depot company to be a man of savage and vicious propensities. So where a porter of a palace car, being asked by a passenger if he could get him a sandwich, flew into a passion and violently and wantonly assaulted him: *Pullman Palace Car Co.* v. *Lawrence*, 74 Mississippi, 782. So where a servant employed to deliver milk wilfully adulterated it with the design of injuring his master's business: *Stranahan Brothers Catering Co.* v. *Coit*, 58 Ohio State, 398 (one Judge dissenting), a valuable discussion. (This goes even further than *Stewart* v. *Brooklyn, &c. R. Co.*, *supra*.) So where the driver of an express wagon injured a person while conveying a load of poles for himself (citing the *Mitchell* case): *Mulvehill* v. *Bates*, 31 Minnesota, 364; 47 Am. Rep. 796. So where a servant employed to keep loafers away from a railway station saturated the clothing of one with benzine and set fire to it, for his own amusement, or it was fired by a third person: *Meade* v. *Chicago, &c. R. Co.*, 68 Missouri Appeals, 92. So where a clerk in a shop detained a woman and mistakenly accused her of having stolen an article from the shop: *McDonald* v. *Franchere*, 102 Iowa, 496.

Whether the servant in doing a given act is in the course of his employment or engaged in an undertaking of his own, has been considerably discussed, and generally is a question of fact: *Kimball* v. *Cushman*, 103 Massachusetts, 194; 4 Am. Rep. 528; *Redding* v. *So. Car. R. Co.*, 3 South Carolina, 1; 16 Am. Rep. 681; *Rounds* v. *Delaware, &c. R. Co.*, 64 New York, 129; 21 Am. Rep. 597. Such are always cases dependent on the extent of the deviation: *Ritchie* v. *Waller*, 63 Connecticut, 155; 38 Am. St. Rep. 361 (citing *Mitchell* v. *Crassweller*). An important consideration always is whether the act is in the course of active prosecution of the master's business, or is in the servant's own hours and entirely disconnected from the service of the master.

If the servant acts without reference to his master's service, to effect some independent purpose of his own, the master is not liable. *Stephenson* v. *So. Pac. R. Co.*, 93 California, 558; 27 Am. St. Rep. 223; *Pittsburgh, &c. Ry. Co.*

v. *Shields*, 47 Ohio State, 397; 21 Am. St. Rep. 840; *Stone* v. *Hills*, 45 Connecticut, 44; 29 Am. Rep. 635 (citing *Mitchell* v. *Crassweller*), and notes, 640.

But if the deviation is slight, and is in the master's time, and constitutes only an interruption of the active service, the master is liable. *Quinn* v. *Power*, *supra*; *Ritchie* v. *Waller*, 63 Connecticut, 155; 38 Am. St. Rep. 361; 27 Lawyers' Rep. Annotated, 161.

In *Keep* v. *Walsh*, 17 Appellate Division (N. Y. Sup. Ct.), 104, an action to recover the value of a plate-glass window broken by defendants' employee, while he was returning a hand-car that he had borrowed, without the knowledge of the defendants, for the purpose of moving goods that the latter had directed him to move, an instruction that before the defendants could be held liable for the negligent acts of their servant, those acts must have become known to the defendants and been approved by them during the time he was engaged in the service, and before he attempted to return the truck, was held erroneous. The Court said: "The plaintiffs were entitled to have the jury instructed, that if the plaintiffs were damaged by the negligent act of the servant while he was acting within the general scope of his employment, and if the motive which prompted the act and the purpose sought by it were within the scope of his employment, and in the business of defendants, and not independent or outside of his employment, or disconnected with the master's business, the plaintiffs were entitled to a verdict. *Wellman* v. *Miner*, 19 Misc. Rep. 644 and cases cited; *Burns* v. *Poulson*, L. R. 8 C. P. 563; *Railroad Co.* v. *Randall*, 40 Kansas, 421; *Walker* v. *Johnson*, 28 Minn. 147; *Railroad Co.* v. *Kirk*, 102 Ind. 399; Wharton Neg. (2d ed.) 167. If the jury should find upon all the evidence that the act of the servant was no part of his business, nor within the scope of his employment, nor for the benefit of defendants, nor in furtherance of their interest, then they are not liable. If the servant, in borrowing and returning the truck, was carrying out a separate and independent purpose and motive of his own, and in doing so ceased to be an actor within the scope of his employment and within the range of his master's business, then the defendants are not liable. 'The test of the master's responsibility for the act of his servant is not whether such act was done according to the instructions of the master to the servant, but whether it is done in the prosecution of the business that the servant was employed by the master to do.' *Cosgrove* v. *Ogden*, 49 N. Y. 255."

In *Phelon* v. *Stiles*, 43 Connecticut, 426, the servant, in delivering bran for his master, left several bags by the roadside, his object being to save unnecessary transportation, and to give him time to attend to some private business of his own; but it was held that he was acting in his master's employment, and that the latter was liable for an injury caused by the fright of a horse caused by the bags of bran.

In *Fletcher* v. *Baltimore & P. R. Co.*, 168 United States, 135, the plaintiff was an employee of the defendant, and was injured by a stick of wood thrown from a repair train by another employee. It appeared to have been for a long time the custom of the employees, on the return of the train at evening, to throw off sticks of refuse wood for their own use, at the points nearest their own homes, and it was by one of these that the injury was inflicted. It was

held error to take the case from the jury, and that it should have been left to them to determine whether the defendant knew the custom, and acquiesced, and whether it was so dangerous that injury should have been apprehended, and whether the defendant was negligent in failing to prohibit it. The Court distinguished *Walton* v. *N. Y. C. Sleeping Car Co.*, *Snow* v. *Fitchburg Railroad Co.*, and *Walker* v. *Hannibal & St. J. Railroad Co.*, *supra*. The decision was put on the ground of the sufferance of a dangerous custom.

Mr. Wood cites the *Limpus* case (Master and Servant, sect. 295), observing, "This rule has probably nowhere been better illustrated than in an English case, which has come to be regarded as a leading case upon this question." He also cites *Seymour* v. *Greenwood*, 6 H. & N. 359; 7 id. 356, saying it "is cited with approbation upon this question in all the American courts."

The principal cases are cited in Shearman & Redfield on Negligence, sects. 145, 146, 147, and in Thompson on Negligence, pp. 884, 889, and in Ray on Negligence of Imposed Duties — Passenger Carriers, pp. 333, 335.

SECTION V. — *Relation as regards Third Parties.*

No. 10. — LUMLEY *v.* GYE.

(Q. B. 1853.)

No. 11. — BOWEN *v.* HALL.

(C. A. 1881.)

No. 12. — ALLEN *v.* FLOOD.

(H. L. 1897.)

RULE.

WHERE there is a contract between two persons for exclusive personal service to be rendered by the one to the other, an action lies against a third person (not a party to the contract) who intentionally induces the former party to break his contract so as to cause, as a natural consequence of the breach, loss to the other.

But an inducement to put an end to the relation of master and servant, not involving a breach of a contract for service, and not accompanied by acts of personal violence, or constituting an attack upon property, is not

actionable, even where the party promoting the dissolution of the relation is, according to the express finding of a jury, actuated by malice.

Lumley v. Gye.

2 Ellis & Bl. 216–270 (s. c. 22 L. J. Q. B. 463; 17 Jur. 827).

Bowen v. Hall.

6 Q. B. D. 333–344 (s. c. 50 L. J. Q. B. 305; 44 L. T. 75; 29 W. R. 367).

[These cases will be found reported as Nos. 14 and 15 of "ACTION," 1 R. C. 706, 717.]

Allen (Appellant) v. Flood and Taylor (Respondents).

1898, A. C. 1–181; (s. c. 67 L. J. Q. B. 119).

Action, Cause of. — Maliciously inducing Employer to discharge Servant. — [1] *Lawful Interference with Trade.*

An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.

The respondents were shipwrights employed "for the job" on the repairs to the woodwork of a ship, but were liable to be discharged at any time. Some ironworkers who were employed on the ironwork of the ship objected to the respondents being employed, on the ground that the respondents had previously worked at ironwork on a ship for another firm, the practice of shipwrights working on iron being resisted by the trade union of which the ironworkers were members. The appellant, who was a delegate of the union, was sent for by the ironworkers and informed that they intended to leave off working. The appellant informed the employers that unless the respondents were discharged all the ironworkers would be called out or knock off work (it was doubtful which expression was used); that the employers had no option; that the iron-men were doing their best to put *an end to the practice of shipwrights doing ironwork, and that [*2] wherever the respondents were employed the iron-men would cease work. There was evidence that this was done to punish the respondents for what they had done in the past. The employers, in fear of this threat being carried out, which (as they knew) would have stopped their business, discharged the respondents and refused to employ them again. In the ordinary course the respondents' employment would have continued. The respondents having brought an action against the appellant, the jury found that he had maliciously induced the employers to discharge the respondents and not to engage them, and gave the respondents a verdict for damages.

Held, reversing the decision of the Court of Appeal [1895], 2 Q. B. 21 (Lord HALSBURY, L. C., and Lords ASHBOURNE and MORRIS dissenting), that the appellant had violated no legal right of the respondents, done no unlawful act, and

used no unlawful means, in procuring the respondents' dismissal; that his conduct was therefore not actionable, however malicious or bad his motive might be, and that, notwithstanding the verdict, the appellant was entitled to judgment.

The facts material to this appeal (omitting matters not now in question) were as follows: In April, 1894, about forty boiler-makers, or "iron-men," were employed by the Glengall Iron Company in repairing a ship at the company's Regent Dock in Millwall. They were members of the boiler-makers' society, a trade union, which objected to the employment of shipwrights on ironwork. On April 12 the respondents, Flood and Taylor, who were shipwrights, were engaged by the company in repairing the woodwork of the same ship, but were not doing ironwork. The boiler-makers, on discovering that the respondents had shortly before been employed by another firm (Mills & Knight) on the Thames in doing ironwork on a ship, became much excited and began to talk of leaving their employment. One of them, Elliott, telegraphed for the appellant Allen, the London delegate of the boiler-makers' society. Allen came up on the 13th, and being told by Elliott that the iron-men, or some of them, would leave at dinner-time, replied that if they took the law into their own hands he would use his influence with the council of the society that they should be deprived of all benefit from the society and be fined, and that they must wait and see how things settled. [* 3] Allen then had an interview * with Halkett, the Glengall Company's manager, and Edmonds the foreman, and the result was that the respondents were discharged at the end of the day by Halkett. An action was then brought by the respondents against Allen for maliciously and wrongfully and with intent to injure the plaintiffs procuring and inducing the Glengall Company to break their contract with the plaintiffs and not to enter into new contracts with them, and also maliciously, &c., intimidating and coercing the plaintiffs to break, &c., and also unlawfully and maliciously conspiring with others to do the above acts.

At the trial before KENNEDY, J., and a common jury, Halkett and Edmonds were called for the plaintiffs, and gave their account of the interview with Allen. In substance it was this:[1] Allen told them that he had been sent for because Flood and Taylor were known to have done ironwork in Mills & Knight's yard, and that unless Flood and Taylor were discharged all the members of

[1] Part of the evidence is given verbatim in the judgment of Lord HALSBURY, L. C.

the boiler-makers' society would be "called out" or "knock off" work that day: they could not be sure which expression was used; that Halkett had no option; that the iron-men were doing their best to put an end to the practice of shipwrights doing ironwork, and wherever these men were employed, or other shipwrights who had done ironwork, the boiler-makers would cease work — in every yard on the Thames. Halkett said that if the boiler-makers (about one hundred in all were employed) had been called out it would have stopped the company's business, and that in fear of the threat being carried out he told Edmonds to discharge Flood and Taylor that day, and that if he knew of any shipwrights having worked on ironwork elsewhere, when he was engaging men, for the sake of peace and quietness for themselves he was not to employ them. Allen was called for the defence. His account of the interview is discussed in the judgment of Lord HALSBURY, L. C.

KENNEDY, J., ruled that there was no evidence of conspiracy, or of intimidation or coercion, or of breach of contract, Flood and Taylor having been engaged on the terms that they might be discharged at any time. In the ordinary course *their [*4] employment would have continued till the repairs were finished or the work slackened.

In reply to questions put by KENNEDY, J., the jury found that Allen maliciously induced the Glengall Company (1) to discharge Flood and Taylor from their employment; (2) not to engage them; that each plaintiff had suffered £20 damages; and that the settlement of the dispute was a matter within Allen's discretion. After consideration, KENNEDY, J., entered judgment for the plaintiffs for £40. This decision was affirmed by the Court of Appeal (Lord ESHER, M. R., LOPES and RIGBY, L. JJ.) [1895], 2 Q. B. 21. Against these decisions Allen brought the present appeal. It was argued first before Lord HALSBURY, L. C., and Lords WATSON, HERSCHELL, MACNAGHTEN, MORRIS, SHAND, and DAVEY on December 10, 12, 16, 17, 1895, and again (the following Judges having been summoned to attend, — HAWKINS, MATHEW, CAVE, NORTH, WILLS, GRANTHAM, LAWRANCE, and WRIGHT, JJ.) on March 25, 26, 29, 30, April 1, 2, 1897, before the same noble and learned Lords, with the addition of Lords ASHBOURNE, and JAMES of Hereford.

At the close of the arguments the following question was [11]

propounded to the Judges: Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?

The Judges desired time to consider, and on June 3, 1897, delivered their opinions; each giving their reasons at length. In short, the question was answered in the affirmative by HAWKINS, J., CAVE, J., NORTH, J., WILLS, J., GRANTHAM, J., and LAWRANCE, J.; and in the negative by MATHEW, J., and WRIGHT, J.

On the final consideration (14 Dec., 1897) the opinions of the majority of the Lords who heard the appeal (Lords WATSON, HERSCHELL, MACNAGHTEN, SHAND, DAVEY, and JAMES of Hereford) were given for a reversal of the judgment of the Court of Appeal. A minority (Lord HALSBURY, L. C., Lord ASHBOURNE and Lord MORRIS) were for affirming the judgment. The following are selected as the most fully reasoned opinions on either side.

[67] Lord HALSBURY, L. C. — My Lords, in this case the two plaintiffs sued three persons as defendants for having maliciously and wrongfully, and with intent to injure the plaintiffs, intimidated and coerced the employers, *videlicet*, a certain company called the Glengall Iron Company, to break contracts, and not to enter into contracts with them, whereby the plaintiffs had suffered damage.

I have compendiously stated the cause of action, as I conceive it to be, in order to discuss by itself the main and important principle which is at stake in the determination of this appeal; but I shall return to the question of the pleadings and to the course of the trial before KENNEDY, J., since it appears to me that some confusion has been created by not keeping

[*68] * separate objections directed to those subordinate parts of the appeal from the cause of action itself as I have stated it.

The two plaintiffs were shipwrights, and were working in their trade on board a vessel called the *Sam Weller*. The vessel was being repaired, and the two plaintiffs were engaged by the Glengall Iron Company to work at their trade in the repair of the vessel.

I think there is much to be said for the doubt thrown out by HAWKINS, J., in his elaborate and most able opinion, whether the assumption was accurate on which both parties conducted the case, namely, that there was no contractual relation between the

employers and employed so as to bring into debate the question of whether there was any inducement offered to the Glengall Iron Company to break contracts with the plaintiffs. But for the present I will assume that there was no contract by which the company were bound to keep the plaintiffs in their service till the repairs of the vessel were completed, while on the other hand there was no reasonable doubt that but for what was done by the defendant they would have been kept at work until the termination of the repairs.

My Lords, I am not concerned to discuss minutely the evidence where the witnesses are in conflict, or where it may be contended that the witnesses relied on by the plaintiffs have exaggerated or misunderstood what was said by the defendant. Such questions were for the jury, and if there was any reasonable evidence for them it was for them, and not for me or for any one else, to decide.

The plaintiffs gave evidence that while thus employed the defendant Allen came to the responsible manager of the Glengall Iron Company and made certain communications (which I will deal with presently, because upon the character of those communications much depends), and that in consequence of those communications they were discharged from their employment. As to the one being the consequence of the other, although in a certain sense it is still a question of fact, I confess I am surprised in no small degree to hear a doubt suggested that it was not in consequence of the communications made by Allen that the plaintiffs were discharged. One of the officers * of the de- [* 69] fendant company, it is true, explains that it was for peace and quietness in the yard; but though his words are accompanied by such expressions as these, I should have thought no one could have seriously doubted that what he meant (and, indeed, I think what he said), in the ordinary intelligible use of language, was that he discharged them because he could not have the work in his yard interrupted. I confess I am wholly unable to understand what is stated by some of your Lordships that the men were not discharged by reason of anything that Allen said, and that the boiler-makers would have ceased working even if Allen had said nothing! this is not the evidence, and, what is more important, it is in the teeth of the express finding of the jury in answer to KENNEDY, J.'s question, as I will presently show. And, in truth,

if this were accurate, there would be nothing to discuss, since, in that case, Allen would have done nothing that caused any damage to any one.

And now I will quote, as nearly as I can, the language which is alleged to have been used by Allen in his communications. I quote first what was stated by Mr. Halkett, who was the managing director of the Glengall Iron Company. Allen said, "He had received word from some of the boiler-makers that were working in our yard that they wanted to see him, and he came round and had an interview with these men, and they told him that we had two shipwrights engaged in our employment who were known to have done ironwork before in Mills & Knight's yard, and that unless these two men were discharged from our employment that day, all the ironworkers belonging to his society would leave off work that day; and they gave as the only reason that these men were guilty of doing ironwork in Mills & Knight's yard. . . . The substance of what he said was that they were really trying to put an end to this practice of doing ironwork by the shipwrights — to stop shipwrights being engaged in ironwork. That it was not from any ill-feeling against ourselves nor against any men in particular — Flood and Taylor; but they — that is, the boiler-makers — had made up their minds — or we have made up our minds — that wherever it is known that any shipwrights have been engaged doing ironwork, their workmen — that [*70] is, the *boiler-makers' — would cease work on the same ship on the same employment."

Then a question was asked, "Did he say anything in regard to Flood and Taylor in respect of other yards besides yours?" And the answer was, "Not in a particular sense; in a general sense that these men would be followed — that these men were known — it was so difficult to get them known; that these men were known, and wherever these men were employed the same action would be taken there as had been taken in our place." He also said, "You have no option. If you continue to engage these men our men will leave. . . . It was in consequence of that that the men were discharged. It was the fear of the threat being carried out — of the men leaving — the boiler-makers. If the boiler-makers had left or had been called out it would seriously have impeded our business. . . . The threat to withdraw these ironworkers extended to every workman we had in our employment at

whatever place." He goes on to say (after an embarrassing interruption) that "the threat was to withdraw the ironworkers in the employment of the Glengall Iron Company from every ship or every job upon which the Glengall Iron Company were engaged on which the men of their union were employed."

Mr. Edmonds, the foreman of the Glengall Iron Company, deposed as follows: "Mr. Halkett sent for me and when I got in the room he said, 'Mr. Allen has come here and says that if those two men' — that is, Flood and Taylor — 'are not discharged all of the iron-men will knock off work or be called out.' I will not be sure what term he used. I asked Mr. Allen the reason why. He said because those two men had been working at Messrs. Mills & Knight's on ironwork. I told him I thought it was very arbitrary on his part to do anything like that. I told him I thought it was not right that Messrs. Mills & Knight's sins should be visited upon us."

(Q.) "Did anything else take place?"

(A.) "For the reason that we were not employing the shipwrights on ironwork, and never had done so — not at the Glengall. There was a lot of other conversation, but that is not material to this case. He says that was the case, and if * these [*71] men were not discharged, their men would be called out or 'knock off' — I will not be sure what term he used. Me and Mr. Allen had a few words, but that is immaterial to this. I think that is all that is material to this case."

(Q.) "Was anything said about other yards?"

(A.) "Yes. When I spoke about it not being right to visit Mills & Knight's sins on us, he said the men would be called out from any yard they went to — they would not be allowed to work anywhere in London river."

As I have said, in the face of this evidence, how any one can doubt that it was the communications made by Allen that caused the dismissal of these two men, I am not able to understand; and in what I have to say hereafter I shall assume as proved, or, at all events, as established by evidence proper to be submitted to a jury, that it was Allen who caused the dismissal of the plaintiffs.

The first objection made to the plaintiffs' right to recover for the loss which they thus undoubtedly suffered is that no right of the plaintiffs was infringed, and that the right contended for on their behalf is not a right recognised by law, or, at all events, only

such a right as every one else is entitled to deprive them of if they stop short of physical violence or obstruction. I think the right to employ their labour as they will is a right both recognised by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong.

Very early authorities in the law have recognised the right; and, in my view, no authority can be found which questions or qualifies it. The schoolmaster who complained that his scholars were being assaulted and brought an action, the quarry owner who complained that his servants were being menaced and molested, were both held to have a right of action. And it appears to me that the importance of those cases, and the principle established by them, have not been sufficiently considered. It is said that threats of violence or actual violence were unlawful means: the lawfulness of the means I will discuss hereafter. But the point on which these cases are important is the exist-
[*72] ence of the right. It was not the schoolmaster who * was assaulted; it was not the quarry owner who was assaulted or threatened; but, nevertheless, the schoolmaster was held entitled to bring an action in respect of the loss of scholars attending his school, and the quarry owner in respect of the loss of workmen to his quarry. They were third persons; no violence or threats were applied to them, and the cause of action, which they had a right to insist on, was the indirect effect upon themselves of violence and threats applied to others.

My Lords, in my view these are binding authorities to show that the preliminary question, namely, whether there was any right of the plaintiffs to pursue their calling unmolested, must be answered in the affirmative. The question of what is the right invaded would seem to be reasonably answered, and the universality of the right to all Her Majesty's subjects seems to me to be no argument against its existence. It is, indeed, part of that freedom from restraint, that liberty of action, which, in my view, may be found running through the principles of our law.

As I have said, I will deal separately both with the remedy for the infringement of that right, if it has been infringed, and with the means by which it is alleged to have been infringed.

Upon this part of the case I wish to quote and make my own the language of BRAMWELL, B., in *Reg.* v. *Druitt*, 10 Cox C. C. 600: "When the law gave, or rather acknowledged, a right, it

provided a punishment or a remedy for the violation of that right. That was a cardinal rule and an obvious one. The old expression that 'there was no wrong without a remedy' might also be interpreted to mean that there was also no right without a remedy. Sometimes the remedy was by a criminal proceeding, sometimes by a civil action, sometimes by both. Having made those general remarks he would make another, which was also familiar to all Englishmen, namely, that there was no right in this country under our laws so sacred as the right of personal liberty. No right of property or capital, about which there had been so much declamation, was so sacred or so carefully guarded by the law of this land as that of personal liberty. They were quite aware of the pains taken by the common law, by the writ, as it was called, of *habeas corpus*, and supplemented by statute, to [*73] secure to every man his personal freedom — that he should not be put in prison without lawful cause, and that if he was he should be brought before a competent magistrate within a given time, and be set at liberty or undergo punishment. But that liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents and his industry, was as much a subject of the law's protection as was that of his body. Generally speaking, the way in which people had endeavoured to control the operation of the minds of men was by putting restraints on their bodies, and therefore we had not so many instances in which the liberty of the mind was vindicated as was that of the body. Still, if any set of men agreed among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves. He was referring to coercion or compulsion — something that was unpleasant and annoying to the mind operated upon, and he laid it down as clear and undoubted law that if two or more persons agreed that they would by such means co-operate together against that liberty they would be guilty of an indictable offence."

It is said, indeed, that an action for the infringement of such a right is a novelty; but I do not concur that it is, or that if it were it would be a sufficient argument. The whole history of the

action upon the case, from 13 Edw. I., c. 24, downwards affirms the principle that where cases fall under the same right and require a like remedy new precedents should be created.

So in *Pasley* v. *Freeman* (1789), 3 T. R., at p. 63 (1 R. R. 647), per ASHHURST, J. : " Another argument which has been made use of is that this is a new case, and that there is no precedent for such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon [* 74] the application of a * principle recognised in the law to such new case, it will be just as competent to Courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago. If it were not so, we ought to blot out of our law books one-fourth part of the cases that are to be found in them. "

First it is said that the company were acting within their legal rights in discharging the plaintiffs. So they were; but does that affect the question of the responsibility of the person who caused them so to act by the means he used? The scholars who went away from the school were entitled to do so. The miners were entitled to cease working at the quarry. The natives were entitled to avoid running the risk of being shot; but the question is, What was the cause of their thus exercising their legal right?

The question must be whether what was done in fact, and what did in fact procure the dismissal of the plaintiff, was an actionable wrong or not. I have never heard that a man who was dismissed from his service by reason of some slander could not maintain an action against the slanderer because the master had a legal right to discharge him.

In treating the question I can desire no more apt exposition of the law than what is contained in BOWEN, L. J.'s admirably reasoned judgment in the *Mogul Case*, 23 Q. B. D. 614, in the Court of Appeal: " Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence: *Tarleton* v. *M'Gawley*, 1 Peake N. P. C. 270 (3 R. R. 689); the obstruction of actors on the stage

by preconcerted hissing: *Clifford* v. *Brandon*, 2 Camp. 358 (11 R. R. 731); *Gregory* v. *Brunswick*, 6 Man. & G. 205, 953; the disturbance of wild fowl in decoys by the firing of guns: *Carrington* v. *Taylor*, 11 East, 571 (11 R. R. 270), and *Keeble* v. *Hickeringill*, 11 East, 574 *n.* (11 R. R. 273 *n.*); the impeding or threatening servants or workmen: *Garret* v. *Taylor*, Cro. Jac. 567; the inducing persons under personal contracts to break their contracts: * *Bowen* v. *Hall*, 6 Q. B. D. 333; *Lumley* v. *Gye*, 2 [*75] E. & B. 216, — all are instances of such forbidden acts."

It will be observed that in what BOWEN, L. J., says, intimidation, obstruction, or molestation, or intentional procurement of a violation of individual rights contractual or other (always assuming that there is no just cause for it), are each of them, where damage has been caused, actionable wrongs. And so Sir WILLIAM ERLE, in a passage quoted by the late MASTER OF THE ROLLS (Lord ESHER), points out that "every person has a right under the law, as between himself and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition" (Erle on Trade Unions, p. 12).

The LORD JUSTICE was too keen a reasoner not to observe that the words "without just cause or excuse" which he had used required exposition to render his reasoning complete, and accordingly he explains in another part of his judgment what his view was of malice. His Lordship thus describes the state of mind which, in his view, would negative just cause or excuse (*Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 23 Q. B. D. 613): "Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong.

See *Bromage* v. *Prosser*, 4 B. & C. 247 (28 R. R. 241); *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, at p. 772, per Lord BLACKBURN."

[*76] *My Lords, I must for my own part disclaim the idea that you can get rid of observations such as these in the learned Judge's judgment by saying that they are *obiter*. Of course, one is familiar with the observation that such and such an opinion expressed by a learned Judge was not necessary for the decision of the case. But where a distinction is being drawn between what is lawful and what is not, and where, as in this case, the observations form part of the reasoning by which the conclusion is arrived at, it appears to me that whichever way the decision may be, one part of the judgment is as much an authoritative exposition of the law as the other.

Now, it will be observed that BOWEN, L. J., points out that not only contractual rights are comprehended within his view but other rights, such as the right to carry on the business of an actor and the like.

In the same case, when appealed to this House ([1892] A. C. 38), it appears to me that the principle upon which that decision was arrived at is an important one, as excluding what is here suggested to be lawful. I myself asked in that case: "What legal right is interfered with? What coercion of the mind or will or of the person is effected? All are free to trade upon what terms they will, and nothing has been done, except in rival trading, which can be supposed to interfere with the appellants' interests."

Lord WATSON pointed out that the withdrawal of agents at first appeared to him to be a matter attended with difficulty, but that on consideration he was satisfied that it could not be regarded as an illegal act: "In the first place, it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents; and, in the second place, the respondents gave the agents the option of continuing to act for one or other of them in circumstances which placed the appellants at no disadvantage." And he added "that it had not been proved and not been suggested that the respondents used either misrepresentation or compulsion for the purpose of attaining the object of their combination."

And Lord BRAMWELL begins his judgment by saying that the * plaintiffs in that case " did not complain of any [* 77] trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act the ultimate object of which was to injure the plaintiffs having its origin in malice or ill-will to them."

Lord MORRIS expressed his intention to adopt entirely the principles laid down by BOWEN, L. J.; and Lord MACNAGHTEN read and adopted Lord BRAMWELL'S judgment.

Lord FIELD justifies his opinion, which he says may be supported upon the principles laid down in *Keeble* v. *Hickeringill*, 11 East, 574 *n.* (11 R. R. 273 *n.*), as to which I shall have a word to say hereafter. But he goes on to say that " everything that was done by the respondents was done in the exercise of their right to carry on their own trade, and was *bonâ fide* so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment, in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its obvious object of harm."

And Lord HANNEN says " that he considered that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one; namely, to injure the plaintiffs, whether they, the defendants, should be benefited or not." And he concludes his judgment by saying " that it appears to him that in that case there was nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade, by giving better terms to customers than their rivals, the plaintiffs, were willing to offer."

My Lords, I have been careful to call attention to the opinions of the noble and learned Lords, not only because I think a use has been made of the decision in that case which is not justified by anything in the opinions delivered, but rather because I * think that, upon the principles I have indicated before, [* 78] these opinions form a very considerable body of authority that, if the elements which each noble Lord in turn pointed out

did not exist in that case had in fact existed, the decision would have been the other way.

My Lords, I do not think that the case of *Keeble* v. *Hickeringill* stands alone, though if it did, considering who decided it, and that certainly in later years it has been much quoted and commented on, and never until now, so far as I am aware, criticised or questioned, I should be quite content to rely upon the authority of so profound a lawyer as Sir John Holt, and such an expositor as he was of the spirit of freedom which runs through the English law; but it will be also observed that in this House Lords BRAMWELL and FIELD, and in the Court of Appeal BOWEN, L. J., assume it to be good law.

It is interesting to observe that that case has been recognised and acted upon in the American courts, where these questions of capital and labour have not infrequently arisen.

In *Walker* v. *Cronin*, 107 Mass. 555, it was held that an action of tort would lie upon a count alleging that the plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendant, well knowing this, did unlawfully, and without justifiable cause, molest him in carrying on the said business with the unlawful purpose of preventing him from carrying it on, and wilfully induced many shoemakers who were in his employment, and others who were about to enter into it, to abandon it without his consent and against his will, and that thereby he lost their services and the profits, &c., to be derived therefrom, and was put to expense, &c. The second count alleges contracts between the plaintiff and the shoemakers to make stock into shoes, and that the defendant, " well knowing this, with the unlawful purpose of preventing him (the plaintiff) from carrying on his business, induced them to return the stock unfinished to the factory, and to neglect and refuse to make it into shoes as they had agreed to do." The third count alleges that the defendant enticed [* 79] and procured a shoemaker in the plaintiff's service * and employment who had agreed to make three cases of shoes to leave the plaintiff's service and employment. There was a demurrer to the declaration, and this demurrer was allowed in the Superior Court, whereupon the plaintiff appealed. WELLS, J., after citing Com. Dig., Action on the Case, A: " In all cases where a man has a temporal loss or damage by the wrong of another, he

may have an action on the case to be repaired in damages," goes on to review in order *Keeble* v. *Hickeringill*, 11 East, 574, *n.* (11 R. R. 273 *n.*); *Tarleton* v. *M'Gawley*, 1 Peake N. P. C. 270 (3 R. R. 689); *Green* v. *Button*, 2 C., M. & R. 707; *Gunter* v. *Astor* (1819), 4 J. B. Moore, 12 (21 R. R. 733); *Hart* v. *Aldridge* (1774), 1 Cowp. 54; *Shepherd* v. *Wakeman*, 1 Sid. 79; *Winsmore* v. *Greenbank* (1745), Willes, 577; *Lumley* v. *Gye*, 2 E. & B. 216. He overruled the demurrer, and, holding that the declaration sufficiently alleged (1) intentional and wilful acts, (2) calculated to cause damage to the plaintiff in his lawful business, (3) done with the unlawful purpose to cause such damage and loss without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) actual damage and loss resulting, held that each of the three counts disclosed a good cause of action. "This decision," continues the learned Judge, "does not apply to a case of interference by way of friendly advice, honestly given; nor is it in denial of the right to free expression of opinion. We have no occasion now to consider what would constitute justifiable cause."

Benton v. *Pratt* (1829), 2 Wend. 385, and *Rice* v. *Manley* (1876), 66 N. Y. (21 Sickels) 82, were both cases where the defendant through false words caused a third person, who had entered into contracts of sale (in the first-named case of cheese, in the second of hogs) void by the Statute of Frauds, to break such contracts. An action was held to lie in each case.

In *Bixby* v. *Dunlap*, 22 Amer. Rep. 475, it was held that exemplary damages could be recovered from a defendant who knowingly procured a servant to leave a master whom she had contracted to serve without ever being actually in his employment. *Lumley* v. * *Gye* is here taken as having laid [* 80] down the law on this subject.

In *Angle* v. *Chicago, &c. Ry. Co.* (1893), 151 U. S. 1, it was alleged that the United States had granted lands in the State of Wisconsin in aid of the construction of railways. The State of Wisconsin had granted a portion of these lands to the defendant company for the purpose of constructing a particular railway. It had also granted other lands to another company, the Portage Company, to construct another and somewhat competing railway: this latter railway was to be completed within a certain time. This could not be done, and the State of Wisconsin enlarged the

time for completion. The Portage Company then employed the plaintiff to complete the line, and he was actively prosecuting the work when the defendant company, conspiring with certain officials of the Portage Company, induced the State of Wisconsin to revoke the concession to the Portage Company, whereby the plaintiff lost his employment. He accordingly brought his action. The Court held, following *Lumley* v. *Gye* and *Bowen* v. *Hall*, 6 Q. B. D. 333, that the defendant company were liable to the plaintiff.

My Lords, I now revert to that part of the case which I admit has to be carefully considered: whether in what the defendant did in order to procure the dismissal of the plaintiffs he came within any of the rules which have been laid down in the cases quoted. Now, to my mind, he was guilty of intimidation and coercion through that intimidation. In using that word "intimidation," I am not using it in the technical sense which the statutes upon the subject have been construed to mean; I will explain in what sense I do understand the word; but in passing I must deprecate the language which has been used to minimise the effect of what Allen said. I observe it is described as "inconvenience." That is not how it is described by the witness. Edmonds, the foreman of the Glengall Company, thus describes what would have been the effect upon the business of the firm. He says: "They were rather busy just then with the boiler-makers; that they employed three [* 81] times * as many boiler-makers as shipwrights, and if the boiler-makers had knocked off work or struck, it would have stopped the business of the company altogether — entirely — at that time, and that it was a very serious matter to the firm, and that the discharge of the men was in order to prevent their having to stop their business."

My Lords, it seems to me very obvious to ask whether the threat to do that which will have such an effect as the witness described is a coercion of the will or not. The men were good workmen and of good character; they were working, even according to Allen's own view, at their own trade as shipwrights, but they had worked upon a former occasion for a different employer upon an iron ship.

I think the dissatisfaction among the boiler-makers at these two men being employed has been greatly exaggerated. The man Elliott, who actually sent for Allen, gives this account of it:

"We were having a talk together at breakfast-time, and some of them felt dissatisfied about it. Some of them said we had better leave our work. I said, 'Do not do anything of the kind.' . . . I sent a telegram to Allen. . . . When I met Mr. Allen at breakfast-time the next morning he said to me, 'Well, what is this here little bit of a trouble here?' 'Well,' I said, 'the chaps are dissatisfied about these here two plaintiffs Flood and Taylor being in the habit of working over at Mills & Knight's.' 'Well,' he said, 'what do they want?' 'Some of them are saying they are going to leave their work.' He says, 'The best thing you can do is to go in and tell them not to leave their work until things are settled; wait and see how things settle.' I said, 'Very good; I will tell them what you say now.'"

The cross-examination is important with reference to what took place afterwards, and as exhibiting the extent and degree to which even some of the men — for it goes no further — expressed their wishes. The learned counsel asks: "Their wishes were that these men whose conduct they objected to at Mills & Knight's should not be kept in the same employ with themselves? — (A.) Oh, no. (Q.) That was the feeling, was it not? — (A.) No. (Q.) Well, let me understand. — (A.) They *did not say they [*82] should not be kept in the employ of the firm at all. (Q.) They did not say they should not be kept on the job on which they were being employed? — (A.) They did not wish them among our midst. (Q.) Working on the same ship? — (A.) Yes."

It will be observed how limited are the numbers in respect of which the allegation of discontent is put forward, and it will be observed that this witness entirely repudiated any wish to prevent these men being employed; but even that wish is limited to the desire that they should not be employed upon the same ship. But perhaps the most astonishing part of the case is to be found in Allen's own evidence.

Allen denies that he had ever said anything about the men being called out. He denies in terms that he said the same thing would happen in any yard where the two men were employed. He denies that he used that memorable language, "We have made up our minds that wherever it is known that there are any shipwrights who have been engaged doing ironwork the boilermakers will leave work in that yard." Being asked whether he wished the step to be taken of the two men being discharged, he

said, "He had no such thought floating in his mind at the time." This is, of course, in direct conflict with the evidence given by the manager and the foreman of the Glengall Company; but, as I have said, the credibility of the witness was for the jury and not for me.

And now it is important to call attention to the exact question which was left to the jury. KENNEDY, J., said: "The question that I want you to answer is that, if you find he induced the Glengall Iron Company by the threat which is suggested by the plaintiffs of calling out all the men on strike, and he continued in that course of conduct if there was any attempt to employ them again, did he do that with the malicious intention which I have endeavoured to explain, that is merely, not for the purpose of forwarding that which he believed to be his interest as a delegate of his union in the fair consideration of that interest, but for the purpose of injuring these plaintiffs, and preventing them doing that which they were each of them entitled to do." Observe [* 83] the phrase used, * "the threat suggested by the plaintiffs of calling out all the men on strike," and that that induced the Glengall Iron Company to discharge the plaintiffs; and yet it is to be said that Allen's threat had nothing to do with the discharge of the plaintiffs. It will be observed that KENNEDY, J., draws a distinction between the conduct which he assumes to be lawful on Allen's part to do what he did do if it were merely for the purpose of forwarding that which he believed to be his interest as a delegate of his union in fair consideration of that interest on the one hand, and on the other hand his conduct if what he did was done for the purpose of injuring these plaintiffs.

My Lords, it appears to me that that is a direction of which the defendants cannot complain, since it puts what is to my mind an alternative more favourable to them. In my view, his belief that what he was doing was for his interest as a delegate of his union would not justify the doing of what he did do. It is alleged, and to my mind and to the mind of the jury proved, that the employers were compelled under pressure of the threats that he used to discharge the plaintiffs.

I have not used the word "intimidated," because I observe the learned Judge says there was no intimidation in a legal sense. If what was meant by that was that there was no threat of violence to person or property, it is true; but the word "intimidation" is

not always to be construed as it has been construed under 6 Geo. IV., c. 129. The construction of it in that statute flowed from the other words with which the word "intimidate" is associated; and if, without using the word "intimidate," that which was held out as the inducement to dismiss the plaintiffs was that such a stoppage of the works should be occasioned as that the business of the company would seriously suffer, I should think that would be a thing which would be likely to produce fear of the consequences of the company retaining them in their employment, and a company which abstained from doing so by reason of that fear would justly be described as "intimidated."

But the objection made by the defendants appears to be that the word "malicious" adds nothing; that if the thing was lawful it was lawful absolutely; if it was not lawful it was unlawful — the addition of the word "malicious" can [*84] make no difference. The fallacy appears to me to reside in the assumption that everything must be absolutely lawful or absolutely unlawful. There are many things which may become lawful or unlawful according to circumstances.

In a decision of this House it has undoubtedly been held that whatever a man's motives may be, he may dig into his own land and divert subterranean water which but for his so treating his own land might have reached his neighbour's land. But that is because the neighbour had no right to the flow of the subterranean water in that direction, and he had an absolute right to do what he would with his own property. But what analogy has such a case with the intentional inflicting of injury upon another person's property, reputation, or lawful occupation? To dig into one's own land under the circumstances stated requires no cause or excuse. He may act from mere caprice, but his right on his own land is absolute, so long as he does not interfere with the rights of others.

But, referring to BOWEN, L. J.'s observation, which to my mind is exactly accurate, "in order to justify the intentional doing of that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade," you must have some just cause or excuse.

Now, the word "malicious" appears to me to negative just cause or excuse; and without attempting an exhaustive exposition

of the word itself, it appears to me that, if I apply the language of BOWEN, L. J., it is enough to show that this was within the meaning of the law "malicious."

It appears to me that no better illustration can be given of the distinction on which I am insisting between an act which can be legally done and an act which cannot be so done because tainted with malice, than such a colloquy between the representative of the master and the representative of the men as might have been held on the occasion which has given rise to this action. If the representative of the men had in good faith and without indirect motive pointed out the inconvenience that might result [*85] from having two sets of men working together on *the same ship, whose views upon the particular question were so diverse that it would be inexpedient to bring them together, no one could have complained; but if his object was to punish the men belonging to another union because on some former occasion they had worked on an iron ship, it seems to me that the difference of motive may make the whole difference between the lawfulness or unlawfulness of what he did.

I see it is suggested by one of your Lordships that the action for malicious prosecution is supposed to be an exception. I am not quite certain that I understand what is the proposition to which it is an exception. If it means that there is no other form of procedure known to the law wherein malice may make the distinction between a lawful and an unlawful act, I am unable to agree. Maliciously procuring a person to be made a bankrupt, maliciously and without reasonable or probable cause presenting a petition to wind up a company, or maliciously procuring an arrest, are equally cases wherein the state of mind of the person procuring the arrest may affect the question of the lawfulness or unlawfulness of the act done.

Again, in slander or libel the right to preserve one's character or business from attack appears to me quite as vague and general a right as it is suggested is the right to pursue one's occupation unmolested; and it cannot be denied that in both these cases the lawfulness or unlawfulness of what is said or written may depend upon the absence or presence of malice.

Doubtless there are cases in which the mere presence of malice in an act done will not necessarily give a right of action, since no damage may result; and in this case, however malicious Allen's

intervention may have been, if the employers had defied Allen's threats instead of yielding to them, the plaintiffs could not have succeeded in an action, because they would not have been injured. See *Quartz Hill Co.* v. *Eyre*, 11 Q. B. D. 674; *Gibbs* v. *Pike*, 9 M. & W. 351; *Jenings* v. *Florence* (1857), 2 C. B. (N. S.) 467.

On the same principle an action will not lie against a sheriff for a false return to a writ of execution if the plaintiff has not * suffered actual damage in consequence of the false [* 86] return. See *Wylie* v. *Birch* (1843), 4 Q. B. 566.

I turn now to the course of the trial, which is important in more ways than one. It is manifest that both the form of the statement of claim and the evidence directed at the trial were intended to raise the question of the right of the Boiler Makers' Union to use what I will call their union for the combined action against the individual plaintiffs who belonged to another union.

The plaintiffs apparently proceeded upon the assumption that what was represented to them as having been said by Allen was said in his character of delegate of and speaking with the authority of the Boiler Makers' Union, and, accordingly, the general secretary of this trades union and the chairman at the time of these transactions were both joined as defendants. Had they adopted or been proved to authorise the course taken by Allen, a question would have arisen whether or not they were all three parties to a conspiracy. Whether that charge could have been maintained against them or not I at present desire to say nothing. Such a question may arise again, and I wish to keep myself free to consider that question when it arises. But the chairman and the secretary of the union absolutely disclaimed any general or specific authority on the part of Allen either to threaten the employers or to withdraw the men. As to specific authority, the chairman proved that he had never heard of the dispute until he was served with the writ in the action. He says in terms that he never gave any authority to Mr. Allen to threaten employers to withdraw men from the work, and to do any such thing he regarded as a very serious matter for any delegate to take upon himself; and so far was he from adopting what Allen is sworn to have said, namely, that the union would hunt the two men out of every employment where they were known to be because they had once worked on an iron ship, he emphatically denies the right of his union to do anything of the sort; he says in terms, " Pro-

viding that the shipwright after being at the ironwork started in some other place, for instance, then I would say we have no [* 87] right * whatever to interfere with him unless we were then beginning ironwork again. If he started at woodwork, we would not interfere with him in any other place."

The learned counsel then put a question to him (I think somewhat under a misapprehension as to what the learned Judge himself meant by a question he put), "You say that may depend on circumstances?" And his answer is, "I do not say they would in that instance, because in no instance have I ever known men interfering with him when he went to some other works and started his own particular work."

My Lords, I think it is only just to the Boiler Makers' Union to point out how emphatically and distinctly their authorised officers (chairman and general secretary) disclaimed any such practice or principle as that which Allen is sworn to have attributed to them; and accordingly no imputation or liability could properly be attributed to the Boiler Makers' Union or their authorised officers. But does that relieve Allen from the consequences of what he did?

If concerted collective action to enforce, by ruining the men's employment, the will of a large number of men upon a minority, whether the minority consists of a small or of a large number, be a cause of action where the actual damage is produced, it would seem to be a very singular result that an individual who falsely assumes the character of representing a large body, uses the name of that large body to give force and support to the threat which he utters, and so produces the injury to the individual, or to the minority, could shield himself from responsibility by proving that the body whose power and influence he had falsely invoked as his supporters had given him no authority for his threats; so that, if they in truth authorised him, he and they might all have been responsible, while the false statement that he made, though acting upon the employer by the same pressure because it was believed and producing the same mischief to the person against whom it was directed, could establish no cause of action against himself because it was false.

My Lords, I now come to the question raised upon the pleadings, — that the falsehood of Allen's allegation is not set [* 88] * out. I venture to think that this objection is founded

upon an erroneous assumption that the action must be brought for false representations, and that accordingly the false representations must be set out in the statement of claim. As I say, I think this is an erroneous assumption; that the action is what it is; that the defendant maliciously and wrongfully, and with intent to injure the plaintiffs, intimidated and coerced the Glengall Iron Company not to enter into contracts with the plaintiffs, whereby the plaintiffs have suffered damage.

The objection may be treated as one of form or as one of substance: treating it as one of form only, I do not think that it ever was necessary in the pleadings, where an unlawful procuring something to be done was the cause of action, to set out the means by which that something was procured. It is not necessary, says WILLES, C. J., in *Winsmore* v. *Greenbank*, Willes, 577, "to set forth all the facts to show how a thing which is charged to be unlawfully done was unlawful; that would make the pleadings intolerable, and would increase the length and expense unnecessarily." And even in an indictment for conspiracy it is not necessary to state the means employed. See *Rex* v. *Sterling* (1664), 1 Lev. 125; *Rex* v. *Kinnersley and another* (1719), 1 Str. 193; see also *Sydserff* v. *Reg.* (1847), 11 Q. B. 245.

So also upon an indictment under 37 Geo. III., c. 70, the preamble of which states that, "Whereas divers wicked and evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, have of late industriously endeavoured to seduce persons serving in His Majesty's forces by sea and land from their duty and allegiance to His Majesty, and to incite them to mutiny and disobedience," it was enacted "that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in His Majesty's forces, by sea or land, from his or their duty and allegiance to His Majesty, or to incite or stir up any such person or persons to commit an act of mutiny," &c., should be guilty of felony. It was held that it was unnecessary in the indictment to do more than charge the defendants with having *endeavoured to seduce persons [*89] from their allegiance without setting forth any of the words or writings by which that endeavour was made. *Rex* v. *Fuller* (1797), 1 Bos. & P. 180.

If treating it as matter of substance, the objection would be that without giving notice to the defendant, and without any such

specified objection being submitted to the jury, it was being imputed to him that he had said what was false, it is almost impossible to suggest that here there could be any such objection of substance. What he said and did by way of inducement, threat, or coercion was in truth the whole question in the case. He gave evidence denying what was imputed to him, and, so far from setting up the right on behalf of his union to exercise their right of withdrawing their men if the demand for the discharge of the two plaintiffs were not complied with, he absolutely denied that he had ever done so; and the proper authorities of his union, as I have pointed out already, negatived any authority to make such representations as the other witnesses proved that he did make, or that they had been parties, or would consent to be parties, to the most offensive of his threats, namely, the hunting down of the two shipwrights because they had once worked upon iron ships. This question was before the jury, and the jury could not have answered the question as they did if they had not disbelieved Allen's statement.

It seems to me, therefore, that neither in substance nor in form can any objection be made to the topic (for it is but the topic, and not the substance of the cause of action) that he was guilty of false representations as fortifying the threats that he was making. It can scarcely be contended that because he had not that authority behind him which he represented, because he was not truly representing either the wishes or the commands of his union, that could furnish him with any excuse. As well might it be contended that the highwayman was not responsible for the coercion he exercised towards his victim if he put a pistol to his head because it should afterwards turn out that the pistol was unloaded.

My Lords, I regret that I am compelled to differ so [*90] widely *with some of your Lordships; but my difference is founded on the belief that in denying these plaintiffs a remedy we are departing from the principles which have hitherto guided our Courts in the preservation of individual liberty to all. I am encouraged, however, by the consideration that the adverse views appear to me to overrule the views of most distinguished Judges, going back now for certainly two hundred years, and that up to the period when this case reached your Lordships' House there was a unanimous consensus of opinion; and that of eight Judges who

have given us the benefit of their opinions, six have concurred in the judgments which your Lordships are now asked to overrule.

Lord WATSON. — My Lords, this appeal, in which the litigants are members of two rival associations of working-men, registered under the Trade Unions Act of 1871, raises some important questions, upon which there appears to be room for considerable difference of opinion. The appellant is a member, and the London delegate, of the boiler-makers' society, an association which restricts the labour of its members to ironwork; whilst the two respondents belong to the society of shipwrights, whose members are permitted to work either in wood or iron — an alternative which, whether rightly or wrongly, is not regarded with favour by the boiler-makers.

In the month of April, 1894, about forty men of the boiler-makers' society were engaged at the Regent Dock, Millwall, in repairing an iron ship, on the employment of the Glengall Iron Company. The respondents were at the same time employed by the company to execute repairs upon the woodwork of the vessel. The boiler-makers having learned that the respondents, although they were at that time engaged in carpenter-work, had on previous occasions undertaken and executed ironwork in other shipyards, resolved that they would not continue at the same job with workmen who wrought in iron as well as wood; and they were accordingly prepared to leave the Regent Dock in a body as soon as their engagement with the Glengall Iron Company, which was merely from day to day, expired. Being apprehensive, however, that they might not be allowed *strike pay by their union [*91] if they left their work without the approval of some of its office-bearers, they on April 12 telegraphed for the appellant, who, in compliance with their request, went to the yard on the morning of the day following. He was there met by one of the workmen who had sent for him, who on their behalf informed him that they objected to the respondents, who had done ironwork elsewhere, working among them, and that they intended in consequence to leave the work on that day after the dinner-hour. The appellant intimated that in his opinion the men would not be justified in striking work as they contemplated until an attempt had been made to settle the matter otherwise. He then had an interview with the managing director of the Glengall Iron Company, at which the foreman of the yard was present, the result

being that on the afternoon of the same day the services of the respondents were dispensed with by the company, and the boilermen continued at their work.

The present action was brought against the appellant in the beginning of July, 1894, and in February, 1895, it was tried before KENNEDY, J., and a jury, who returned affirmative answers to these two questions: " (1) Did the defendant Allen maliciously induce the Glengall Iron Company to discharge the plaintiffs, or either of them, from their employment? (2) Did the defendant Allen maliciously induce the Glengall Iron Company not to engage the plaintiffs, or either of them?" and assessed damages to each of the respondents at £20.

The appellant contends that judgment ought to be entered in his favour, inasmuch as the findings of the jury, when rightly interpreted, do not disclose any cause of action against him; and, alternatively, that these findings being against the weight of evidence, the case ought to be sent back for new trial. I have not found it necessary to consider the second of these propositions, having arrived at the conclusion that the first of them is well founded.

The substance of the verdict may be resolved into these three findings: first, that the Glengall Iron Company discharged the respondents from their employment and did not re-engage them; secondly, that the company were induced to do so by
[* 92] * the appellant; and, thirdly, that the appellant maliciously induced the action of the company. There is no expression in the verdict which can be held, either directly or by implication, to impeach the legality of the company's conduct in discharging the respondents. The mere fact of an employer discharging or refusing to engage a workman does not imply or even suggest the absence of his legal right to do either as he may choose. It is true that the company is not a party to this suit; but it is also obvious that the character of the act induced, whether legal or illegal, may have a bearing upon the liability in law of the person who procured it. The whole pith of the verdict, in so far as it directly concerns the appellant, is contained in the word " maliciously " — a word which is susceptible of many different meanings. The expression " maliciously induce," as it occurs upon the face of the verdict, is ambiguous: it is capable of signifying that the appellant knowingly induced an act which of itself constituted

a civil wrong, or it may simply mean that the appellant procured, with intent to injure the respondents, an act which, apart from motive, would not have amounted to a civil wrong; and it is, in my opinion, material to ascertain in which of these senses it was used by the jury.

Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due. A wrongful act, done knowingly and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. There is a class of cases which have sometimes been referred to as evidencing that a bad motive * may be an element in the composition of civil [* 93] wrong; but in these cases the wrong must have its root in an act which the law generally regards as illegal, but excuses its perpetration in certain exceptional circumstances from considerations of public policy. These are well known as cases of privilege, in which the protection which the law gives to an individual who is within the scope of these considerations consists in this, — that he may with immunity commit an act which is a legal wrong and but for his privilege would afford a good cause of action against him, all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognises, and shall not be prompted by a desire to injure the person who is affected by his act. Accordingly, in a suit brought by that person, it is usual for him to allege and necessary for him to prove an intent to injure in order to destroy the privilege of the defendant. But none of these cases tend to establish that an act which does not amount to a legal wrong, and therefore needs no protection, can have privilege attached to it; and still less that an act in itself lawful is converted into a legal wrong if it was done from a bad motive.

Lord BOWEN (at that time BOWEN, L. J.), in the case of the *Mogul Steamship Co.* v. *McGregor*, laid it down that in order to constitute legal malice the act done must, apart from bad motive, amount to a violation of law. The learned Judge, with his accustomed accuracy and felicity, said (23 Q. B. D. 612): "We were invited by the plaintiffs' counsel to accept the position from which their argument started, that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure' are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an attempt to do wrongful harm. 'Maliciously,' in [* 94] * like manner, means and implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its term the infringement of some right."

The words which I have quoted are in substantial agreement with the language used by BAYLEY, J., in *Bromage* v. *Prosser*, 4 B. & C. 255 (28 R. R. 241), to the effect that "malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." According to the learned Judge, in order to constitute legal malice, the act done must be wrongful, which plainly means an illegal act subjecting the doer in responsibility for its consequences, and the intentional doing of that wrongful act will make it a malicious wrong in the sense of law. Whilst it is true that no act in itself lawful requires an excuse, it is equally true that some acts in themselves illegal admit of a legal excuse, and it is to these that BAYLEY, J., obviously refers.

The root of the principle is that, in any legal question, malice depends, not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed. In my opinion it is alike consistent with reason and common sense that when the act done is, apart from the feelings which prompted it, legal, the civil law ought to take no congnisance of its motive.

It does not appear to me to admit of doubt that the jury, in finding the action of the company to have been maliciously induced by the appellant, simply meant to affirm that the appellant was influenced by a bad motive, namely, an intention to injure the respondents in their trade or calling of shipwrights. At the trial, the case for the plaintiff was conducted, and was submitted to the jury by the learned Judge who presided, upon the lines laid down by the MASTER OF THE ROLLS and LOPES, L. J., in *Temperton* v. *Russell* [1893], 1 Q. B. 715. When the present case was before the Appeal Court, the same doctrine was repeated by the MASTER OF THE ROLLS and LOPES, L. J., and was expounded at great length by Lord ESHER. RIGBY, L. J., deferred to, but did not express his concurrence in, the authority of *Temperton* v. *Russell*, which he accepted as binding upon * him. The doctrine is [* 95] thus stated by the MASTER OF THE ROLLS ([1895], 2 Q. B. 37): "Now it is clear that merely to persuade a person who has contracted to break his contract gives no cause of action at all. But, if it is done maliciously, for the purpose of injuring the person to whom the advice is given, or for the purpose of injuring some one else, the person against whom the malice is directed and carried out has a cause of action, not on the ground of the persuasion to break the contract, but on the ground of the malice directed against him. To my mind, the result is the same whether the persuasion is to break a contract or not to make a contract. One person has a perfect right to advise another not to make a particular contract, and that other is at perfect liberty to follow that advice. But, if the person uses that persuasion with intent to injure the other, or to injure the other with whom he is going to make the contract, then the act is malicious, and the malice makes that unlawful which would otherwise be lawful." In that state of the law, as expounded in the Appeal Court, it is not surprising to find that KENNEDY, J., whilst he did not suggest to the jury that the action of the appellant, apart from its motive, constituted a legal wrong, directed them to consider whether the appellant acted "maliciously," and explained that by that word he meant "with the intention and for the purpose of doing an injury to the plaintiffs in their business."

I do not dispute that the law laid down in this case by the presiding Judge, and upheld by the Court of Appeal, would justify the verdict of the jury. It simply comes to this: that to

induce another person to commit an act which is within his legal right does not in itself afford a cause of action; but that the person who procures his action is guilty of a legal wrong, if he was actuated by an intent to injure, and is liable in reparation to those against whom his evil intent was directed. The words which I have already quoted clearly disclose the doctrine which runs through Lord ESHER'S judgment. Whether mere "persuasion" or mere "advice" entails liability on the person using them appears to me to be a speculation which it would be unprofitable to discuss, and I shall therefore assume that the [*96] *words refer to the means used by a person who, in the sense of law, "procures" the act of another. A breach of contract is in itself a legal wrong; and in *Lumley* v. *Gye*, 2 E. & B. 216, 232, it was said by ERLE, J. (afterwards ERLE, Ch. J.): "It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong." In the same case it was held by the majority of the learned Judges that the defendant was liable in damages upon the express ground that, in knowingly procuring an illegal act, he had committed a wrong which the law regards as malicious. They regarded malice as signifying in law, not that the defendant had been actuated by a bad motive, but that he had procured the commission of an act which he knew to be illegal.

There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye*, 2 E. & B. 216, the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party.

The question submitted by the House for the opinion of the learned Judges who have favoured us with their assistance was: "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" The terms in which the query is framed afford an

opportunity, of which some of the learned Judges have not been slow to avail themselves, of referring to the evidence of the respondents' witnesses in quest of some fact which might impart a legal and not a conventional meaning to malice as found by the jury. But, according to my apprehension, it was not intended, nor would it be legitimate, in pursuing that investigation to disregard the pleadings of the *respondents, or the [*97] course which was followed by their counsel, at the trial of the cause. To deal with the case on any other terms would be to start issues which the respondents themselves never raised until they came to the bar of this House, and to apply to these issues evidence which was directed, not to these, but to other points. I therefore find it necessary to express an opinion upon various questions which were canvassed in the course of the argument addressed to us.

First of all, although the statement of claim set forth that the appellant induced the Glengall Iron Company to "break and refuse to perform their contract" with the respondents, the allegation is not borne out by their own evidence. One of them (Taylor) only goes the length of saying that "When a man is once put on he is entitled to come back, day by day, until the job is finished or he is discharged;" and the other (Flood) stated substantially the same thing, with the addition that there was no rule as to the time of notice. Then, at the trial, the cross-examination for the appellant in regard to the matter of contract was stopped by the presiding Judge with the observation, "So far as the breach of contract was opened, in fact there was no breach of contract, because the employment was day by day, and terminated at the end of each day." And in charging the jury the learned Judge, referring to the averment of breach in the statement of claim, again observed, without objection or exception taken by the respondents' counsel, "that has altogether fallen through, because it is quite clear that there was no contract existing which the defendants or any of them could have induced the Glengall Iron Company to break with the plaintiff."

Assuming that the Glengall Iron Company, in dispensing with the further services of the respondents, were guilty of no wrong, I am willing to take it that any person who procured their act might incur responsibility to those who were injuriously affected by it, if he employed unlawful means of inducement directed

against them. According to the decision of the majority in *Lumley* v. *Gye*, already referred to, a person who by illegal means, that is, means which in themselves are in the nature of [*98] *civil wrongs, procures the lawful act of another, which act is calculated to injure, and does injure, a third party, commits a wrong for which he may be made answerable. So long as the word " means " is understood in its natural and proper sense that rule appears to me to be intelligible; but I am altogether unable to appreciate the loose logic which confounds internal feelings with outward acts, and treats the motive of the actor as one of the means employed by him.

It has been maintained, and some of the learned Judges who lent their assistance to the House have favoured the argument, that the appellant used coercion as a means of compelling the Glengall Iron Company to terminate their connection with the respondents; but that conclusion does not appear to me to be the fair result of the evidence. If coercion, in the only legal sense of the term, was employed, it was a wrong done as much to the Glengall Iron Company, who are the parties said to have been coerced, as to the respondents. Its result might be prejudicial to the respondents, but its efficacy wholly depended upon its being directed against and operating upon the company. It must be kept in view that the question of what amounts to wrongful coercion in a legal sense involves the same considerations which I have discussed in relation to the elements of a civil wrong as committed by the immediate actor. According to my opinion, coercion, whatever be its nature, must, in order to infer the legal liability of the person who employs it, be intrinsically and irrespectively of its motive a wrongful act. According to the doctrine ventilated in *Temperton* v. *Russell* [1893], 1 Q. B. 715, and the present case it need not amount to a wrong, but will become wrongful if it was prompted by a bad motive.

It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree or continue to work. It may be deplorable that feelings of rivalry between different associations of working-men should ever run so high as to make members of one union seriously object to continue their labour in company with members of another trade union; but so long as they commit no legal [*99] wrong, and use no means which are illegal, they are at *per-

fect liberty to act upon their own views. That the boilermakers who were employed at the Regent Dock, Millwall, did seriously resent the presence among them of the respondents very plainly appears from the evidence of the respondents themselves; and that they would certainly have left the dock had the respondents continued to be employed appears to me to be an undoubted fact in the case. They were not under any continuing engagement to their employers, and, if they had left their work and gone out on strike, they would have been acting within their right, whatever might be thought of the propriety of the proceeding. Not only so; they were, in my opinion, entitled to inform the Glengall Iron Company of the step which they contemplated, as well as of the reasons by which they were influenced, and that either by their own mouth, or, as they preferred, by the appellant as their representative. If the workmen had made the communication themselves, and had been influenced by bad motives towards the respondents, then, according to the law which has been generally accepted by the Courts below, they would each and all of them have incurred responsibility to the respondents. But it was clearly for the benefit of the employers that they should know what would be the result of their retaining in their service men to whom the majority of their workmen objected; and the giving of such information did not, in my opinion, amount to coercion of the employers who were in no proper sense coerced, but merely followed the course which they thought would be most conducive to their own interests.

I think it is right to observe that if the evidence had, in my opinion, contained statements sufficient to support a charge of coercion, I should have declined in the circumstances of the present case to give effect to it. It is quite true that in the 5th count of the statement of claim intimidation and coercion are alleged; but it is equally true that from the time when that pleading was filed until the second argument upon this appeal the word "coercion" or its equivalents have never been heard except in one instance. It does not even occur in the respondents' case; and the exception to which I have referred is to be found in the charge of the learned Judge who, without * any [*100] challenge by the respondents' counsel, made the observation to the jury: "There is no evidence here, of course, of anything amounting to intimidation or coercion in any legal sense of

the term." The evidence now relied on as showing intimidation and coercion was adduced to prove, and was represented to the jury as proving, the *malus animus* of the appellant, and nothing else. I entertain little doubt as to the incompetency, but none as to the inexpediency of this House entertaining and deciding an issue of fact, which, if not formally abandoned, was not brought forward at the trial or submitted to the jury, and that upon evidence which was not directed to it, for the purpose of patching up a verdict which is impeached in point of law.

The doctrine laid down by the Court of Appeal in this case, and in *Temperton* v. *Russell*, with regard to the efficacy of evil motives in making — to use the words of Lord ESHER — "that unlawful which would otherwise be lawful," is stated in wide and comprehensive terms; but the majority of the consulted Judges who approve of the doctrine have only dealt with it as applying to cases of interference with a man's trade or employment. Even in that more limited application it would lead in some cases to singular results. One who committed an act not in itself illegal, but attended with consequences detrimental to several other persons, would incur liability to those of them whom it was proved that he intended to injure, and the rest of them would have no remedy. A master who dismissed a servant engaged from day to day, or whose contract of service had expired, and declined to give him further employment because he disliked the man, and desired to punish him, would be liable in an action for tort. And *ex pari ratione*, a servant would be liable in damages to a master whom he disliked if he left his situation at the expiry of his engagement and declined to be re-engaged, in the knowledge and with the intent that the master would be put to considerable inconvenience, expense, and loss before he could provide a substitute. If that be the state of the law, it is somewhat remarkable that there is no case to be found in the books of any such action having been sustained. The authority [* 101] which is mainly relied * on as supporting the doctrine of the recent decisions is *Keeble* v. *Hickeringill*, 11 East, 574 *n.* (11 R. R. 273 *n.*), which was decided by the Court of Queen's Bench about two centuries ago. I am very far from suggesting that the antiquity of a decision furnishes a good objection to its weight; but it is a circumstance which certainly invites and requires careful consideration, unless the decision is clearly in

point, and its principle has since been recognised and acted upon.

In *Keeble* v. *Hickeringill*, the plaintiff sued for the disturbance of a decoy upon his property, which he used for the purpose of capturing wild fowl and sending them to market. The defendant, who was an adjoining proprietor, had fired guns upon his own land, not with the view of killing game or wild fowl, but with the sole object of frightening the birds, and either driving them out of his neighbour's decoy pond or preventing them from entering it. The act complained of was, in substance, the making of a noise so close to the lands of the plaintiff as to be a nuisance to him. Upon that aspect of the case I do not find it necessary to express any opinion as to the conduct of the defendant; but this much is clear, that no proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violates that condition he commits a legal wrong, and if he does so intentionally, he is guilty of a malicious wrong, in its strict legal sense. HOLT, Ch. J., who delivered the opinion of his Court, treated the case as one of interference with the plaintiff's trade, consisting in the capture and sale of wild fowl. He distinguishes it from the case of invading a franchise, which, I apprehend, would in itself amount to a legal wrong, and thus states the law applicable to it: "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases." I see no reason to doubt that by a "violent act" the learned Judge had in view an act of violence done in such circumstances as to make it amount to a legal wrong; and I see as little reason why, in speaking of a "malicious act," he should not be understood as using the word
* "malicious" in its proper legal sense, and as referring [* 102]
to other wrongs, not accompanied by violence, but done intentionally, and, therefore, in the eye of the law, maliciously. The object of an act, that is, the results which will necessarily or naturally follow from the circumstances in which it is committed, may give it a wrongful character, but it ought not to be confounded with the motive of the actor. To discharge a loaded gun is, in many circumstances, a perfectly harmless proceeding; to fire it on the highway, in front of a restive horse, might be a very different matter.

The learned CHIEF JUSTICE proceeds to give various illustrations of the general rule which he had formulated. He first notices a case in which it had been held that a schoolmaster had no cause of action against a defendant who had attracted his pupils and injured his school by setting up a rival establishment, a proceeding which was obviously in the ordinary course of competition, and then adds: "But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars." From that observation I see no reason to differ, because, in my opinion, frightening a child with a gun so that it cannot get to school is in itself a violent and unlawful act, directed both against the child and its schoolmaster. The learned Judge then refers to three instances in which the defendant would be liable in an action upon the case: (1) Where he obstructs a person in charge of a horse, who is taking it to a market for sale, and prevents his reaching the market, thereby depriving the market owner of his dues; (2) where, to the detriment of a proprietor, he by threats frightens away his tenants at will; and (3) when he beats a servant, and so hinders him from taking his master's tolls. It must be observed that, apart from any question of motive, all these cases involve the use of means in themselves illegal, — obstruction, coercion by means of threats, and personal assault.

But assuming, what to my mind is by no means clear, that *Keeble* v. *Hickeringill* was meant to decide that an evil [*103] *motive will render unlawful an act which otherwise would be lawful, it is necessary to consider how far that anomalous principle has been recognised in subsequent decisions. Laying aside the recent decisions which are under review in this appeal, only one case has been cited to us in which the Court professed that they were guided by the reasoning of HOLT, Ch. J. That instance is to be found in *Carrington* v. *Taylor*, 11 East, 571 (11 R. R. 270), a decision which I venture to think that no English Court would at this day care to repeat. The facts of the case resembled those which occurred in *Keeble* v. *Hickeringill*, in this single respect, that the plaintiff was the owner of a decoy for wild fowl. The defendant was the owner of a boat in which he rowed along the coast and earned a livelihood by shooting wild fowl for the market, which he was lawfully entitled to do. But some

of the shots fired by him in the pursuit of that occupation had the effect of scaring birds which otherwise would or might have entered the plaintiff's decoy; and, in respect of that disturbance, he was held liable in damages to the plaintiff. Whatever construction might be put upon the judgment of HOLT, Ch. J., it does not appear to me to contain a single expression which would justify that result. I am not surprised to find that an eminent Judge, with whose opinion as a whole I am unable to concur, has had the courage to express his dissent from the judgment in *Carrington* v. *Taylor*, as he failed "to see what wrong the defendant in that case had done." To my mind the case is of considerable importance, because it shows that in the year 1809 the Court of Queen's Bench did not regard *Keeble* v. *Hickeringill* as establishing the doctrine that a lawful act, done with intent to injure, will afford a cause of action. In the case before them there was no allegation and no evidence of any intent to injure the plaintiff's decoy. The sole motive of the defendant in firing his gun was to earn his livelihood by killing wild fowl for the market. I cannot avoid the conclusion that the learned Judges accepted *Keeble* v. *Hickeringill* as an authority to the effect that, apart from any question of motive, the disturbance of a lawful decoy is an illegal invasion of the private right of its proprietor.

* A variety of well-known cases, including even [* 104] *Lumley* v. *Gye*, 2 E. & B. 216, were relied on by the respondents as showing that the so-called principle of *Keeble* v. *Hickeringill* has been from time to time applied by the English Courts since the date of that judgment. Except in the case of *Carrington* v. *Taylor*, which I have already noticed, I have been unable to discover in these authorities, which I do not consider it necessary to examine in detail, any trace of the doctrine for which the respondents contend until recent years, when it is first firmly foreshadowed in a *dictum* which occurs in *Bowen* v. *Hall*, 6 Q. B. D. 333, and is subsequently developed in *Temperton* v. *Russell* [1893], 1 Q. B. 715, and in the present case. The authorities antecedent to *Bowen* v. *Hall*, as well as that decision itself, are all cases belonging to one or other of these three classes: (1) Cases of privilege, where the perpetrator of an act which *per se* constituted a legal wrong was protected from its usual consequences in the event of its being proved that he was actuated by an honest desire to fulfil a public or private duty; (2) cases in

which the act complained of was in itself a plain violation of private right; and (3) cases in which an act detrimental to others, but affording no remedy against the immediate actor, had been procured by legal means.

The early case of *Garret* v. *Taylor*, Cro. Jac. 567, furnishes an apt illustration of the third class. According to the report, which is very brief, the plaintiff, a quarryman, complained that the defendant had, by threats to " mayhem " and annoy them with litigation, induced or coerced some of his customers to discontinue buying stones from his quarry. Decree passed in absence, and the case was reheard on an appeal brought by the defendant in arrest of judgment upon the ground that the declaration did not disclose any cause of action. The declaration (2 Roll. Rep. 162) discloses facts which, if true, as they were necessarily assumed to be, did amount to illegal means used in order to influence the action of the plaintiff's customers. One learned Judge has assumed that the judgment went on the prin-
[* 105] ciple * that every man " has a right to carry on his trade without disturbance," a proposition which was not involved in the case, but which I should not demur to if he meant " illegal " disturbance. The decision really went upon the terms of the declaration, which appears to me to disclose a clear case of the employment of unlawful means. I am not at present prepared to hold that threats of vexatious litigation, which might cause anxious apprehension in the minds of many, will in no circumstances amount to unlawful influence; but I entertain no doubt that these, when coupled with serious threats of personal violence going the length of mutilation or demembration, do, when the party threatened is overcome by and yields to them, constitute legal coercion.

Tarleton v. *M'Gawley*, 1 Peake N. P. C. 270 (3 R. R. 689), is a case of the same complexion. Two British ships, the *Othello* and the *Bannister*, were lying near to each other off the Calabar coast, both engaged in the same kind of adventure, that of bartering their cargoes for palm-oil and other West African produce. A canoe manned by natives desiring to trade was approaching the *Bannister* for that purpose, when the master of the *Othello* directed against it and fired a cannon loaded with gunpowder and shot and killed one of its crew, an outrage which occasioned such a panic amongst the native tribes that the season's trade of the *Bannister*

was lost. The master of the *Othello* was held to be responsible for that result, which was the direct and natural consequence of his wrongful and criminal act. The case was just the same as if some person had persisted in firing bullets at all and sundry who were about to enter a particular shop with the effect of driving away its customers and ruining the shopkeeper's business. Such an act could not be reasonably described as lawful but for the motive by which it was dictated.

I have already indicated that, in my opinion, no light is thrown upon the decision of the present question by *Pitt* v. *Donovan*, 1 M. & S. 639 (14 R. R. 535), and other cases of that class. The defendant had in that case represented, contrary to the fact, that the plaintiff was insane at the time when he executed a particular deed. * The communication was [* 106] made to a person to whom the defendant was under a legal duty to make the disclosure if it had been true; and the defendant was in law absolved from the ordinary consequences of his having circulated a libel which was false and injurious, if he honestly believed it to be true. The law applicable in cases of that description is, I apprehend, beyond all doubt; but the rule by which the law in certain exceptional cases excuses the perpetration of a wrong, by reason of the absence of evil motive, is insufficient to establish or to support the converse and very different proposition, that the presence of an evil motive will convert a legal act into a legal wrong. *Lumley* v. *Gye*, 2 E. & B. 216, is a weighty authority in this branch of the law, but it does not lend any aid to the respondents' argument. It was an action of damages against a defendant who had induced a professional singer to break her engagement with the plaintiff to his detriment, and it was resisted mainly upon the ground that the engagement broken did not constitute the relationship of master and servant between the contracting parties. That plea was overruled, and the defendant found liable. The principle of the decision (from which COLERIDGE, J., alone dissented) was clearly explained by Mr. Justice (afterwards Chief Justice) ERLE, whose opinion is in complete accordance with the views expressed by the other learned Judges who constituted the majority of the Court. He said: "The authorities are numerous and uniform that an action will lie against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases

comprises the present, for there the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed, and the present case is the same." The learned Judge went on to say, in language which I have already referred to: "It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong." These statements embody an intelligible and a salutary principle, and they contain a full explanation of the law upon which the case was decided.

[* 107] * He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured. None of the learned Judges made any reference to the case of *Keeble* v. *Hickeringill*, 11 East, 574 *n.* (11 R. R. 273 *n.*), and not a single expression is to be found in their opinions tending to suggest that an injurious motive can impart a wrongful character either to a lawful act or to its procurement by means which are not in themselves illegal.

In *Bowen* v. *Hall*, 6 Q. B. D. 333, the wrong complained of was the intentional inducing of a breach of contract to the detriment of the plaintiff, who was obviously entitled to succeed if *Lumley* v. *Gye* had been well decided. According to the opinion expressed by ERLE, Ch. J., and the other Judges of the majority in that case, the defendant in *Bowen* v. *Hall* had been guilty of a wrong which was in the sense of law malicious because he had knowingly procured the commission of an illegal act. The judgment in *Lumley* v. *Gye* was followed by Earl SELBORNE and by Lord ESHER (at that time BRETT, L. J.), whilst COLERIDGE, Ch. J., adhered to the opposite view, which had been taken by COLERIDGE, J. Lord ESHER, in delivering the judgment of Earl SELBORNE and himself, substantially affirms the reasoning of the majority in *Lumley* v. *Gye;* but there are one or two sentences in his judgment relating to points with which the learned Judges who decided that case did not deal, and which were not raised by the facts either of *Lumley* v. *Gye* or of the case before him. His Lordship said: "Merely to persuade a man to break his contract may not be wrongful in law or fact as in the second case put by COLERIDGE, J. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at

the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact." These words are obviously susceptible of two *very different [*108] constructions, according as they are understood to refer to the procurement of an act which is in violation of the law, and therefore a legal wrong, or to the procurement of a lawful act. *Primâ facie*, they would have appeared to me to refer to the procuring of an illegal act, because the assumption upon which the whole passage is framed is that there has been successful persuasion to break a contract, which is an undoubted violation of the law; and in that case there would be a malicious wrong as it is defined in *Lumley* v. *Gye*. But the words have now been explained by their author to mean, not merely that the procuring of an unlawful act with intent to injure is a malicious wrong, giving a good cause of action, but that the presence of injurious intent in the mind of the procurer gives a good cause of action, although the act procured is in itself lawful. In that aspect of them, the words can only be regarded as *obiter dicta*, because no such question was raised by the circumstances of the case.

I do not think it necessary to notice at length *Temperton* v. *Russell* [1893], 1 Q. B. 715, in which substantially the same reasons were assigned by the MASTER OF THE ROLLS and LOPES, L. J., as in the present case. It is to my mind very doubtful whether in that case there was any question before the Court with regard to the effect of the *animus* of the actor in making that unlawful which would otherwise have been lawful. The only findings of the jury which the Court had to consider were: (1) That the defendants had maliciously induced certain persons to break their contracts with the plaintiffs; and (2) that the defendants had maliciously conspired to induce, and had thereby induced, certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which had been disposed of in *Lumley* v. *Gye*. According to the second finding, the persons induced merely refused to make contracts, which was not a legal wrong on their part; but the defendants who induced were found to have accom-

plished their object, to the injury of the plaintiffs, by means of unlawful conspiracy — a clear ground of liability according
[* 109] to * *Lumley* v. *Gye*, if, as the Court held, there was evidence to prove it.

I am quite alive to the fact that the question which we have to decide is one of importance, and also that it has never been previously considered by this House. Having come to the conclusion, with the majority of your Lordships who have heard the appeal, that the doctrine advanced by the respondents is neither sound in principle nor supported by authority, I move that the order appealed from be reversed, and judgment entered for the appellant, and that the appellant have his costs of this appeal, and costs in both Courts below, including the costs of the trial.

[114] Lord HERSCHELL. — My Lords, in this case the respondents, who were the plaintiffs in the action, were members of the shipwrights' union. The appellant is an official — the delegate of the London district — of the United Society
[* 115] of Boiler Makers * and Iron Ship Builders. It appears that before the time of the occurrences which gave rise to this action a controversy had existed between these unions and the members of whom they were respectively composed. The boiler-makers' union insisted that it was not a legitimate part of the work of a shipwright to execute ironwork upon ships, and that they ought to confine themselves to the woodwork. On the other hand, the shipwrights' union contended that ironwork, as well as woodwork, fell properly within their craft. In April, 1894, the respondents were engaged to do certain piecework upon a ship called the *Sam Weller*, in the Regent's Dock, Millwall, for the Glengall Iron Company. They were employed only upon woodwork. Just before this engagement they had been doing iron ship-building work for another firm. This was known to the boiler-makers and ironworkers engaged upon the *Sam Weller*, who were much annoyed at the presence in their midst of men who they considered had been unfairly trenching upon their trade or calling. It is clear that they were indisposed to work in company with them. In consequence of the feeling which had been excited, one of the ironworkers telegraphed to the appellant to come to the ship. On his arrival, he learned that the ironworkers, or some of them, had determined to throw down their

tools and leave at once. He told the ironworker who had telegraphed to him to inform them that if they did so he should use his influence with the executive council of the union to deprive them of any benefit from that society. He then proceeded to an interview with the manager and foreman of the Glengall Company. There is some conflict of evidence as to what passed at that interview, — whether the appellant intimated that the boiler-makers engaged on the ship would be called out if the respondents were allowed to continue to work on board her, or whether he merely represented that the men belonging to his union would cease to work for the company if the employment of the respondents continued. I shall return to this point presently. It is, at all events, clear that the manager of the Glengall Company came to the conclusion that if he continued to employ the respondents the boiler-makers would cease to work for him. In view of this, he determined that the * company would not continue [* 116] the employment of the respondents. It is said that they were "discharged" in consequence of the defendant's action. This is true in the sense that they were no longer employed; it is untrue if intended to imply that any right by contract or otherwise was violated by their discharge.

In consequence of the step taken by the Glengall Company this action was brought. Besides the appellant, Jackson and Knight, the chairman and secretary of the union, were made defendants. KENNEDY, J., before whom the case was tried, left to the jury the following questions: (1) Did the defendant Allen maliciously induce the Glengall Iron Company to discharge the plaintiffs from their employment? (2) Did he maliciously induce the Glengall Iron Company not to engage the plaintiffs, or either of them? The jury answered both questions in the affirmative, and assessed the damages at £20 for each plaintiff. They also found that the other defendants did not authorise the defendant Allen in acting as he did, and that the settlement of the dispute was a matter within the discretion of Allen. Upon these findings the learned Judge entered judgment for the plaintiffs against the appellant, but entered judgment for the other defendants.

This judgment was affirmed by the Court of Appeal. RIGBY, L. J., however, only concurred in the judgment because he regarded the question as practically settled by the judgment in *Temperton* v. *Russell* [1893], 1 Q. B. 715.

It was argued at the bar for the respondents that the jury must be taken to have adopted the view that the evidence for the plaintiffs was correct, and that the appellant did intimate that he would call the boiler-makers out if the company continued to employ the respondents. In my opinion, it is not material whether the account of the conversation given by the appellant or by the manager of the ironworks is the correct one; but I cannot concur in the contention of the respondents that the jury must be taken to have adopted the latter account.

The learned Judge, no doubt, indicated an opinion, which I am not able to share, that it would have a bearing on the question whether the appellant induced the company to decline
[* 117] * to employ the respondents, and also, on the question of malice, whether the one account of the conversation or the other was the correct one. But he did not lay this down as a matter of law; he left it for the jury to decide. Under these circumstances, I do not think the case can properly be dealt with on the assumption that the finding of the jury involves a finding that the version of what passed given by the plaintiffs' witnesses is the correct one. I have said that I do not share the opinion entertained by the learned Judge that the point upon which there was a conflict of testimony had a bearing upon the question whether the company were induced by the appellant to cease to employ or decline employing the respondents. What induced them to do so is plain: it was their belief that if they employed the respondents the ironworkers would cease to work for them, and a sense of the inconvenience which this would cause. It is certain that this belief was engendered by the statement which the appellant made to them. They would be equally induced to take the action, and induced in precisely the same sense, whether the representation was that the ironworkers would cease working, or that they would be called out. Nor was the motive different, whichever representation was made. In my judgment, there can be no difference in the legal effect of these two representations. If the one would give a cause of action, the other, in my opinion, would equally do so.

The question is whether the findings of the jury entitled the plaintiffs to judgment. After a careful and prolonged consideration of the arguments addressed to your Lordships when the case was first presented at the bar of this House, I arrived at the con-

clusion that the question must be answered in the negative. The reasons for this conclusion, which I then prepared, are in substance those to which I now invite your Lordships' attention. I have since carefully reconsidered the matter in view of the opinions which have been expressed by the learned Judges who were summoned on the occasion of the second argument at the bar, but I have seen no ground for changing the opinion at which I had previously arrived. I have, however, added some observations upon the views presented by the learned Judges.

[*118] *It is to be observed, in the first place, that the company in declining to employ the plaintiffs were violating no contract — they were doing nothing wrongful in the eye of the law. The course which they took was dictated by self-interest: they were anxious to avoid the inconvenience to their business which would ensue from a cessation of work on behalf of the ironworkers. It was not contended at the bar that merely to induce them to take this course would constitute a legal wrong, but it was said to do so because the person inducing them acted maliciously. The MASTER OF THE ROLLS declined in the present case to define what was meant by "maliciously:" he considered this a question to be determined by a jury. But if acts are, or are not, unlawful and actionable, according as this element of malice be present or absent, I think it is essential to determine what is meant by it. I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful, because they choose, without any legal definition of the term, to say that they are malicious. No one would know what his rights were. The result would be to put all our actions at the mercy of a particular tribunal whose view of their propriety might differ from our own. However malice may be defined, if motive be an ingredient of it, my sense of the danger would not be diminished.

The danger is, I think, emphasised by the opinions of some of the learned Judges. In a case to which I shall allude immediately the MASTER OF THE ROLLS included within his definition of malicious acts persuasion used for the purpose "of benefiting the defendant at the expense of the plaintiff." WILLS, J., thinks this "going a great deal too far," and that, whether the act complained of was malicious depends upon whether the defendant has, in pursuing his own interests, "done so by such means

and with such a disregard of his neighbour as no honest and fair-minded man ought to resort to." Here it will be seen that malice is not made dependent on motive. The assumed motive is a legitimate one, — the pursuit of one's own interest. The malice depends on the means used and the disregard of one's neigh-
[*119] bour, and the test of its existence is whether these * are such as no honest and fair-minded man ought to resort to. There is here room for infinite differences of opinion. Some, I dare say, applying this test would consider that a strike by workmen at a time damaging to the employer, or a "lock-out" by an employer at a time of special hardship to the workmen, were such means, and exhibited such a disregard of his neighbour as an honest and fair-minded man ought not to resort to. Others would be of the contrary opinion. The truth is, this suggested test makes men's responsibility for their actions depend on the fluctuating opinions of the tribunal before whom the case may chance to come as to what a right-minded man ought or ought not to do in pursuing his own interests. Again, the late CAVE, J. (whom I cannot name without deploring his loss), expressed the view that the action of the appellant might have been justified on the principles of trade competition if it had been confined to the time when the men were doing ironwork, but that it "was without just cause or excuse, and consequently malicious," inasmuch as the respondents were not at the time engaged upon ironwork. On the other hand, it is evident, from the reasoning of some of the learned Judges, who think the respondents entitled to succeed, that they would not be prepared to adopt this distinction, and would regard the act as "malicious" in either case.

The present case was treated in the Court below as governed practically by the previous decisions of the same Court in *Bowen* v. *Hall*, 6 Q. B. D. 333, and *Temperton* v. *Russell* [1893], 1 Q. B. 715. The former of these cases was an action brought against the defendant for maliciously inducing a person who had entered into a contract of service with the plaintiff to break that contract. It raised, for the first time in the Court of Appeal, the question whether *Lumley* v. *Gye*, 2 E. & B. 216, was rightly decided. The MASTER OF THE ROLLS (then BRETT, L. J.,) delivered the judgment of the Court, in which the late Lord SELBORNE concurred, the late LORD CHIEF JUSTICE dissenting. The law was thus laid down in the judgment of the majority of the Court: "Merely to per-

suade a person to break his contract may not be wrongful in law or fact as in the second * case put by COLERIDGE, J. [*120] But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact."

This case was followed, and the view of the law thus expressed was reasserted by the MASTER OF THE ROLLS in *Temperton* v. *Russell*. It will be seen that "malicious" is here defined as the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff. It is said that a malicious act thus defined is, in law and in fact, a wrong act, and therefore a wrongful act. I am not sure that I quiet understand what is meant by saying that it is "in fact" a wrong act, as distinguished from its being so "in law," and that because so wrong it is therefore wrongful. I can only understand it as meaning that it is an act morally wrong. The law certainly does not profess to treat as a legal wrong every act which may be disapproved of in point of morality; but, further, I cannot agree that all persuasion where the object is to benefit the person who uses the persuasion at the expense of another is morally wrong. Numberless instances might be put in which such persuasion, which is of constant occurrence in the affairs of life, would not be regarded by any one as reprehensible. The judgment is grounded almost wholly upon the presence of this element, — that the purpose of the inducement is to injure the plaintiff, or to benefit the defendant at his expense. The fact that the act which is induced by the persuasion is the breach of a contract with the plaintiff is treated as a subordinate matter which without this element would not be a wrong act, or an act wrongful and therefore actionable. The motive of the person who did the act complained of was thus treated as the gist of the action. In *Temperton* v. *Russell* the further step was taken by the majority of the Court, A. L. SMITH, L. J., reserving his opinion on the point, of asserting that it was immaterial that the act induced was not the * breach of a contract, but only the not entering into a [*121] contract, provided that the motive of desiring to injure

the plaintiff, or to benefit the defendant at the expense of the plaintiff, was present. It seems to have been regarded as only a small step from the one decision to the other, and it was said that there seemed to be no good reason why, if an action lay for maliciously inducing a breach of contract, it should not equally lie for maliciously inducing a person not to enter into a contract. So far from thinking it a small step from the one decision to the other, I think there is a chasm between them. The reason for a distinction between the two cases appears to me to be this: that in the one case the act procured was the violation of a legal right, for which the person doing the act which injured the plaintiff could be sued as well as the person who procured it; whilst in the other case no legal right was violated by the person who did the act from which the plaintiff suffered: he would not be liable to be sued in respect of the act done, whilst the person who induced him to do the act would be liable to an action.

I think this was an entirely new departure. A study of the case of *Lumley* v. *Gye* has satisfied me that in that case the majority of the Court regarded the circumstance that what the defendant procured was a breach of contract as the essence of the cause of action. It is true that the word "maliciously" was to be found in the declaration the validity of which was then under consideration; but I do not think the learned Judges regarded the allegation as involving the necessity of proving an evil motive on the part of the defendant, but merely as implying that the defendant had wilfully and knowingly procured a breach of contract. Indeed, CROMPTON, J., appears to me to indicate this in express terms. He says: "It must now be considered clear law that a person who wrongfully and maliciously, or which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it, and during the time stipulated [*122] for as the period of service, * whereby the master is injured, commits a wrongful act for which he is responsible at law." He then proceeds to consider whether the same law is applicable to a contract for future service in the case of a theatrical singer.

ERLE, J., said: "The authorities are numerous and uniform that an action will lie by a master against a person who procures

that a servant should unlawfully leave his service. The principle involved in these cases comprises the present, for there the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed." Not a word, be it observed, is said about the motive as constituting an element in the wrongful act. This is made, if possible, clearer by the answer which the learned Judge gives to the objection that this class of actions for procuring the breach of a contract of hiring rested upon no principle, and ought not to be extended beyond the cases theretofore decided relating to trade, manufacture, or household service. "The answer," said the learned Judge, "appears to me to be that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that when this principle is applied to a violation of a right arising upon a contract of hiring the nature of the service contracted for is immaterial."

I think the view of WIGHTMAN, J., was substantially the same. He relies much upon the case of *Winsmore* v. *Greenbank*, Willes, 577. In relation to that case he says: "It was *primâ facie* an unlawful act of the wife to live apart from her husband, and it was unlawful, and therefore tortious, in the defendant to procure and persuade her to do an unlawful act; and as damage to the plaintiff was thereby occasioned, an action on the case was maintainable. This case appears to me to be an exceedingly strong authority in the plaintiff's favour. It was undoubtedly, *primâ facie*, an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so."

It is true the learned Judge here uses the word "maliciously," * but I think he means no more by this than [*123] "wilfully and knowing that he was procuring an unlawful act." The essence of the tort was manifestly regarded by the learned Judge as the procuring one person to do an unlawful act to the injury of another. In *Winsmore* v. *Greenbank*, which the learned Judge relied upon as a strong authority in support of the plaintiff's case, there was not even an allegation of malice in the first count. The allegation was that the defendant "unlawfully and unjustly" procured a wife not to return to her husband,

whereby he was damnified. WILLES, Ch. J., in his judgment, said, in answer to objections that were taken to the first count: "It must be an unlawful procuring, and it need not be shown on the pleadings how it is unlawful. It was said that it was necessary for the plaintiff to add 'by false insinuations,' but it is not material whether they were true or false. If they were true, and by means of them the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant."

Upon a review, then, of the judgment in *Lumley* v. *Gye*, I am satisfied that the procuring what was described as an unlawful act, namely, a breach of contract, was regarded as the gist of the action. I think the judgment would have been precisely the same if, instead of the word "maliciously," the words "wilfully and with notice of the contract," had been found in the declaration. Every word of the reasoning of the three learned Judges would have been equally applicable to that case. I am not concerned now to inquire whether the decision in *Lumley* v. *Gye* was right. I admit the force of the reasons given by the learned Judges for holding that an action lies not only against a person who breaks a contract, but against any one procuring a breach of contract to the detriment of the plaintiff. There are, however, arguments the other way, and I must not be understood as expressing an opinion one way or the other, whether such an action can be maintained.

It is certainly a general rule of our law that an act *primâ facie* lawful is not unlawful and actionable on account of
[* 124] the * motive which dictated it. I put aside the case of conspiracy, which is anomalous in more than one respect.

It has recently been held in this House, in the case of *Bradford Corporation* v. *Pickles* [1895], A. C. 587, 594, that acts done by the defendant upon his own land were not actionable when they were within his legal rights, even though his motive were to prejudice his neighbour. The language of the noble and learned Lords was distinct. The LORD CHANCELLOR said: "This is not a case where the state of mind of the person doing the act can affect the right. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good the motive might be, he would have no right to do it." The statement was confined to the class of cases then before the House; but I apprehend that what was said is not applicable only to

rights of property, but is equally applicable to the exercise by an individual of his other rights.

The common law on the subject was emphatically expressed by PARKE, B., in delivering the judgment of the Court in *Stevenson* v. *Newnham*, 13 C. B. 285, 297. In that case the question was whether a declaration was good which averred that the defendant "maliciously" distrained for more rent than was due. It was held that the allegation of malice did not make it good. PARKE, B., said: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."

More than one of the learned Judges who were summoned refers with approval to the definition of malice by BAYLEY, J., in the case of *Bromage* v. *Prosser*, 4 B. & C. 247, 255 (28 R. R. 241, 247): "Malice in common acceptation of the term means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." It will be observed that this definition eliminates motive altogether. It includes only "wrongful" acts intentionally done. I may remark in passing that I am quite unable to see how the definition assists the respondents. It seems to me to tell the other way. In the present case the contention is that the malicious motive makes "wrongful" an act that otherwise would not be so.

* It may be convenient here to refer to *Green* v. *London* [*125] *General Omnibus Co.*, 7 C. B. (N. S.) 290, which was relied on as showing that a malicious motive may make actionable acts otherwise innocent. In my opinion it affords no support to such a proposition. Acts were charged in the declaration which manifestly interfered with the plaintiff in the free use of the highway to which he was entitled. The declaration averred that he was obstructed in the use of it. It was demurred to on the ground that a corporation could not be guilty of malice, and that this was of the essence of the cause of action. The decision was only that the declaration was good. It was not held that a malicious motive was essential. ERLE, Ch. J., in delivering the judgment of the Court, stated as the ground of the demurrer, that the declaration charged "a wilful and intentional wrong," and that the defendants being a corporation could not be guilty of such a wrong. He obviously gave the averment of malice the meaning attributed to it by BAYLEY, J., in the case just referred to, namely, that the wrongful acts were done intentionally.

Great stress was laid at the bar on the circumstance that in an action for maliciously and without reasonable and probable cause putting in motion legal process an evil motive is an essential ingredient. I have always understood, and I think that has been the general understanding, that this was an exceptional case. The person against whom proceedings have been initiated without reasonable and probable cause is *primâ facie* wronged. It might well have been held that an action always lay for thus putting the law in motion. But I apprehend that the person taking proceedings was saved from liability if he acted in good faith, because it was thought that men might otherwise be too much deterred from enforcing the law, and that this would be disadvantageous to the public. Some of the learned Judges cite actions of libel and slander as instances in which the legal liability depends on the presence or absence of malice. I think this a mistake. The man who defames another by false allegations is liable to an action, however good his motive, and however honestly he believed in the statement he made. It is true that in a limited class [* 126] of * cases the law, under certain circumstances, regards the occasion as privileged, and exonerates the person who has made false defamatory statements from liability if he has made them in good faith. But if there be not that duty or interest which in law creates the privilege, then, though the person making the statements may have acted from the best of motives, and felt it his duty to make them, he is none the less liable. The gist of the action is that the statement was false and defamatory. Because in a strictly limited class of cases the law allows the defence that the statements were made in good faith, it seems to me, with all deference, illogical to affirm that malice constitutes one of the elements of the torts known to the law as libel and slander. But even if it could be established that in cases falling within certain well-defined categories, it is settled law that an evil motive renders actionable acts otherwise innocent, that is surely far from showing that such a motive always makes actionable acts prejudicial to another which are otherwise lawful, or that it does so in cases like the present utterly dissimilar from those within the categories referred to.

The question raised by the decision under appeal is one of vast importance and wide-reaching consequences. In *Temperton* v. *Russell* [1893], 1 Q. B. 715, it was held that the principle of

Lumley v. *Gye*, 2 E. & B. 216, and *Bowen* v. *Hall*, 6 Q. B. D. 333, was not confined to breaches of contract of service, but applied to breaches of any contract. The law laid down in *Bowen* v. *Hall* in terms applies to all contracts, and I quite agree that the nature of the contract can make no difference.

If the judgment under appeal is to stand, and the fact that the act procured was unlawful as being a breach of contract be immaterial, it follows that every person who persuades another not to enter into any contract with a third person may be sued by that third person if the object were to benefit himself at the expense of such person. Such a case is within the very words employed in *Bowen* v. *Hall* as applied in the present judgment. I do not think it possible to maintain such a proposition. It would obviously apply where one trader * induced another not to [* 127] contract with a third person with whom he was in negotiation, but to make the contract with himself instead, a proceeding which occurs every day, and the legitimacy of which no one would question. Yet it is within the very language used in *Bowen* v. *Hall*. He induces a person not to enter into a contract with a third person, and his object is to benefit himself at the expense of the person who would otherwise have obtained the contract, and thus necessarily to injure him by depriving him of it. It was said at the bar by the learned counsel for the respondents, in answer to this difficulty, that there was an exception in favour of trade competition. I know of no ground for saying that such an exercise of individual right is treated with exceptional favour by the law. I shall revert to this point presently in connection with another branch of the respondents' argument. But it is possible to give many illustrations to which no such answer would apply. I give one: a landowner persuades another to sell him a piece of land for which a neighbour is negotiating. It is so situated that it will improve the value of the property of whichever of them obtains it. His motive is to benefit himself at his neighbour's expense; he induces the owner of the land not to contract with his neighbour. The case is within the terms of the judgment in *Bowen* v. *Hall*. Would it be possible to contend that an action lay in such a case? If the fact be that malice is the gist of the action for inducing or procuring an act to be done to the prejudice of another, and not that the act induced or procured is an unlawful one as being a breach of contract or otherwise, I can see no possi-

ble ground for confining the action to cases in which the thing induced is the not entering into a contract. It seems to me that it must equally lie in the case of every lawful act which one man induces another to do where his purpose is to injure his neighbour or to benefit himself at his expense. I cannot hold that such a proposition is tenable in principle, and no authority is to be found for it. I should be the last to suggest that the fact that there was no precedent was in all cases conclusive against [* 128] the right to maintain an action. It is * the function of the Courts to apply established legal principles to the changing circumstances and conditions of human life. But the motive of injuring one's neighbour or of benefiting one's self at his expense is as old as human nature. It must for centuries have moved men in countless instances to persuade others to do or to refrain from doing particular acts. The fact that under such circumstances no authority for an action founded on these elements has been discovered does go far to show that such an action cannot be maintained. I think these considerations (subject to a point which I will presently discuss) are sufficient to show that the present action cannot be maintained.

It is said that the statement that the defendant would call the men out, if made, was a threat. It is this aspect of the case which has obviously greatly influenced some of the learned Judges. HAWKINS, J., says that the defendant without excuse or justification " wilfully, unlawfully, unjustly, and tyrannically invaded the plaintiffs' right by intimidating and coercing their employers to deprive them of their present and future employment," and that the plaintiffs are therefore entitled to maintain this action. But " excuse or justification " is only needed where an act is *primâ facie* wrongful. Whether the defendant's act was so is the matter to be determined. To say that the defendant acted " unlawfully " is, with all respect, to beg the question, which is whether he did so or not. To describe his acts as unjust and tyrannical proves nothing, for these epithets may be and are, in popular language, constantly applied to acts which are within a man's rights, and unquestionably lawful. In my opinion these epithets do not advance us a step towards the answer to the question which has to be solved. The proposition is therefore reduced to this, that the appellant invaded the plaintiffs' right by intimidating and coercing their employers. In another passage in his opinion the

learned Judge says that there is no authority for the proposition that to render threats, menaces, intimidation, or coercion available as elements in a cause of action, they must be of such a character as to create fear of personal violence. I quite agree with this. The threat of violence to property is equally a threat in the eye of the law. * And many other instances might [* 129] be given. On the other hand it is undeniable that the terms "threat," "coercion," and even "intimidation," are often applied in popular language to utterances which are quite lawful and which give rise to no liability, either civil or criminal. They mean no more than this, that the so-called threat puts pressure, and perhaps extreme pressure, on the person to whom it is addressed to take a particular course. Of this, again, numberless instances might be given. Even, then, if it can be said without abuse of language that the employers were "intimidated and coerced" by the appellant, — even if this be in a certain sense true, it by no means follows that he committed a wrong or is under any legal liability for his act. Everything depends on the nature of the representation or statement by which the pressure was exercised. The law cannot regard the act differently because you choose to call it a threat or coercion instead of an intimation or warning.

I understood it to be admitted at the bar, and it was indeed stated by one of the learned Judges in the Court of Appeal, that it would have been perfectly lawful for all the ironworkers to leave their employment and not to accept a subsequent engagement to work in the company of the plaintiffs. At all events, I cannot doubt that this would have been so. I cannot doubt either that the appellant or the authorities of the union would equally have acted within his or their rights if he or they had "called the men out." They were members of the union. It was for them to determine whether they would become so or not, and whether they would follow or not follow the instructions of its authorities; though no doubt if they had refused to obey any instructions which under the rules of the union it was competent for the authorities to give, they might have lost the benefits they derived from membership. It is not for your Lordships to express any opinion on the policy of trade unions, membership of which may undoubtedly influence the action of those who have joined them. They are now recognised by law; there are combinations of

employers as well as of employed. The members of these unions, of whichever class they are composed, act in the interest of their class. If they resort to unlawful acts they may be in-
[* 130] dicted or sued. If they * do not resort to unlawful acts they are entitled to further their interests in the manner which seems to them best, and most likely to be effectual.

If, then, the men had ceased to work for the company either of their own motion or because they were "called out," and the company in order to secure their return had thought it expedient no longer to employ the plaintiffs, they could certainly have maintained no action. Yet the damage to them would have been just the same. The employers would have been subjected to precisely the same "coercion" and "intimidation," save that it was by act and not by prospect of the act; they would have yielded in precisely the same way to the pressure put upon them, and been actuated by the same motive, and the aim of those who exercised the pressure would have been precisely the same. The only difference would have been the additional result that the company also might have suffered loss. I am quite unable to conceive how the plaintiffs can have a cause for action, because, instead of the ironworkers leaving, either of their own motion or because they were called out, there was an intimation beforehand that either the one or the other of these courses would be pursued. The ironworkers were employed on the terms that they might leave at the close of any day, and that on the other hand the employers might, if they saw fit, then discharge them. The company had employed the men knowing that they were members of the union, and they had on one occasion, at least, dealt with the appellant as its delegate. They had no ground for complaint if the men left, as they were by contract entitled to do, whether the men left of their own motion or followed the instruction of their union leaders. It is said that the company were in the power of the men because of the business loss to which the withdrawal of the men would subject them. But to what was this due, if not to the act of the company themselves in employing these men under a contract which either party might any day determine? Under such circumstances, to compare the act of the company to that of the traveller who, on a pistol being presented to his head, hands his purse to the highwayman, appears to me grotesque.

[* 131] * The object which the appellant and the ironworkers

had in view was that they should be freed from the presence of men with whom they disliked working, or to prevent what they deemed an unfair interference with their rights by men who did not belong to their craft doing the work to which they had been trained. Whether we approve or disapprove of such attempted trade restrictions, it was entirely within the right of the ironworkers to take any steps, not unlawful, to prevent any of the work which they regarded as legitimately theirs being intrusted to other hands.

Some stress was laid in the Court below upon the fact that the plaintiffs were not at the time in question engaged upon ironwork, although immediately before that time they had been so employed elsewhere. This, it was said, showed that the motive of the defendant and the ironworkers was the "punishment" of the plaintiffs for what they had previously done. I think the use of the word "punishment" has proved misleading. That word does not necessarily imply that vengeance is being wreaked for an act already done, though no doubt it is sometimes used in that sense. When a Court of justice, for example, awards punishment for a breach of the law the object is not vengeance. The purpose is to deter the person who has broken the law from a repetition of his act, and to deter other persons also from committing similar breaches of the law.

In the present case it was admitted that the defendant had no personal spite against the plaintiffs. His object was, at the utmost, to prevent them in the future from doing work which he thought was not within their province, but within that of the ironworkers. If he had acted in exactly the same manner as he did at a time when the plaintiffs were engaged upon ironwork, his motive would have been precisely the same as it was in the present case, and the result to the plaintiffs would have been in nowise different. I am unable to see, then, that there is any difference either in point of ethics or law between the two cases. The ironworkers were no more bound to work with those whose presence was disagreeable to them than the plaintiffs were bound to refuse to work because they found that *this [*132] was the case. The object which the defendant, and those whom he represented, had in view throughout was what they believed to be the interest of the class to which they belonged; the step taken was a means to that end. The act which caused the

damage to the planitiffs was that of the iron company in refusing to employ them. The company would not subordinate their own interests to the plaintiffs. It is conceded that they could take this course with impunity. Why, then, should the defendant be liable because he did not subordinate the interests of those he represented to the plaintiffs'? Self-interest dictated alike the act of those who caused the damage, and the act which is found to have induced them to cause it.

I have been dealing so far with the ground upon which the judgment in the Court below proceeded. The learned counsel for the respondents, however, rested their arguments mainly upon a different ground, and it is this ground, and not that taken in the Court below, which has found most favour with the learned Judges who think the plaintiffs entitled to judgment.

It was contended that the defendant by the course he took had interfered with the plaintiffs in their trade or calling, and that this of itself was an actionable wrong. In support of this very broad proposition reliance was mainly placed on the case of *Keeble* v. *Hickeringill*, 11 East, 574 *n.* (11 R. R. 273 *n.*). The declaration charged the defendant with firing a gun with design to damnify the plaintiff, and frighten the wild fowl from his decoy. In one report (Holt, 14; 11 East, 573 *n.*) it is stated that the plaintiff was lord of a manor, and had a decoy, and the plaintiff had also made a decoy upon his own ground, which was next adjoining the defendant's ground, and there the plaintiff had decoy and other ducks, of which he made profit. It was held that the action lay. In another report (11 Mod. 74) this observation is attributed to Lord HOLT: "Suppose defendant had shot in his own ground, if he had occasion to shoot it would have been one thing, but to shoot on purpose to damage the plaintiff is another thing, and a wrong." In another report (11 East, 574 *n.*) Lord HOLT is reported as saying: "The action lies, for, first, [*133] *using or making a decoy is lawful; secondly, this employment of his ground for that use is profitable to the plaintiff, as is the skill and management of that employment." It is argued that this decision rests upon the principle that intentional interference with the trade of another is wrongful. If it was intended by the decision to draw a distinction between firing by the defendant on his own land when the decoy was kept by the plaintiff for purposes of trade profit, and doing the same act when

the decoy was kept for purposes of pleasure only, I can see no ground for such a distinction. The defendant in firing upon his own land in such a way as to frighten the birds from the plaintiff's land, was either acting within his own rights or not. If he was not, he would surely be liable, whether the plaintiff was using his land for pleasure or profit. If he was within his rights he would not be liable in either case, and I do not see how his rights could depend on the circumstance that the plaintiff traded in ducks and did not merely use his decoy for purposes of sport, or that he sold them, and did not merely use them for consumption by his household. I cannot think that the right of action depended on the circumstance that the plaintiff traded in ducks, or that there would have been no right of action, all other circumstances being the same, if he had not done so. The case may be supported, and the observation of Lord HOLT, which has been quoted, explained by the circumstance that if the defendant merely fired on his own land in the ordinary use of it, his neighbour could make no complaint, whilst, if he was not firing for any legitimate purpose, connected with the ordinary use of land, he might be held to commit a nuisance. In this view of it *Keeble* v. *Hickeringill* has, of course, no bearing on the present case.

It is, however, treated in their opinions by the majority of the learned Judges as establishing the wide and far-reaching proposition that every man has a right to pursue his trade or calling without molestation or obstruction, and that any one who by any act, though it be not otherwise unlawful, molests or obstructs him is guilty of a wrong, unless he can show lawful justification or excuse for so doing.

* The case of *Keeble* v. *Hickeringill* was decided about [* 134] two centuries ago, but I cannot find that it has ever been treated, unless it be quite recently, as establishing the broad general proposition alleged. No such proposition is to be found stated, so far as I am aware, as the ground of any decision, or in any standard text-book of the English law. In Smith's Leading Cases, which were selected, and the notes on which were written, by one of the most eminent lawyers of his day, the case of *Keeble* v. *Hickeringill* is not even referred to. And the first editors of the work, after Mr. J. W. Smith's death, WILLES and KEATING, JJ., lawyers on whose eminence it is unnecessary to dilate, equally passed it by without notice. If the view taken by the majority of

the learned Judges whose opinions were given at the bar be correct, *Keeble* v. *Hickeringill* ought to have been itself treated as a leading case.

It has not, as I believe, been an authority on which subsequent decisions have been based, except in cases relating to the disturbance of decoys of wild birds. It is, nevertheless, suggested by the learned Judges that it embodies the principle on which many subsequent cases have been decided, though it was not referred to, and the Judges who pronounced the judgments were apparently unconscious of the authority they are said to have followed.

It is remarkable that amongst these cases are *Lumley* v. *Gye*, 2 E. & B. 216, and *Bowen* v. *Hall*, 6 Q. B. D. 333, which I have already discussed. They are said by several of the Judges to rest on the principle established in *Keeble* v. *Hickeringill*. Some of the Judges, indeed, criticise adversely the grounds upon which these cases were decided, and intimate that they can only be supported on the ground taken by Lord HOLT in *Keeble* v. *Hickeringill*. That case, however, was not even cited by the counsel who argued *Lumley* v. *Gye* or *Bowen* v. *Hall*, or by any of the Judges who decided them. If it establishes the proposition contended for, it is astonishing that those very learned and distinguished Judges were unaware of any such legal proposition, and instead [* 135] of taking this short cut to their * decision based it upon elaborate reasoning entirely unconnected with it.

Great reliance was placed by the respondents on certain *dicta* of HOLT, Ch. J., in *Keeble* v. *Hickeringill*. That learned Judge is reported to have said that if a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, an action lies in all cases. And he gives the following illustrations: "If H. should lie in the way with guns and fright boys from going to school, and their parents would not let them go thither, that schoolmaster would have an action for loss of his scholars. A man hath a market to which he hath toll of horses sold, a man is bringing his horse to market to sell, a stranger hinders and obstructs him from going to the market, an action lies, because it imports damage. Again, an action on the case lies against one that by threats frightens away his tenants at will." In all these cases I think the CHIEF JUSTICE was referring to acts in themselves wrongful. Firing guns in such a manner as to terrify persons lawfully passing along the highway would, I take it, be

an offence. And the other illustrations given import, I think, that the obstruction and frightening were of such a character as to be unlawful, quite independently of the motives which led to them.

The case of *Carrington* v. *Taylor*, 11 East, 571 (11 R. R. 270), was also relied on by the respondents. It is, I believe, the only case which has been expressly based on *Keeble* v. *Hickeringill*. The plaintiff there possessed an ancient decoy, and the defendant sought his livelihood by shooting wild fowl from a boat on the water, for which boat, with small arms, he had a license from the Admiralty for fishing and coasting along the shores of Essex. The decoy was near a salt creek where the tide ebbs and flows. The only proof of disturbance of the decoy by the defendant was that, being in his boat shooting wild fowl in a part of the open creek, he had fired his fowling-piece, first within a quarter of a mile of the decoy and afterwards within two hundred yards of it, and had killed several widgeons. The Judge left these facts to the jury as evidence of a wilful disturbance of the plaintiff's decoy by the defendant. The jury returned a verdict for 40*s.* damages, * and the Court, on the motion for a new trial, [* 136] refused to disturb the verdict. They gave no reasons for their judgment. Unless a decoy possesses some peculiar privileges in the eye of the law, I confess myself quite unable to understand why the defendant was liable to an action or was not within his rights in shooting the wild fowl at the place he did for the purpose of gaining a livelihood, which is stated to have been his object. In any case, the decision affords no support to the contention now under consideration. For there was no allegation that the plaintiff traded in wild fowl; "great profits and advantages," in pleader's language, might well have accrued to him without his doing so. And there was no proof that he did so. Although some of the learned Judges, who support the judgment below, rely on this case, one at least thinks it bad law. The case is important as showing, as I think it clearly does, that the Judges of the Court of King's Bench in 1809 did not regard the judgment in *Keeble* v. *Hickeringill* as founded on interference with trade or dependent on the presence of malice.

I turn now to the other cases which are relied on by the learned Judges in support of the proposition on which they found their conclusion in favour of the respondents, and which are said to

have been decided upon the principle embodied in *Keeble* v. *Hickeringill.* Amongst the earliest of these is *Garret* v. *Taylor,* Cro. Jac. 567. The declaration alleged that the plaintiff was a mason, and used to sell stones, and employed workmen in his stone pit. "Al queux" — I quote from the fuller statement of the pleading in 2 Rolle's Reports, p. 162 — "le defendant tantas et frequentas minas de vita et de mutilatione membrorum suorum et bonorum devastatione per diversas sectas legis dedit" whereby the plaintiff's workmen left, and he was unable to obtain others. After judgment this declaration was held to disclose a cause of action. It is suggested that it is difficult to explain this decision except on the ground that the law recognises in every man a right to carry on his trade without disturbance. I am unable to see the difficulty or to think that the decision rests on any [* 137] principle specially relating to trade. * If the plaintiff had not been a tradesman, but the owner of a house, and the same menaces had been uttered to those who came from time to time to visit him, I cannot but think that he would equally have had a cause of action. He would have been affected prejudicially in the occupation and enjoyment of his property by acts in themselves wrongful. Again, in *Tarleton* v. *M'Gawley,* 1 Peake N. P. C. 270 (3 R. R. 689), a gun was fired at a canoe coming to the plaintiff's ship, whereby one of the natives in it was killed, and so natives were deterred by fright from approaching the ship for the purpose of trading. It is said that the essence of the wrong in this case was that the plaintiff was disturbed in his trade. I do not think so. Can it be doubted that if the shipowner had desired the presence of persons on board his ship for any other purpose, and the same wrongful act had deterred them from approaching the ship, the shipowner might have maintained a similar action to recover damages for any loss or inconvenience to which he had been put owing to the wrongful act of the defendant?

I will not trouble your Lordships by going through all the cases referred to. Speaking generally, I believe these actions would equally have been maintainable if a similar wrongful act had caused damage to, or had affected the legal rights of, a person wholly unconnected with trade. In all of them the act complained of was in its nature wrongful; violence, menaces of violence, false statements. In none of them was the proposition now

contended for laid down or hinted at, and they can be supported without resort to any such principle. No doubt in some of the cases referred to the wrong was of such a nature that it is difficult to imagine circumstances in which precisely the same wrong could have caused damage to a person not in trade; but the act was not wrongful merely because it affected the man in his trade, though it was this circumstance which occasioned him loss. Among the authorities relied on were those relating to slander of a man in the way of his trade. This action again was traced to the principle that a man's trade must not be interfered with. It is true that slander of a man in the way of his trade is actionable without proof of special * damage; but whatever the slan- [* 138] der, the wrong is precisely the same, that defamatory words have been uttered. And slander of a man in the way of his office, if it be an office of profit or even of dignity, where it is one from which the holder may be removed, is actionable without proof of special damage in precisely the same way as slander of a man in the way of his trade.

I now proceed to consider on principle the proposition advanced by the respondents, the alleged authorities for which I have been discussing. I do not doubt that every one has a right to pursue his trade or employment without "molestation" or "obstruction" if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that every one has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition in my opinion has no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work, is in law a right of precisely the same nature, and entitled to just the same protection as a man's right to trade or work. They are but examples of that wider right of which I have already spoken. That wider right embraces also the right of free speech. A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium. Unless he is thus shown to have abused his right, why is he to be

called upon to excuse or justify himself because his words may interfere with some one else in his calling?

In the course of the argument one of your Lordships asked the learned counsel for the respondents whether, if a butler on account of a quarrel with the cook told his master that he would quit his service if the cook remained in it, and the master preferring to keep the butler terminated his contract with the cook, the [* 139] latter could maintain an action against the butler. * One of the learned Judges answers this question without hesitation in the affirmative. As in his opinion the present action would lie, I think he was logical in giving this answer. But why, I ask, was not the butler in the supposed case entitled to make his continuing in the employment conditional on the cook ceasing to be employed? And if so, why was he not entitled to state the terms on which alone he would remain, and thus give the employer his choice? Suppose after the quarrel each of the servants made the termination of the contract with the other a condition of remaining in the master's service, and he chose to retain one of them, would this choice of his give the one parted with a good cause of action against the other? In my opinion a man cannot be called upon to justify either act or word merely because it interferes with another's trade or calling; any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shown to be in its nature wrongful, and thus to require justification.

The notion that there may be a difference in this respect between acts affecting trade or employment and other acts seeems to be largely founded on certain *dicta* of BOWEN, L. J., in the case of the *Mogul Steamship Company*. It must be remembered that these were *obiter dicta*, for the decision was that the defendants were not liable. The passage perhaps chiefly relied upon is the following: "Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong (23 Q. B. D., at p. 613)." It will be noted that the learned Judge here makes no distinction between acts which interfere with property and those which interfere with trade. For the purpose then in hand the statement of the law

may be accurate enough, but if it means that a man is bound in law to justify or excuse every wilful act which may damage another in his property or trade, then I say, with all respect, the proposition is far too wide; everything * depends [* 140] on the nature of the act, and whether it is wrongful or not.

Whatever may be the effect of the *dicta* of some of the Judges in the case of *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, I regard it as an authority supporting the appellant's case. Certain owners of ships formed an association with the object of securing to themselves exclusively a particular carrying trade. They allowed a rebate on the freights to all shippers who shipped only with members of the association. They also sent ships to ports where the plaintiffs were endeavouring to obtain cargoes, to carry at unremunerative rates, in order to secure the trade to themselves. A circular was sent by an agent of the defendants, reminding shippers at a particular port that shipments for London by any of the plaintiffs' steamers at any of the ports in China would exclude the firm making the shipment from participation in the returns of freight during the whole six-monthly period in which they had been made, even though the firm elsewhere might have given exclusive support to the steamers of the combination. It was held by this House that the plaintiffs had no cause of action. This, too, be it observed, though the action was in respect of a conspiracy, what was done being in pursuance of a common course of action concerted by several shipowners.

In that case the very object of the defendants was to induce shippers to contract with them, and not to contract with the plaintiffs, and thus to benefit themselves at the expense of the plaintiffs, and to injure them by preventing them from getting a share of the carrying trade. Its express object was to molest and interfere with the plaintiffs in the exercise of their trade. It was said that this was held lawful because the law sanctions acts which are done in furtherance of trade competition. I do not think the decision rests on so narrow a basis, but rather on this, that the acts by which the competition was pursued were all lawful acts, that they were acts not in themselves wrongful, but a mere exercise of the right to contract with whom, and when, and under what circumstances and upon what conditions they pleased. I am aware of no ground for saying that competition * is regarded with special favour by the law; at all [* 141]

events, I see no reason why it should be so regarded. It may often press as hardly on individuals as the defendant's acts are alleged to have done in the present case. But if the alleged exception could be established, why is not the present case within it? What was the object of the defendant, and the workmen he represented, but to assist themselves in their competition with the shipwrights? A man is entitled to take steps to compete to the best advantage in the employment of his labour, and to shut out, if he can, what he regards as unfair competition, just as much as if he was carrying on the business of a shipowner. The inducement the appellant used to further his end was the prospect that the members of his union would not work in company with what they deemed unfair rivals in their calling. What is the difference between this case and that of a union of shipowners who induce merchants not to enter into contracts with the plaintiffs, by the prospect that if at any time they employ the plaintiffs' ships they will suffer the penalty of being made to pay higher charges than their neighbours at the time when the defendants' ships alone visit the ports? In my opinion there is no difference in principle between the two cases.

A further point to which I have not yet alluded was raised by the junior counsel for the respondents on the first argument at the bar. It was strenuously insisted upon by both learned counsel on the occasion of the second argument. It was said that the appellant had been guilty of misrepresentation, which had induced the company to take the course they did. No such point is to be found suggested in the pleadings; no such point was raised at the trial or in the Court of first instance, or until the junior counsel for the respondents addressed your Lordships. The jury were not asked whether there had been a misrepresentation, and have not found that this was the case. It is certainly not admitted by the appellant. Under these circumstances it would, in my opinion, be without justification and contrary to precedent for your Lordships to attach any weight to the point now. But I think it right to add that it does not seem to me to have been made good [* 142] as a matter of * fact. It is contended, as I understand, that the appellant represented that all the iron-workers in the union would leave if the plaintiffs continued to be employed, whereas some only had said that they would do so. I think the contention rests on a misapprehension. It is true that some only

appear to have said that they would leave at once, but I think that this referred to an immediate departure without waiting till the end of the day, or at all events without awaiting the result of the interview between the appellant and the employers. The witness Elliot, whose evidence is relied on, himself says that "the chaps" were dissatisfied, and that there was only one way of settling it, and that was in accordance with the wishes of their men, these wishes being that the plaintiffs should not be continued upon work in the same ship. Even if a misrepresentation by the appellant to the Glengall Company would be sufficient in any circumstances to afford a right of action to the plaintiffs, I think it could scarcely be contended that it could do so, unless the misrepresentation were wilful and intentional. Of this there is, in my opinion, not a tittle of evidence. The appellant may well have believed from the statements made to him, that if the plaintiffs continued to work in the ship, all the ironworkers would cease to work. On the evidence I should come without hesitation to the conclusion that they would have done so.

For the reasons I have given I think the judgment should be reversed, and judgment entered in the action for the defendant with costs.

I have only very recently had the opportunity of knowing the views entertained by my noble and learned friend on the woolsack with regard to this case. In consequence of them, I think it right to add the following observations. I am not behind my noble and learned friend in the desire to preserve individual liberty. But I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has been exercised in a particular instance may be distasteful.

I am unable to regard as altogether accurate the statement of my noble and learned friend that up to the period when this * case reached your Lordships' House there was a [* 143] unanimous consensus of opinion. I think he has overlooked the following facts. When the Court of Appeal in *Bowen* v. *Hall*, 6 Q. B. D. 333, held that an action lay for maliciously inducing another to break his contract, the late LORD CHIEF JUSTICE, differing from his two colleagues, was of opinion that even in such a case an action could not be maintained. When in *Temperton* v. *Russell* [1893], 1 Q. B. 715, Lord ESHER and LOPES, L. J., carried the doctrine further, and held that an action would

lie for maliciously inducing another not to enter into a contract, A. L. SMITH, L. J., notwithstanding the strong expression of opinion by those learned Judges, significantly reserved his own opinion on the point. And when in the present case Lord ESHER and LOPES, L. J., reaffirmed the opinions they had previously pronounced, RIGBY, L. J., only concurred in the judgment under appeal in deference to the opinions expressed in the previous case.

In my opinion the conclusion at which I have arrived is not in conflict with any decision or even with the pronounced opinions of any Judges except those enunciated in the recent cases now under review. On the contrary, I believe with all deference to my noble and learned friend on the woolsack that any other conclusion would run counter to principles of the common law which have been long well established.

I regret to have trespassed so long on your Lordships' time. My excuse must be that I regard the decision under appeal as one absolutely novel, and which can only be supported by affirming propositions far-reaching in their consequences and in my opinion dangerous and unsound.

[181] *Order of the Court of Appeal reversed and judgment entered for the appellant with costs here and below, including the costs of the trial; cause remitted to the Queen's Bench Division.*

Lords' Journals, December 14, 1897.

ENGLISH NOTES.

Allen v. *Flood*, the third principal case, may be classed among those decisions, the sequel of which it is impossible to anticipate. It may mark the starting-point of a modern development, or simply indicate the limits of the older law.

The case of *Allen* v. *Flood* in part confirms the *nisi prius* ruling of Lord KENYON, Ch. J., in *Nichol* v. *Martyn* (1799), 2 Esp. 732, 5 R. R. 770, that it is not actionable to induce a servant to leave at the expiration of his term of service.

In *Sykes* v. *Dixon* (1839), 9 Ad. & Ell. 693, 1 Per. & D. 463, the servant had signed a memorandum which only contained the stipulations on his part with the master. The agreement was unenforceable by reason of section 4 of the Statute of Frauds (29 Car. II., c. 3). A third person was held not to be guilty of harbouring the person who, as the plaintiff alleged, had quitted his service without proper notice. The Court there distinguished the case of *Keane* v. *Boycott* (1795),

2 H. Bl. 511, 3 R. R. 494, where a recruiting officer was held liable for enticing away a negro apprentice. In *Bird* v. *Randall* (1762), 3 Burr. 1345, 1 W. Bl. 373, 387, the master and the servant had bound themselves in a penalty to perform an agreement for service and employment. Within the stipulated period of service the defendant enticed the servant to break the agreement. The master then sued the servant for the penalty stipulated by the agreement, and recovered the whole as damages. The master then commenced the action (*Bird* v. *Randall*) for enticing the servant, and during the pendency of that action received satisfaction under his judgment against the servant. It was held that the proceedings against the third party were not further maintainable.

The measure of damages is not to be limited to the actual loss the employer sustained at the time when the servant was enticed away, but is to include full compensation for the injury done to him by causing the servant to leave his employment. *Gunter* v. *Astor* (1819), 4 Moore, 12, 21 R. R. 733.

AMERICAN NOTES.

See notes, *ante*, vol. i. p. 728.

In *Angle* v. *Chicago, &c. R. Co.*, 151 United States, 1, it is said, following the English cases of *Lumley* v. *Gye*, 2 E. & B. 216, and *Bowen* v. *Hall*, 6 Q. B. Div. 333, that if one maliciously interferes in a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the interferer. But in two recent cases in Kentucky, *Chambers* v. *Baldwin*, 91 Kentucky, 121 (34 Am. St. Rep. 165), and *Bourlier* v. *Macauley*, 91 Kentucky, 135 (34 Am. St. Rep. 171; 11 Lawyers' Rep. Annotated, 550), the English cases are disapproved, and it is held that an action cannot in general be maintained for inducing a third person to break his contract with the plaintiff, even if it be alleged that the defendant's interference was malicious. The only exceptions were declared to be where apprentices, menial servants, and others whose sole means of living was by manual labor, are enticed to leave their employment, or where a person has been procured, against his will or contrary to his purpose, by coercion or deception of another to break his contract.

To maintain an action for enticing away a servant, it must be shown that there was an existing obligation to render service. *Peters* v. *Lord*, 18 Connecticut, 337; *Butterfield* v. *Ashley*, 2 Gray (Mass.), 256; *Campbell* v. *Cooper*, 34 New Hampshire, 49; *Caughey* v. *Smith*, 47 New York, 244. To induce a servant to leave when his time of service shall expire is not actionable, although he may not have intended to quit the service. *Boston Glass Manuf.* v. *Binney*, 4 Pickering (Mass.), 425.

In *Raycroft* v. *Tayntor*, 68 Vermont, 219; 54 Am. St. Rep. 882; 33 Lawyers' Rep. Annotated, 225, it was held that if A., in the exercise of a lawful right, threatens to terminate a contract between himself and B., unless the latter discharges a certain employee, not engaged for any definite term, the

latter is without remedy against A. although his motive was malicious. The Court said: "The authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act, or threat *aliunde* the exercise of a lawful right, had broken up the contract relation existing between the plaintiff and Libersont, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor. But the same authorities clearly establish that if the defendant's act, or threatened act, was one which, in his relation to the property and parties, he had a lawful right to perform, unless it involved a superior right of the plaintiff, it gave the plaintiff no right of action, though it occasioned a loss to him and was actuated by a desire to injure."

"So too in *Chipley* v. *Atkinson*, 23 Florida, 206; 11 Am. St. Rep. 367, it is said: 'Where one does an act which is legal in itself, and violates no right of another person, it is true that the fact that the act is done from malice or other bad motive toward another does not give the latter a right of action against the former. Though there be loss or damage resulting to the other from the act, and the doer was prompted to it solely by malice, yet if the act be legal and violates no legal right of the other person, there is no right of action.' In support of this doctrine a large number of decisions are cited, and among them *Chatfield* v. *Wilson*, 28 Vermont, 49; *South Royalton Bank* v. *Suffolk Bank*, 27 Vermont, 505; *Harwood* v. *Benton*, 32 Vermont, 724.

"William L. Hodge, in January and February numbers of 'American Law Review,' in an article on 'Wrongful interference by third parties with the rights of employees and employed,' reviews a great number of cases, and on page 54 says: 'So also it is said, and there are indeed many authorities which appear to hold, that to constitute an actionable wrong, there must be a violation of some definite legal right of the plaintiff. But these are cases for the most part, at least, where the defendants were themselves acting in the lawful exercise of some distinct right which furnished the defence of a justifiable cause for their acts except so far as they are in violation of a superior right in another. Therefore if the defendant's act be (1) legal in itself, and (2) violates no superior right in another, it is not actionable, although it be done maliciously and cause damage to that other.'"

In *Boysen* v. *Thorn*, 98 California, 578; 21 Lawyers' Rep. Annotated, 233, it was held that maliciously inducing another to break a contract with a third person will not create a liability to the latter when done without threats, violence, fraud, falsehood, deception, or benefit to the person inducing the breach. This was a contract of boarding at a hotel, and the case came up on demurrer. The Court said the complaint did not bring the case within the principle governing the relation of master and servant, and noticed *Lumley* v. *Gye* and *Bowen* v. *Hall*, and cited *Payne* v. *Western & A. R. Co.*, 13 Lea (Tennessee), 507.

In *Morgan* v. *Andrews*, 107 Michigan, 33, it was held that maliciously and by falsehood and deceit to induce one to induce a purchaser to break his contract with a seller, is actionable; citing *Benton* v. *Pratt*, 2 Wendell (N. Y.),

385; 20 Am. Dec. 623; *Rice* v. *Manley*, 66 New York, 82; 23 Am. Rep. 230; and *Chipley* v. *Atkinson*, *supra*.

In *Perkins* v. *Pendleton*, 90 Maine, 166; 60 Am. St. Rep. 252, it was held that one is liable in damages for inducing, maliciously and by threats, fraud, or intimidation, an employer to discharge his employee, even when by the terms of the hiring the employer is at liberty to discharge him at his pleasure. The Court examined all the leading cases hereinbefore mentioned, both English and American, and distinguished the Vermont case on the ground that the threat there was to do what the defendant had an undoubted right to do, namely, to terminate a contract of his own with the employer. The Court concluded: —

"Our conclusion is, that wherever a person, by means of fraud or intimidation, procures either the breach of a contract or the discharge of a plaintiff from an employment, which but for such wrongful interference would have continued, he is liable in damages for such injuries as naturally result therefrom; and that the rule is the same whether by these wrongful means a contract of employment as to time is broken, or an employer is induced, solely by reason of such procurement, to discharge an employee whom he would otherwise have retained. Merely to induce another to leave an employment or to discharge an employee, by persuasion or argument, however whimsical, unreasonable, or absurd, is not in and of itself unlawful, and we do not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate an employer, by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employee, whom he desired to retain and would have retained, except for such unlawful threats, is an actionable wrong." So in *Noice* v. *Brown*, 39 New Jersey Law, 133, an action for seduction, the Court said: "It is well settled that a person who, knowing the premises, entices another to break a subsisting contract of service, is liable to an action for the damages which ensue to the employer. Whether an action will lie, where there is no binding contract to continue in service, is not so clear, but I think it may be maintained, both upon reason and authority, where it is merely a subsisting service at will. Where the service is merely at will, all the liabilities and rights existing between master and servant attach to the relation. The master is liable for the negligence of the servant, and may exercise his right to defend him. In such service, like a tenancy at will, the relation must be ended in some way, before the rights of the master can be lost. By the unwarrantable interference of a third party, the employer is deprived of what he otherwise might have retained."

In *Land & G. Co.* v. *Commission Co.*, 138 Missouri, 439, *Lumley* v. *Gye*, *Bowen* v. *Hall*, and *Walker* v. *Cronin* are cited, but the Court hold that except in the case of the relation of master and servant the action in question cannot be maintained, and that no action can be maintained for inducing a carrier to break its contract to carry freight: "To hold that a carrier is the servant or employee of the shipper would revolutionize the whole law relating to the duties, obligations, and liabilities of common carriers."

Judge Cooley (Torts, *497) says: "An action cannot in general be main-

tained for inducing a third person to break his contract with the plaintiff; the consequence after all being only a broken contract, for which the party to the contract may have his remedy by suing upon it." Mr. Bigelow (Torts, p. 80) cites the English cases and *Walker* v. *Cronin*, and commits himself to their doctrine.

In *Chipley* v. *Atkinson*, *supra*, *Lumley* v. *Gye*, *Bowen* v. *Hall*, and *Walker* v. *Cronin* are cited, the Court said: "The chain of reasoning set forth in *Bowen* v. *Hall*, *supra*, would support an action in behalf of an employee against a third party maliciously procuring his employer to discharge him from employment under a legal contract for a certain period, pending such period. The principle applied is as applicable in behalf of an employee as in behalf of an employer so injured through the malicious interference of the third person. Whether however the same principles are applicable when the terms of contract or service are such that the employer may terminate them at his pleasure, without violating any legal right of the employee, is a question of more intricacy." "It is the legal right of the party to such agreement to terminate or refuse to perform it, and in doing so he violates no right of the other party to it; but so long as the other party is willing and ready to perform it, it is not the legal right, but is a wrong on the part of a third party to maliciously or wantonly procure the former to terminate or refuse to perform it." This was however *obiter*, for the decision went on the ground that there was no proof of discharge of the plaintiff from the employment.

The same three cases and *Haskins* v. *Royster*, 70 North Carolina, 601, are cited in *Angle* v. *Chicago, &c. Ry. Co.*, 151 United States, 13, and their doctrine admitted, but the decision steered clear of it.

An action lies by a servant against one who has unlawfully procured his discharge from employment. *Lucke* v. *Clothing, &c. Assembly*, 77 Maryland, 396; 39 Am. St. Rep. 421, citing *Lumley* v. *Gye* and *Bowen* v. *Hall*. But there a new trial was awarded because the declaration varied from the proofs.

An action lies by a father against one who fraudulently obtains his consent to a void marriage with his infant daughter. *Lawyer* v. *Fritcher*, 130 New York, 239; 14 Lawyers' Rep. Annotated, 700.

An action lies against one who maliciously threatens to discharge his employees if they patronize plaintiff. *Graham* v. *St. Charles S. R. Co.*, 47 Louisiana Annual, 214; 49 Am. St. Rep. 366.

The feature of conspiracy is eliminated from the foregoing examination. It is generally held here that a conspiracy to induce a servant to break his contract of service, or a master to break his contract of employment, renders the conspirators liable in damages to the employer or employee. *Curran* v. *Galen*, 152 New York, 33; 57 Am. St. Rep. 496.

No. 13. — MANVELL *v.* THOMSON.

(N. P. 1826.)

No. 14. — EAGER *v.* GRIMWOOD.

(EX. 1847.)

RULE.

IN order to maintain an action for seduction, it is not necessary that the relation of master and servant should be strictly proved. But the plaintiff must show some right to the services of the person seduced at the date of the seduction, and some loss of service consequent thereon.

Manvell v. Thomson.

2 Car. & P. 303, 304 (31 R. R. 666).

Action for Seduction. — Loss of Service.

In trespass for seducing the plaintiff's niece and servant, *per quod* [303] *servitium amisit;* evidence that the party seduced (being about sixteen years of age) occasionally assisted in the household work, no servant being kept in the family, is sufficient to constitute the relation of master and servant between the uncle and niece; and such relation is not destroyed by the circumstance of the niece's being entitled, on her coming of age, to a sum of nearly £500, of which the interest is applied in the mean time for her benefit.

Proof in such case that the niece, after her seduction and abandonment by the defendant, returned to her uncle's house, where she continued some time in a state of great agitation, and received medical attendance, and was obliged to be watched, lest she should do herself some injury, is sufficient to raise the presumption of that loss of service by the uncle which is necessary to maintain the action.

Trespass for seducing the plaintiff's niece and servant.

The plaintiff was a ticket-porter, and his niece, the subject of the action, was a girl of about sixteen years of age, whose parents had been dead some years. A sum of nearly £500 a-piece was left by her parents to herself * and her brothers and [* 304] sisters, which was deposited in the bank till they should come of age. She was brought up at her uncle's, and was for some time out at service, but returned to her uncle's house previously to the time when she was debauched by the defendant.

It appeared that while she was at her uncle's, who had several children, she assisted them in the domestic business of the house, as they kept no regular servant.

Denman, for the defendant: —

The action is not maintainable: the evidence of service is too slight. The presumption of her being a servant to her uncle is rebutted by the fact of her having so large a sum of money; and the relation of uncle and niece is not of itself sufficient.

ABBOTT, Ch. J.: —

Certainly the relation of uncle and niece of itself will not do; but I think there is enough in the evidence to constitute the relation of master and servant. Suppose a son has money enough to find himself in clothes, the relation of father and son is not destroyed by that circumstance. In this case, the uncle is *in loco parentis*. The smallest degree of service will do. It seems there was no servant kept; and it is reasonable to conclude that all the members of the family assisted in turn in the performance of the household work.

The cousin of the girl, and a surgeon, proved, that when she returned to her uncle's house, after she had been seduced and abandoned by the defendant, she was in a state of very great agitation, and continued so for some time; that she received medical attendance, and was obliged to be watched, lest she should do herself some injury. This was taken as evidence raising the presumption of loss of service by the uncle; and he had a

Verdict. Damages £400.

Eager v. Grimwood.

1 Exch. 61–64 (s. c. 16 L. J. Ex. 236).

Action for Seduction. — Proof of Service.

[61] An action for seduction cannot be maintained without some proof of loss of service thereby; therefore, where it appeared that the defendant had debauched the plaintiff's daughter, and that she was delivered of a child, but the jury found that the child was not the defendant's: *Held*, that the jury were rightly directed to find a verdict for the defendant.

Trespass for assaulting and debauching the daughter and servant of the plaintiff, whereby she then became pregnant, &c., and the plaintiff lost and was deprived of her services. Plea, not guilty.

At the trial before POLLOCK, C. B., at the London sittings after

last Michaelmas Term, the following facts appeared: The connection between the defendant and the plaintiff's daughter took place for the first time two days after Christmas-day, 1844. In June, 1845, the plaintiff's daughter gave birth to a child, which, according to the evidence of a surgeon, was a full-grown child. It also appeared that the plaintiff had been put to some expense in consequence of his daughter's illness. The learned CHIEF BARON left it to the jury to say whether or no the defendant was the father of the child; and he told them that if they believed he was not the father of the child, they should find a verdict for him. The jury having found for the defendant,

Prentice obtained a rule *nisi* for a new trial, on the ground of misdirection; against which

Humfrey showed cause. — The question is, whether mere criminal knowledge, unattended with loss of service or pecuniary damage, gives the master a right of action against the seducer. It is submitted that it does not, and that there is no foundation for the action, unless the master sustains some loss of service by reason of the seduction. If it were not so, he would have a right of action for any slight blow which resulted in no injury whatever to the servant. [ALDERSON, B. — If we were to hold, in this case, that there was a loss of service, it would be difficult to say where it would stop; for instance, if a servant took a walk against * the orders of her master, that would amount to a [* 62] loss of service.] In Selwyn's Nisi Prius, tit. "Master and Servant," p. 1103, there is the following note: "Although the daughter cannot have an action, yet the father may, not for assaulting his daughter, and getting her with child, because this is a wrong particularly done to her, yet for the loss of her service, caused by this. Per ROLLE, Ch. J., *Norton* v. *Jason*, Sty. 398." [ROLFE, B. — In that case ROLLE, Ch. J., says: "But for the other point, the cause of action is *per quod servitium amisit*, and for this he hath brought it within the time limited by the statute; for it is an action upon the case, although the *causa causans* is the *vi et armis*, which is but inducement to the action, and the *causa causata*, viz., the loss of service, is the ground of the action."] The seduction is not a trespass, unless it result in a loss of service. A master might maintain an action for striking his servant, *per quod* he was deprived of her services; but if the *per quod* were omitted, the declaration would be bad. [PLATT, B. — In *Cham-*

berlain v. *Hazlewood*, 5 M. & W. 515, 9 L. J. (N. S.) Ex. 87, it was held that an action for seducing the daughter and servant of the plaintiff might be brought either in trespass for the direct injury, *per quod servitium amisit*, or in case for the consequential damage. Trespass is the form usually adopted. *Ditcham* v. *Bond*, 2 M. & S. 436 (14 R. R. 837); *Torrence* v. *Gibbins*, 5 Q. B. 297, 13 L. J. Q. B. 36.] It is a trespass on the servant, of which the master cannot complain, unless it causes him some loss of service. In the present case there was no loss of service occasioned by the act of the defendant, as he was not the father of the child.

Prentice, in support of the rule. — When the service is once established, the law presumes some loss to the master by reason of the assault. The declaration would be good, if it merely [* 63] stated that the defendant assaulted and debauched * the plaintiff's servant, for in such case the law would imply a nominal damage. The damage alleged in this declaration is either special or consequential damage; if the former, not being traversed, it is admitted on the record. *Torrence* v. *Gibbins*, 5 Q. B. 297, 13 L. J. Q. B. 36. [ALDERSON, B. — Upon the plea of not guilty, if it appeared that the party seduced was in the service of a third person, according to your argument, the plaintiff would be entitled to a verdict.] To an action of this kind the defendant could not plead that the plaintiff had not sustained any damage by the assault. In Viner's Abridgment, tit. "Trespass" (L. 6), pl. 7, it is said: "In trespass of battery of his servant, *per quod servitium suum amisit*, &c., it is no plea that *non amisit servitium servientis prædicti*, for by this the battery is confessed, and then the law implies that the master is damnified. But it is a good plea that he was not his servant at the time. Br. 'Traverse,' per, &c., pl. 378, cites 31 Hen. VI." [POLLOCK, C. B. — In the next paragraph it is said, "The master shall not have trespass of battery of his servant, if he does not say *per quod servitium servientis sui amisit*," &c. You must contend, that if the injury produces nothing but pain, both master and servant may maintain the action.] Damage is presumed to have been sustained, whenever an injury is done to the right of a party. *Fay* v. *Prentice*, 1 C. B. 828. The debauching of the plaintiff's servant is an act of trespass, *Woodward* v. *Walton*, 2 Bos. & P. (N. R.) 476, and an invasion of the legal right of the plaintiff, who has a kind of

property in her. [ALDERSON, B. — No: the plaintiff has only a right to her service.]

POLLOCK, C. B. — The case of *Grinnell* v. *Wells*, 7 Man. & G. 1033, is precisely in point. That case decided that an action for seduction cannot be maintained without proof of loss of service. TINDAL, Ch. J., in delivering the judgment of the * Court, says: "The foundation of the action by a father to [* 64] recover damages against the wrong-doer, for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest." The rule must be absolute to enter a nonsuit, unless the plaintiff will consent to a *stet processus*.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule accordingly.

ENGLISH NOTES.

The action may be maintained by a stranger in blood to the party seduced. *Fores* v. *Wilson* (1791), 1 Peake, 77, 3 R. R. 652; *Irwin* v. *Dearman* (1809), 11 East, 23, 10 R. R. 423.

The fact that the plaintiff was entitled to the services of the alleged servant may be inferred from the circumstances. *Maunder* v. *Venn* (1829), Moody & Malkin, 323, 31 R. R. 734. Where the servant had been discharged from an actual employment, and was on her way home to her father's house at the time of the seduction, it was held that there was sufficient evidence of service to entitle the father to maintain the action. *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599, 37 L. J. Q. B. 257, 18 L. T. 521, 16 W. R. 932. But unless some contract for service (expressed or implied) is shown the defendant is entitled to succeed. *Carr* v. *Clarke* (1818), 2 Chitty, 260, 23 R. R. 748; *Hedges* v. *Tagg* (1872), L. R. 7 Ex. 283, 41 L. J. Ex. 169, 20 W. R. 976. Where the defendant, with intent to seduce the plaintiff's daughter, had hired her as a servant, the jury were directed that a new relation of master and servant was not established, and that the plaintiff might maintain the action as if his daughter was still in his service. *Speight* v. *Oliviera* (1819), 2 Starkie, 493, 20 R. R. 729. If the relationship of master and servant is contracted after the seduction, the loss of service cannot then be made the foundation of an action. *Davies* v. *Williams* (1847), 10 Q. B. 728, 16 L. J. Q. B. 369; *Hedges* v. *Tagg*, *supra*.

It would seem that evidence of levity of conduct is admissible in mitigation of damages, but if the jury find that the defendant is the

father of the child then the plaintiff is entitled to the verdict. *Dodd* v. *Norris* (1814), 3 Camp. 519, 14 R. R. 832; *Bate* v. *Hill* (1823), 1 Car. & P. 100, 28 R. R. 766; *Verrey* v. *Watkins* (1836), 7 Car. & P. 308. The defendant is not at liberty to give in evidence particular expressions or statements made by the party seduced, to the effect that the defendant is not the father of her child, unless she has first been cross-examined on the point. *Carpenter* v. *Wall* (1840), 11 Ad. & Ell. 803, 9 L. J. Q. B. 217.

An action for enticing away a servant lies, where there is no allegation that the plaintiff debauched her, or that there was any binding contract of service. *Evans* v. *Walton* (1867), L. R. 2 C. P. 615, 36 L. J. C. P. 307, 17 L. T. 92, 15 W. R. 1062. There the plaintiff's daughter, who was about nineteen years of age, resided with him as a member of his family, and assisted him in his business of a licensed victualler. By means of a fictitious letter of invitation dictated by the defendant, she procured her mother's consent to her quitting her home for a few days, when she left. The defendant took her to a lodging-house, where he cohabited with her for nine days, and she then returned home. It was held that there was a sufficient continuing relation of master and servant to support the action, and sufficient evidence of a wrongful enticing away of the daughter by the defendant to entitle the plaintiff to maintain an action against him.

AMERICAN NOTES.

The action of seduction is not maintainable by a father without proof of loss of service or the right of service, and so he was held disentitled to recover where the daughter was at the time at service with another for a definite period. *Ogborn* v. *Francis*, 15 Vroom (New Jersey Law), 441; 43 Am. Rep. 394: "Such suits rest exclusively on the relationship of master and servant." So in *Bartley* v. *Richtmyer*, 4 New York, 38; *Hornketh* v. *Barr*, 8 Sergeant & Rawle (Penn.), 36; 11 Am. Dec. 568; *Kennedy* v. *Shea*, 110 Massachusetts, 147; 14 Am. Rep. 584; *White* v. *Murtland*, 71 Illinois, 250; 22 Am. Rep. 100; *Harrison* v. *Prentice*, 28 Ontario, 140; *Schmit* v. *Mitchell*, 59 Minnesota, 251; *Dennis* v. *Clark*, 2 Cushing (Mass.), 347 (citing the *Eager* case); *Kinney* v. *Laughenour*, 89 North Carolina, 365. So the action is not maintainable by the mother although the father was an invalid supported by her and the seduced daughter. *Entner* v. *Benneweis*, 24 Ontario, 407.

But if the parent retained the right to the service, he may maintain the action although the seduction took place while the child was away from home. *Lavery* v. *Cooke*, 52 Wisconsin, 612; 38 Am. Rep. 768; *Davidson* v. *Abbott*, 52 Vermont, 570; 36 Am. Rep. 767 (action by a mother where the father had been absent more than seven years; citing the *Manvell* case); *Furman* v. *Van Sise*, 56 New York, 435; 15 Am. Rep. 441; *Blanchard* v. *Ilsley*, 120 Massachusetts, 487; 21 Am. Rep. 535; *Simpson* v. *Grayson*, 54 Arkansas, 404; 26 Am. St. Rep. 52. "Acts of service by the daughter are not necessary; it

is enough if the parent has a right to command them." *Hewitt* v. *Prime*, 21 Wendell (N. Y.), 79; *Noice* v. *Brown*, 39 New Jersey Law, 539.

In *Boyd* v. *Bird*, 8 Blackford (Indiana), 113; 44 Am. Dec. 740, it was held that the father could maintain the action where his minor daughter had left his house with his consent, with no intention of returning, and with his consent to have her own earnings. The Court said: "But no English case, so far as we know, has gone the length of supporting the action, where the daughter, having left her father, was subsequently seduced. Several of the American Courts, however, taking a more liberal view of this remedy, have decided that the action may be maintained, if the unmarried daughter, at the time of her seduction, was under the age of twenty-one years, though her father had relinquished all claim to her services, and she was in the employment of another person. The reasons assigned for these decisions are, that until the majority of the daughter, the relation of master and servant must be supposed to exist between her father and her, inasmuch as he has the legal right to control her conduct, is bound for her support, and may, at any time, revoke his leave of absence, and reclaim her services. *Martin* v. *Payne*, 9 Johnson, 387 (6 Am. Dec. 288); *Nickleson* v. *Striker*, 10 Johnson, 115 (6 Am. Dec. 318); *Hornketh* v. *Barr*, 8 Serg. & R. 36 (11 Am. Dec. 568); *Vanhorn* v. *Freeman*, 1 Halst. 322. We are disposed to adopt the principle established by these decisions. If it be proper to substitute a constructive for an actual service, to enable the wealthy parent, whose daughter resides with him, to maintain this action when the honor and happiness of his family are assailed by the seducer, it is no less proper that the same substitution should be allowed in favor of the less fortunate father, whose circumstances require the absence of his child from the parental roof, in order to enable him by the same means to protect himself and family from the same misfortune."

The action is maintainable where the defendant obtained the consent of the parents to a marriage which proved void: *Lawyer* v. *Fritcher*, 130 New York, 239; 14 Lawyers' Rep. Annotated, 700.

Even in case of a daughter of age, if the relation of master and servant exists. *Sutton* v. *Huffman*, 32 New Jersey Law, 58; *Greenwood* v. *Greenwood*, 28 Maryland, 370; *Stevenson* v. *Belknap*, 6 Iowa, 97; 71 Am. Dec. 392.

All the cases recognize the loss of the most trifling and valueless service as a sufficient foundation for the action. No proof of service is necessary beyond the fact of the daughter's living in the father's house as a member of his family. *Noice* v. *Brown*, 39 New Jersey Law, 539.

The *Greenwood* case is cited in Cooley on Torts, p. 268, and both principal cases are cited in Schouler on Domestic Relations, sects. 260, 261, where it is said: "It is probably at any point short of her abode in another household where the parent has relinquished the right of her service past the power of recall, that the bounds should be placed to this rule of a daughter's service entitling the parent to sue for damages."

MERGER.

No. 1. — KENDALL *v.* HAMILTON.

(H. L. 1879.)

RULE.

THE remedy upon a contract is merged in a judgment (even if unsatisfied) which purports to dispose of the liability under the contract as a cause of action.

Kendall v. Hamilton.

4 App. Cas. 504–546 (s. c. 48 L. J. C. P. 705; 41 L. T. 418; 28 W. R. 97).

[This case will be found reported as No. 3 of "ABATEMENT," 1 R. C. 175.]

ENGLISH NOTES.

In *Edevain* v. *Cohen* (C. A. 1889), 43 Ch. D. 187, 62 L. T. 17, 38 W. R. 177, the plaintiff brought an action against the two defendants for the wrongful removal of furniture. It appeared at the trial that the plaintiff had recovered judgment in an action against other persons who had joined in the removal. After the evidence for the plaintiff and one of the defendants had been taken, an application was made on behalf of the other defendant for leave to amend by pleading this judgment, and a similar application was thereupon made on behalf of the first defendant. This was refused, and the refusal was upheld in the Court of Appeal. It appeared, however, that the first judgment was known to the solicitor of one of the defendants, at the time when the action of *Edevain* v. *Cohen* was brought, and was probably also known to the solicitor of the other defendant, and it was on the ground that the leave to amend was only sought when the defendants saw that they were likely to lose the day on the merits, that the Court, inferring that there was no substance in the objection that the matter was *res judicata*, refused the application.

The ruling case was followed in *Hoare* v. *Niblett*, 1891, 1 Q. B. 781, 60 L. J. Q. B. 565, 64 L. T. 659, 39 W. R. 491. There it was held that the rule extended to the case where one of two joint con-

tractors was a married woman contracting in respect of her separate property.

The liability must, however, arise in respect of the contract. Thus in *Drake* v. *Mitchell* (1803), 3 East, 251, 7 R. R. 449, one of three joint contractors gave a bill of exchange in part payment of a debt secured by a covenant. Judgment was recovered on the bill, and an action on the covenant was held maintainable against the three. This case was followed by the Court of Appeal in *Wegg-Prosser* v. *Evans*, 1895, 1 Q. B. 108, 64 L. J. Q. B. 1, 72 L. T. 8, 43 W. R. 66. There the defendant and one Thomas jointly guaranteed the rent of the plaintiff's tenant. The tenant made default in payment of a half-year's rent, and an application for the rent was made to Thomas, who gave his cheque for the amount. The cheque was dishonoured, and the plaintiff sued Thomas on the cheque and recovered judgment. Execution was issued on the judgment, but nothing was recovered. The plaintiff then brought an action on the guarantee against the defendant, and it was held that the action was maintainable, notwithstanding the judgment recovered against the co-contractor on the cheque.

Some questions of construction have arisen in considering whether merger of a contract has been complete, so as to make interest payable at the statutory rate of four per cent, or whether a higher rate continues to be payable, notwithstanding the institution of proceedings which are prosecuted to judgment. *Popple* v. *Sylvester* (1882), 22 Ch. D. 98, 52 L. J. Ch. 54, 47 L. T. 329, 31 W. R. 116; *Ex parte Fewings, In re Sneyd* (C. A. 1883), 25 Ch. D. 338, 53 L. J. Ch. 545, 50 L. T. 109, 32 W. R. 352.

AMERICAN NOTES.

This case is cited in Black on Judgments, sect. 70; Freeman on Judgments, sects. 231, 232, and is supported by *Mason* v. *Eldred*, 6 Wallace (U. S. Sup. Ct.), 231; *United States* v. *Ames*, 99 United States, 35; *Ward* v. *Johnson*, 13 Massachusetts, 148; *Suydam* v. *Barber*, 18 New York, 468; 75 Am. Dec. 254; *Smith* v. *Black*, 9 Sergeant & Rawle (Penn.), 142; 11 Am. Dec. 686; *Moale* v. *Hollins*, 11 Gill & Johnson (Maryland), 11; 33 Am. Dec. 684; *Brown* v. *Johnson*, 13 Grattan (Virginia), 644; *Ferrall* v. *Bradford*, 2 Florida, 508; 50 Am. Dec. 293; *Elliott* v. *Porter*, 5 Dana (Kentucky), 299; 30 Am. Dec. 689; *Clinton Bank* v. *Hart*, 5 Ohio State, 33; *Wilson* v. *Buell*, 117 Indiana, 315; *People* v. *Harrison*, 82 Illinois, 84; *Jansen* v. *Grimshaw*, 125 Illinois, 468; *Bonesteel* v. *Todd*, 9 Michigan, 371; 80 Am. Dec. 90; *Lauer* v. *Bandow*, 48 Wisconsin, 638; *Harris* v. *Dunn*, 18 Up. Can. Q. B. 352; *Wann* v. *McNulty*, 2 Gilman (Illinois), 355; 43 Am. Dec. 58; *North & Scott* v. *Mudge & Co.*, 13 Iowa, 496; 81 Am. Dec. 441.

The fact that the plaintiff did not know of all the persons bound does not prevent the merger. *Scott* v. *Colmesnil*, 7 J. J. Marshall (Kentucky), 416;

Smith v. *Black*, *supra*; *Moale* v. *Hollins*, *supra*. *Contra*, *Watson* v. *Owens*, 1 Richardson Law (So. Car.), 111 ("entirely unsupported by authority (and) not likely to be anywhere sustained," says Mr. Freeman).

Mr. Freeman says (Judgments, sect. 231): "A different conclusion was announced by Chief Justice Marshall in the case of *Sheehy* v. *Mandeville*, 6 Cranch, 253. He there held that a judgment against one of the makers of a joint note did not merge it as to the other maker. Notwithstanding the respect everywhere entertained for the opinions of this great jurist, this particular one was rarely assented to in the State Courts, was doubted and criticised in England, and after many years was directly overruled in the same Court in which it was pronounced. *Mason* v. *Eldred*, 6 Wallace, 231. The cases in accord with it are few: *Treasurers* v. *Bates*, 2 Bailey Law (So. Car.), 362; *Collins* v. *Lemasters*, 1 id. 348; 21 Am. Dec. 469 and note; *Sneed* v. *Wiester*, 2 A. K. Marshall (Kentucky), 277; *Union Bank* v. *Hodges*, 11 Richardson Law (So. Car.), 480; *Beazley* v. *Sims*, 81 Virginia, 644; while those which oppose it are very numerous."

Where one of two joint debtors was dead, it was held that a judgment against the survivor did not bar pursuit of the decedent's estate on the original claim: *Devol* v. *Halstead*, 16 Indiana, 287. So where the plaintiff was induced by fraud to discontinue as to one and take judgment only against the other: *Ferrall* v. *Bradford*, *supra*. (No good ground in law for this, says Black.) So where the debtors reside in different States, or it is impossible to sue all in the same Court: *Tibbetts* v. *Shapleigh*, 60 New Hampshire, 487; *Yoho* v. *McGovern*, 42 Ohio State, 11; *Merriam* v. *Barker*, 121 Indiana, 74; *Eastern T. B.* v. *Bebee*, 53 Vermont, 177; 38 Am. Rep. 665; *Olcott* v. *Little*, 9 New Hampshire, 250; 32 Am. Dec. 357; *Wiley* v. *Holmes*, 28 Missouri, 286; 76 Am. Dec. 126; *Dennett* v. *Chick*, 2 Greenleaf (Maine), 191; 11 Am. Dec. 59; *Rand* v. *Nutter*, 56 Maine, 339; *Brown* v. *Birdsall*, 29 Barbour (N. Y. Sup. Ct.), 549. But where the judgment in another State is against the same defendants it is a merger: *Henderson* v. *Staniford*, 105 Massachusetts, 504; 7 Am. Rep. 551.

Merger is not effected by a judgment subsequently adjudged void. *McCadden* v. *Slauson*, 96 Tennessee, 586; *Whittier* v. *Wendell*, 7 New Hampshire, 257.

No. 2. — BOALER *v.* MAYOR.

(C. P. 1865.)

RULE.

A SIMPLE contract debt will not be merged in a specialty, unless the specialty is coextensive with the simple contract debt, and made between the same parties.

Boaler v. Mayor.

34 L. J. C. P. 230–234 (s. c. 19 C. B. (N. S.) 76; 12 L. T. 457; 13 W. R. 775).

Deed. — Merger. — Principal and Surety. [230]

The plaintiffs lent M. £650 on the security of a mortgage of certain property, with a covenant by M. to repay the £650, with interest at £5 per cent, on the 22nd of June, 1864; and as the mortgage was not a sufficient security for more than £500, the loan was made on the further security of the promissory note of M. and two sureties for £150, payable on demand, with interest at £4 10*s.* per cent. The promissory note, which it was agreed between the plaintiffs and M. should be a collateral security to the mortgage deed, was made and given to the plaintiffs on the 7th of December, 1863, when £150, part of the loan, was advanced to M.; but the mortgage deed was not executed until the 22nd of December, 1863. The deed contained no reference to the note, and the sureties who signed the note were not parties to the deed. *Held*, that the debt secured by the note did not merge in the deed, and that, though the remedy on the covenant could not be enforced before the 22nd of June, 1864, time was not given to M. so as to discharge the liability of the sureties on the note.

Action by the payees against the makers of a promissory note for £150, payable on demand, with interest thereon at the rate of £4 10*s.* per cent per annum during the forbearance.

Pleas: Thirdly, that the defendants made the said note jointly with one Charles Mayor, and that after making the said note and before action the said Charles Mayor satisfied and discharged the said note, and the plaintiffs' claim thereon, by executing to them a deed whereby the said Charles Mayor secured to the plaintiffs and covenanted with the plaintiffs to pay them £650 and interest, including the amount of the said note, for and on account and in satisfaction and discharge of the said note and the moneys therein mentioned, which deed was executed by the said Charles Mayor at the request of the plaintiffs, and accepted by the plaintiffs in full satisfaction * and discharge of the said plaintiffs' [* 231] claim on the said note, and that the plaintiffs' claim was and is thereby extinguished, satisfied, and discharged.

Fourthly, for defence on equitable grounds, that the defendants made the said note jointly with Charles Mayor as surety to the plaintiffs for the said Charles Mayor, and in consideration of £150 advanced by the plaintiffs for the said Charles Mayor, whereof the plaintiffs had notice before and when they first received the said note, and they, the plaintiffs, received and always held the same

on the terms that the defendants should be liable to them on the said note as sureties only for the said Charles Mayor; and that after making the said note and before action the plaintiffs, without the consent of the defendants or of either of them, for a good, valuable, and sufficient consideration in that behalf, agreed with the said Charles Mayor to give and then gave him time for the payment of the moneys in the said note specified, and thereby discharged the defendants from the said note. Issues thereon.

The following are the facts as they appeared in evidence before ERLE, Ch. J., at the London sittings after last Hilary Term. Mr. Charles Mayor, mentioned in the pleas, and who was the son of the elder and the brother of the younger of the two defendants, having occasion to borrow £650, applied for that purpose to the plaintiffs towards the end of 1863, and offered as security some property to which his wife would become entitled on attaining the age of twenty-five. This was found to be only a sufficient security for £500, and, according to the account given by the plaintiff Watson, and which the jury found to be the true account of the loan, it was agreed between the plaintiffs and Charles Mayor that, as security for the proposed advance of £650, there should be a mortgage deed assigning the wife's interest, and containing a covenant by Charles Mayor and a surety for the repayment of the whole £650, and that, as a collateral and additional security to the deed, there should be a promissory note by Charles Mayor and two sureties for the payment of £150 on demand. Mr. Charles Mayor accordingly applied to his father and brother, the present defendants, to join him in signing the promissory note, the subject of this action. This they did, and the note was thus made and given to the plaintiffs on the 7th of December, 1863, on which day the plaintiffs advanced £150 to Charles Mayor as part of the agreed loan. No interview on the subject ever took place between the plaintiffs and the defendants. On the 22nd of December, 1863, the mortgage deed was executed, and £500, the balance of the loan, was then paid to Charles Mayor. The deed was made between Charles Mayor and Elizabeth his wife of the first part, William Warren (a surety) of the second part, and the plaintiffs of the third part. It contained no reference whatever to the promissory note, but recited the agreement by the plaintiffs to lend Charles Mayor and his wife £650, upon having the repayment thereof, with interest thereon at £5 per cent per annum,

secured by the assignment of the interests of the said Elizabeth Mayor, under a certain will and codicils therein mentioned and of a policy of assurance; and it also recited an agreement by the said Charles Mayor and W. Warren as his surety to enter into certain covenants, and it contained a covenant by the said Charles Mayor and W. Warren for the payment of £650 and interest thereon at the rate of £5 per cent per annum on the 22nd of June, 1864.

It was contended on behalf of the defendants that the deed discharged the defendants either on the ground that it operated as a merger of the promissory note or because it gave time to the principal debtor for the payment of the debt. Under these circumstances a verdict was entered by consent for the defendants, with leave to the plaintiffs to move to enter the verdict for them for the amount claimed, if the Court should be of opinion that in point of law the deed did not so discharge the sureties.

Huddleston afterwards obtained a rule *nisi* to that effect, citing *Ansell* v. *Baker*, 15 Q. B. 20. Against this rule —

Macaulay and Cave now showed cause. — The effect of this deed was to give time to Charles Mayor, the principal creditor, for the payment of the debt, viz., until the 22nd of June, 1864.

* [KEATING, J. — The question is whether he might not [* 232] have been sued on the note before June, 1864.]

It is submitted he could not; it is clear that he could not have been sued on the deed before that time, and it is contended that the creditors having taken this security would not have been allowed by a Court of equity to have enforced their debt against the principal debtor before the 22nd of June.

[SMITH, J. — If the debt be not merged in the deed, an action might be brought on the note against the principal debtor; and does not the case of *Sharpe* v. *Gibbs*, 16 C. B. (N. S.) 527, show that the deed here does not operate as a merger, as the note is for a different debt?]

It is submitted that the deed operated as a merger of the liability of the principal debtor on the promissory note, and the case of *Price* v. *Moulton*, 10 C. B. (N. S.) 561, 20 L. J. C. P. 102, is an authority that it would have that operation irrespectively of the intention of the parties. So also was the joint liability of all the makers of the note likewise merged in the deed (*King* v. *Hoare*, 13 M. & W. 494, 14 L. J. Ex. 29), where it was held that a judgment recovered against one of two joint debtors is a bar to

on the terms that the defendants should be liable to them on the said note as sureties only for the said Charles Mayor; and that after making the said note and before action the plaintiffs, without the consent of the defendants or of either of them, for a good, valuable, and sufficient consideration in that behalf, agreed with the said Charles Mayor to give and then gave him time for the payment of the moneys in the said note specified, and thereby discharged the defendants from the said note. Issues thereon.

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secured by the assignment of the interests of the said Elizabeth Mayor, under a certain will and codicils therein mentioned and of a policy of assurance; and it also recited an agreement by the said Charles Mayor and W. Warren as his surety to enter into certain covenants, and it contained a covenant by the said Charles Mayor and W. Warren for the payment of £650 and interest thereon at the rate of £5 per cent per annum on the 22nd of June, 1864.

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* [KEATING, J. — The question is whether he might not [* 232] have been sued on the note before June, 1864.]

It is submitted he could not; it is clear that he could not have been sued on the deed before that time, and it is contended that the creditors having taken this security would not have been allowed by a Court of equity to have enforced their debt against the principal debtor before the 22nd of June.

[SMITH, J. — If the debt be not merged in the deed, an action might be brought on the note against the principal debtor; and does not the case of *Sharpe* v. *Gibbs*, 16 C. B. (N. S.) 527, show that the deed here does not operate as a merger, as the note is for a different debt?]

It is submitted that the deed operated as a merger of the liability of the principal debtor on the promissory note, and the case of *Price* v. *Moulton*, 10 C. B. (N. S.) 561, 20 L. J. C. P. 102, is an authority that it would have that operation irrespectively of the intention of the parties. So also was the joint liability of all the makers of the note likewise merged in the deed (*King* v. *Hoare*, 13 M. & W. 494, 14 L. J. Ex. 29), where it was held that a judgment recovered against one of two joint debtors is a bar to

on the terms that the defendants should be liable to them on the said note as sureties only for the said Charles Mayor; and that after making the said note and before action the plaintiffs, without the consent of the defendants or of either of them, for a good, valuable, and sufficient consideration in that behalf, agreed with the said Charles Mayor to give and then gave him time for the payment of the moneys in the said note specified, and thereby discharged the defendants from the said note. Issues thereon.

The following are the facts as they appeared in evidence before ERLE, Ch. J., at the London sittings after last Hilary Term. Mr. Charles Mayor, mentioned in the pleas, and who was the son of the elder and the brother of the younger of the two defendants, having occasion to borrow £650, applied for that purpose to the plaintiffs towards the end of 1863, and offered as security some property to which his wife would become entitled on attaining the age of twenty-five. This was found to be only a sufficient security for £500, and, according to the account given by the plaintiff Watson, and which the jury found to be the true account of the loan, it was agreed between the plaintiffs and Charles Mayor that, as security for the proposed advance of £650, there should be a mortgage deed assigning the wife's interest, and containing a covenant by Charles Mayor and a surety for the repayment of the whole £650, and that, as a collateral and additional security to the deed, there should be a promissory note by Charles Mayor and two sureties for the payment of £150 on demand. Mr. Charles Mayor accordingly applied to his father and brother, the present defendants, to join him in signing the promissory note, the subject of this action. This they did, and the note was thus made and given to the plaintiffs on the 7th of December, 1863, on which day the plaintiffs advanced £150 to Charles Mayor as part of the agreed loan. No interview on the subject ever took place between the plaintiffs and the defendants. On the 22nd of December, 1863, the mortgage deed was executed, and £500, the balance of the loan, was then paid to Charles Mayor. The deed was made between Charles Mayor and Elizabeth his wife of the first part, William Warren (a surety) of the second part, and the plaintiffs of the third part. It contained no reference whatever to the promissory note, but recited the agreement by the plaintiffs to lend Charles Mayor and his wife £650, upon having the repayment thereof, with interest thereon at £5 per cent per annum,

secured by the assignment of the interests of the said Elizabeth Mayor, under a certain will and codicils therein mentioned and of a policy of assurance; and it also recited an agreement by the said Charles Mayor and W. Warren as his surety to enter into certain covenants, and it contained a covenant by the said Charles Mayor and W. Warren for the payment of £650 and interest thereon at the rate of £5 per cent per annum on the 22nd of June, 1864.

It was contended on behalf of the defendants that the deed discharged the defendants either on the ground that it operated as a merger of the promissory note or because it gave time to the principal debtor for the payment of the debt. Under these circumstances a verdict was entered by consent for the defendants, with leave to the plaintiffs to move to enter the verdict for them for the amount claimed, if the Court should be of opinion that in point of law the deed did not so discharge the sureties.

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an action against the other; and in *Bell* v. *Bankes*, 3 Man. & G. 267, MAULE, J., expressed the opinion that taking security of a higher value from one of two joint debtors would cause a merger. That opinion is cited in *King* v. *Hoare*, and relied on as one of the grounds for giving judgment in that case. These authorities show, it is submitted, that there was a merger of the liability of the principal debtor on the note, and that no action could have been brought against him on the note; if so, he was only liable on his covenant, and that could not be enforced until the 22nd of June; consequently, there was a giving time which would discharge the sureties. In *Boultbee* v. *Stubbs*, 18 Ves. 20 (11 R. R. 141), where a creditor who had, among other securities, a bond with a surety, took a mortgage from the principal debtor, and agreed to receive the residue by instalments, it was held by Lord ELDON, C., that the creditor's right against the surety was gone, and an injunction was granted against the surety being sued on the bond. So even if Charles Mayor could have been sued at law upon this note, still the effect of the transaction was to give time, at least until the 22nd of June, 1864, because until then no Court of equity would have allowed the creditors to have sued Charles Mayor for any part of the £650. But, moreover, it is submitted, the deed is conclusive and can alone be looked to, and that parol evidence to show that the note was taken by the plaintiffs by way of collateral security is not admissible. *Ex parte Glendenning*, Buck's Cases, 517, and the opinion of BAILEY, J., in *Lewis* v. *Jones*, 4 B. & C. 506 (28 R. R. 360), are authorities to that effect.

[KEATING, J. — Without parol evidence, how is the deed connected with the note so as to be any defence to an action on the note?]

The money secured by the note is part of the sum secured by the deed.

Huddleston and T. Salter appeared, but were not heard, in support of the rule.

ERLE, Ch. J. — I think that the rule should be made absolute to enter a verdict for the plaintiffs. The action was upon a joint and several promissory note made by the defendants as sureties for Charles Mayor for the sum of £150 advanced to him as part of a loan of £650, the other £500 being secured by a mortgage of some property, and by a policy of insurance. The mortgage deed was

to comprise the whole £650; but the mortgage not being a sufficient security for more than £500, Charles Mayor and the lenders agreed that, in addition to the mortgage deed, there should be a promissory note given for £150 payable on demand with two additional names, these being those of the two Mayors who are the present defendants. The promissory note was made on the 6th of December, and the deed was executed on the 22nd of December, the note being payable on demand, and the deed in June the following year. Then, it is said, that this debt, due from the two sureties who signed the note, is merged in the deed which was executed by Charles * Mayor, one of the makers of [* 233] the note. I think it is very clear that it was not so merged, because the deed is between different parties for a different sum payable at a different time and with different interest; and I take the case of *Sharpe* v. *Gibbs* as sufficient to show that as between Charles Mayor and the lenders the deed did not merge the promissory note in the specialty. To do so would be utterly contrary to the intention of the parties. Still, if the law was so the law must have its way; but I think, according to the law, that, in this case, as the specialty was not coextensive with the promissory note, the latter did exist as a collateral security and was not merged. Then, was there time given to Charles Mayor, the principal debtor, so as to operate as a discharge to his sureties? The deed contains a covenant that Charles Mayor will pay in June, that is, six months after the deed was executed, and the promissory note was payable *instanter*. I think also that the covenant to pay in June operated so as to prevent an action for breach of such covenant before June; but there is no stipulation in such deed that the creditors lending the money would not put in force any other remedy they might have before that time. It seems to me, therefore, that the deed did not operate to give time to the principal so as to discharge the sureties. The cases which have been cited by Mr. Cave about the effect of a mortgage-deed were soundly decided in respect of the facts then before the Court. A Court of equity must give effect to what it considers is the intention of the parties in respect of the mortgage deed; and so in the present case I think our judgment does give effect to the intention of the parties; and with regard to the admissibility of parol evidence to show what was the intention of the parties, it was well observed by my Brother KEATING, that the promissory

ENGLISH NOTES.

In *White* v. *Cuyler* (1795), 6 T. R. 176, 3 R. R. 147, the wife of the defendant employed the plaintiff, and the terms of the employment were contained in articles under seal executed by the defendants' wife and one Law. The plaintiff sued the defendant in assumpsit, and the action was held maintainable, as the contract under seal of a surety does not extinguish the debt of the principal. To the same effect is *Holmes* v. *Bell* (1841), 3 Man. & Gr. 213. There a bank took from its customer and a third person a bond conditioned for the payment of all sums already advanced, or thereafter to be advanced, to the customer. The liability of the customer to be sued in assumpsit was not merged in the bond.

East India Co. v. *Lewis* (1828), 3 Car. & P. 358, 33 R. R. 680, is an example of merger of a simple contract debt in a specialty.

In *Davies* v. *Rees* (C. A. 1886), 17 Q. B. D. 408, 55 L. J. Q. B. 363, 54 L. T. 813, 34 W. R. 573, the defendant was assignee of a bill of sale, and had wrongfully seized certain chattels comprised in the bill of sale. The grantor of the bill of sale had covenanted to pay interest at fifty-eight per cent. In an action for the wrongful seizure and conversion of the chattels, the defendant counter-claimed, suing on the covenant for payment. Judgment was given for the sum advanced and interest at five per cent. The ground of the decision was that the bill of sale was absolutely void, and that the covenant had also fallen with the bill of sale.

AMERICAN NOTES.

This case is cited in 15 Am. & Eng. Enc. of Law, p. 356; 2 Daniel on Negotiable Instruments, sect. 1322; Brandt on Suretyship, sect. 376.

Where a contract for a deed contains agreements collateral to and apart from the giving of a deed, they are not merged in the deed. *Wilbeck* v. *Waine*, 16 New York, 532. See *Pike* v. *Pike*, 69 Vermont, 535.

The doctrine that giving time to the principal does not discharge the surety if the remedies against him are expressly reserved is well settled. *Clagget* v. *Salmon*, 5 Gill & Johnson (Maryland), 314; *Austin* v. *Gibson*, 28 Up. Can. C. P. 554; *Canadian Bank* v. *Northwood*, 14 Ontario, 207; *Currie* v. *Hodgins*, 42 Up. Can. Q. B. 601; *Hagey* v. *Hill*, 75 Penn. State, 108; 15 Am. Rep. 583, citing the principal case; *Rockville Nat. Bank* v. *Holt*, 58 Connecticut, 526; 18 Am. St. Rep. 293, citing the principal case; *Jones* v. *Sarchett*, 61 Iowa, 520; *Mueller* v. *Dobschutz*, 89 Illinois, 176; *Morse* v. *Huntington*, 40 Vermont, 488; *Rucker* v. *Robinson*, 38 Missouri, 154; 90 Am. Dec. 412; *First Nat. Bank* v. *Lineberger*, 83 North Carolina, 454; 35 Am. Rep. 582; *Kenworthy* v. *Sawyer*, 125 Massachusetts, 28.

See *Jones* v. *Johnson*, 3 Watts & Sergeant, 276; 38 Am. Dec. 760; *Davis* v. *Anable*, 2 Hill (N. Y.), 339; *United States* v. *Lyman*, 1 Mason (U. S. Circ. Ct.), 482.

No. 3. — JONES *v.* DAVIES.

(EX. CH. 1861.)

RULE

IN order that there may be a merger of estates, the two estates must be held in the same right.

Jones v. Davies and Wife.

31 L. J. Ex. 116–118 (s. c. 7 Hurl. & N. 507; 8 Jur. (N. S.) 592; 6 L. T. 442; 10 W. R. 464).

Ejectment. — Merger. — Term of Years of Husband. — Wife's Estate [116] *in Fee. — Tenancy by the Curtesy.*

If husband and wife have issue, and the wife take by devise an estate in fee in certain lands, and so the husband become tenant by the curtesy initiate, a term for years which the husband previously had in the same lands will not, during the wife's life, merge either * in his estate as such tenant by [*117] the curtesy, or in the estate which he has in the lands in right of his wife.

In this case (an action of ejectment), a verdict having been directed for the defendants, and a rule having been moved for to enter a verdict for the plaintiff, the Court of Exchequer discharged the rule. [29 L. J. Exch. 374].

Against this decision the plaintiff appealed.

The following summary of the facts will explain the point in question.

Davies, the husband, in 1844 became lessee of the lands in question for a term of twenty-one years. Some years afterwards the lessor by his will devised to Mrs. Davies, the wife, the fee of the same lands, charged with an annuity to the plaintiff, with a provision for entry in case of non-payment. The defendant and his wife had several children. The lessor being dead, and the annuity being in arrear, the action was brought under the provision in the will.

Garth, for the appellant, the plaintiff below (Nov. 30, 1861), contended that the action lay, that the term of years of Davies, the husband, merged in the estate of the freehold for his own life, which he took in his own right as tenant by the curtesy; that, although Lord Coke, 1 Inst. p. 30 a, speaks of the estate of a tenant by the curtesy as "initiate" only, and not "consummate,"

until the death of the wife, yet that it existed as a distinct estate in the husband in his own right sufficient to cause the merger.

[BLACKBURN, J. — In Coke's Entries, "Quare Impedit," 520, it is pleaded the husband became tenant by the curtesy after the death of the wife. The pleader evidently thought that the freehold did not arise till the death of the wife.]

He further urged that, even if the husband had only an estate in right of his wife, still that the term merged in that estate, as the estate came to him by purchase, and not by descent. He referred to the authorities cited in the Court below.

The Court took time to consider whether it was necessary to hear argument on the other side. It was now (Dec. 2) stated by the Court that they did not require further argument.

Bovill, for the respondents, the defendants, was therefore not heard.

The judgment of the Court (WIGHTMAN, J., WILLIAMS, J., CROMPTON, J., WILLES, J., BYLES, J., KEATING, J., and BLACKBURN, J.) was delivered by —

WIGHTMAN, J. — We are of opinion that the judgment of the Court of Exchequer in this case was correct, and that there was no merger of the term of twenty-one years created by the lease to Davies; but that it is still subsisting, and a bar, as long as it exists, to the plaintiff's right of entry.

It is clear, upon the authorities referred to upon the argument, that the devise in fee to the wife subsequent to the lease for years to the husband would not operate as a merger of the term, because the husband would have the term in his own right, and the freehold in right of his wife; and that to create a merger the term and the freehold must exist in one and the same right. It was said, indeed, that if the freehold was acquired by the act of the husband himself, and not by operation of law, there might be a merger. However this may be in some cases, there appears to us to be no ground whatever for the argument, that in this case the husband acquired an estate of freehold by his own act. The estate was devised to his wife in fee, and no act was required on his part to make it vest in him and his wife, in right of the wife. Whether he assented or not, provided he did not dissent, the estate would vest, as appears clearly from the passage in Co. Lit. 3 a, cited in the case of *Barnfather* v. *Jordan*, 2 Dougl. 451. It was further contended, for the plaintiff, that even if the estate in fee devised

to the wife would not operate to merge the term for years previously granted to the husband, he had acquired an independent and separate estate of freehold in himself as tenant by the curtesy, in which the term would merge. We are, however, of opinion, in accordance with that of the Court of Exchequer, that whatever might have been the case had the wife died, the husband during her life has not such an estate of freehold in his own right as would merge the term. It is only upon the death of the wife that the husband becomes tenant * by the curtesy in the proper [* 118] sense of the term. It is said, in Co. Lit. 30 a, that four things belong to an estate of tenancy by the curtesy; namely, marriage, seisin of the wife, issue, and death of the wife. During the life of the wife he is only what is called "tenant by the curtesy initiate," and as such is respected in law for some purposes which are enumerated by Lord Coke; but he is not tenant by the curtesy "consummate," so as to give him a separate and independent estate of freehold until the death of the wife. And we are not aware of any authority for holding that until the death of the wife a tenancy by the curtesy "initiate" would be such an estate of freehold in the husband, separate from and independent of the estate in fee of which he and his wife were seised in right of the wife as would merge the term. The judgment of the Court of Exchequer, therefore, will be affirmed. *Judgment affirmed.*

ENGLISH NOTES.

By the Judicature Act, 1873 (36 & 37 Vict., c. 66), s. 25 (4), it is enacted: "There shall not after the commencement of this Act (*i. e.*, the 1st Nov., 1875), be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity." There has accordingly been excluded from this note a number of cases, which prior to this enactment must have been considered.

A saving clause in the Statute of Uses (27 Hen. VIII., c. 10) may also be conveniently disposed of. It is at the end of section 2, and is as follows: "And also saving to all and singular those persons, and to their heirs which be or hereafter shall be seized to any use, all such former right, title, entry, interest, possession, rents, customs, services, and action as they or any of them might have had to his or their own proper use, in or to any manors, lands, tenements, rents, or hereditaments, whereof they be or hereafter shall be seised to any other use, as if this present Act had never been had or made; anything contained in

this Act to the contrary notwithstanding." This proviso has received a wide and favourable construction, and although the proviso is couched in the words "seized to any other use," has been construed to extend to chattel interests. *Cheyney's Case* (1585), Moore, 196, 2 Anders. 192. There Cheyney leased for years to two in trust for his (Cheyney's) wife. Subsequently Cheyney enfeoffed one of the termors and others to certain uses. The Court of Wards held that the term was saved by the proviso in the statute. *Ferrers* v. *Fennor* (1623), Cro. Jac. 643, 2 Rolle's Rep. 245, was a peculiar case. There a conveyance (by way of bargain and sale and fine) of a freehold interest was made to a termor and others to make a tenant to the *præcipe*, for the purpose of suffering a recovery in performance of a covenant. It seems to have been agreed on all hands that the term had merged. But the Court held that when the recovery was suffered the term revived. The ground of the decision was that the bargain and sale, fine and recovery, were together but one assurance.

Merger only applies to estates, and not to mere rights. *Doe d. Rawlings* v. *Walker* (1826), 5 B. & C. 111, 29 R. R. 184. There the lessee of premises took a reversionary lease for years. Prior to the date fixed for the commencement of the reversionary lease, the lessee acquired an estate for life in the premises, and conveyed this estate. It was held that as he had merely an *interesse termini*, there could be no merger. It is to be noticed that in *Doe d. Rawlings* v. *Walker* the second lease was still reversionary at the date when the termor conveyed his life estate. The point adverted to in *Doe d. Rawlings* v. *Walker* does not seem to have been raised in *Stephens* v. *Brydges* (1821), 6 Madd. 66, 22 R. R. 242. There a mortgage term was created in 1720 for one thousand years. The persons in whom the term became vested took an assignment of another mortgage term in the same premises created in 1725 for five hundred years. Both these terms were then assigned to the trustees of a marriage settlement. LEACH, V. C., held that the term of one thousand years was merged in the reversionary term of five hundred years. It nowhere appears in the report that the termors of the respective terms had entered.

Merger takes place by operation of law. Thus if lands stand limited to husband and wife (A. and B.) for life, remainder to their first and other sons in tail, remainder to the heirs of A. and B., remainders over; here A. and B. take an estate tail *sub modo*, that is, until the birth of a son, when the estates are divided: — so that A. and B. become tenants for their lives, remainder to the issue male in tail, remainder to the heirs male of A. and B. *Lewis Bowles' Case* (1616), 11 Co. Rep. 79. And, although an estate *pur auter vie* is inferior to an estate for a man's own life; yet a lease to one and his assigns, *habendum*

to him during his life and the lives of B. and C., is a lease for three lives and the lives of the survivors. *Rosse's Case* (1599), 5 Co. Rep. 13, Moore, 398, pl. 521. An estate by descent would effect a merger. *Hartpole* v. *Kent* (1677), T. Jones, 76, 1 Vent. 306, Pollexf. 199.

In order that merger may take place, the two estates must meet in the same person without any intervening estate. *Whitchurch* v. *Whitchurch* (1724), 2 P. Wms. 236; *Scott* v. *Fenhoullet* (1779), 1 Bro. C. C. 69; *Webb* v. *Russell* (1789), 3 T. R. 393, 1 R. R. 725; *Doe d. Daniel* v. *Woodroffe* (H. L. 1849), 2 H. L. Cas. 811, 13 Jur. 1013. Formerly the intervening estate must have been vested; for a merger would in certain events have destroyed the intervening estates, if contingent remainders. This, however, is no longer the case by express statutory provision (8 & 9 Vict., c. 106, s. 8).

There is only one case in which a less estate will not merge in a larger estate. That is the case of an estate tail, which, upon the construction of the statute *De Donis* (13 Ed. I. c. 1), is held not to merge in the fee. This was decided in 27 Ed. III., 27 Ass. 60; *Wiscots' Case* (1599), 2 Co. Rep. 60, Cro. Eliz. 470, 481; *Roe d. Crow* v. *Baldwere* (1793), 5 T. R. 104, 2 R. R. 550. One change has been effected by the Fines and Recoveries Act (3 & 4 Will. IV., c. 74), s. 39. Prior to this enactment a base fee would have merged upon union with an immediate reversion in fee. See *Lord Shelburne* v. *Biddulph* (H. L. 1748), 6 Bro. P. C. 356; *Roe d. Crow* v. *Baldwere, supra.* But any intermediate interest would have prevented a merger. *Doe d. Daniel* v. *Woodroffe* (H. L. 1849), 2 H. L. Cas. 811, 13 Jur. 1013. The effect of merger was to let in the ancestor's charges. *Lord Shelburne* v. *Biddulph; Roe d. Crow* v. *Baldwere, supra;* Real Prop. Commrs., 1st Report, p. 28. The effect now is that the base fee does not merge, but is *ipso facto* enlarged into as large an estate as a tenant in tail with the consent of the protector, if any, might have created by any disposition under the Act, if the remainder or reversion had been vested in any other person.

Next as to quality of estate. An equitable estate will in general merge in the legal estate. *Goodright d. Alston* v. *Wells* (1781), Dougl. 741; *Selby* v. *Alston* (1797), 3 Ves. 339, 4 R. R. 10.

The subject of attendant terms will be dealt with in the next note.

AMERICAN NOTES.

This case is cited in 15 Am. & Eng. Enc. of Law, p. 817, with other English cases; 1 Washburn on Real Property, p. 587.

Merger of estates takes place only where two estates unite in one person in the same right. *Pool* v. *Morris*, 29 Georgia, 374; 74 Am. Dec. 68; *Pratt* v. *Bank of Bennington*, 10 Vermont, 293; 33 Am. Dec. 201; *Flanigan* v. *Sable*, 44 Minnesota, 417.

Washburn says: "But if the estate accrue in different rights, merger will take place where the accession is by the act of the parties, but not where it is by act of law" (citing *Clift* v. *White*, 15 Barbour [N. Y. Sup. Ct.], 70, which however is reversed in 12 New York, 519); "thus if an executor who has the reversion in his own right becomes possessed, as executor, of a term for years, the two will not merge; and it is well settled, that if a husband has a freehold in reversion, and his wife acquires a term for years, the term will not merge, although he has the complete power of disposal of such term."

No. 4. — FORBES *v.* MOFFATT.
MOFFATT *v.* HAMMOND.
(CH. 1811.)

RULE.

THE merger of charges in a freehold, whether upon the acquisition or payment off of the charge, or acquisition of the estate, depends upon the intention of the party in whom the freehold and charge are vested. And this intention may be inferred from a consideration of the question whether it will be for the benefit of the owner of the charge that merger should or should not take place.

Forbes v. Moffatt.

Moffatt v. Hammond.

18 Ves. 384–394 (11 R. R. 222).

Merger. — Mortgage. — Presumed Intention.

[384] Mortgage not merged by union with the fee: the actual intention, not established by the acts of the party, presumed from the greater advantage against merger in favour of the personal representative.

By indentures of lease and release, dated the 7th and 8th of April, 1785, reciting the will of Andrew Moffatt, that the sum of £27,000 was due to his estate from Aaron Moffatt; and that James Moffatt and Hindman, the executors of Andrew, had agreed [* 385] to lend the *further sum of £12,000 upon a mortgage of all the estates of Aaron Moffatt in Jamaica: to secure both the said sums, John Moffatt, the brother of Aaron, being a party, and agreeing to postpone a debt of £13,000, due to him by Aaron,

to the said intended advance of £12,000 in consideration of the said sum of £12,000, and to enable the executors of Andrew Moffatt to obtain an immediate security for the said debt of £27,000, Aaron Moffatt, with the consent of John Moffatt, conveyed to James Moffatt and Hindman, and their heirs, the plantation of Blenheim, &c., and all other the estates of Aaron Moffatt in Jamaica, subject to the payment of the sum of £12,000; and the same estates were conveyed to James Moffatt, Hindman, and John Moffatt, and their heirs, subject to the said mortgage for £12,000, and to a proviso for redemption on payment to James Moffatt and Hindman of £27,000, and to John Moffatt of £13,000.

Aaron Moffatt died in 1797; having by his will, dated in 1795, given all his property, real and personal, to his brother John Moffatt, and appointed him sole executor. John Moffatt died in 1807, intestate and without issue.

The bill in the first cause was filed by Forbes and Elizabeth Moffatt, executors of James Moffatt, the surviving executor of Andrew; praying an account as to the mortgage for £27,000, and a foreclosure; charging that John Moffatt, taking possession under the will of Aaron, became the absolute owner of the premises, that his mortgage was thereby extinguished, and, the charge of £12,000 being paid, the £27,000 was the only subsisting mortgage.

The defendant Sarah Moffatt, the widow of John, by her answer insisted upon the mortgage for £13,000 * as [*386] still subsisting; and prayed a sale, and an application of the produce to the two mortgages *pari passu*.

The bill in the other cause was filed by Sarah, the widow of John Moffatt, and by his next of kin, against the plaintiffs in the first cause, and against Elizabeth Hammond and Martha Bayard, the next of kin of John Moffatt, and his co-heiresses at law, in whom the legal estate was vested under the first mortgage; praying an account with reference to the sum of £13,000 and a foreclosure.

The acts of John Moffatt, from which his intention not to consider himself a mortgagee was collected, were possession taken upon the death of Aaron; considerable expenditure upon the estate, and the sale of some parts; the payment, as executor of his brother, of £5000, on the mortgage account, generally, without distinction of the two mortgages; that sum exceeding by about

£500 the balance in his hands from the produce of the real estate: on the other hand, the registry of the mortgage deed in Jamaica, after the death of Aaron, was relied on by the personal representatives; and accounts kept of the annual supplies and produce of the estate, entitled "the estate of Aaron Moffatt, deceased, in account current with John Moffatt."

The bill in the second cause alleged that the mortgage deed was not recorded in the Island of Jamaica until after the death of Aaron Moffatt at his request; that the estates, sold by John Moffatt, were not named or considered by him as part of the security; and that the sum of £5000 was paid only in part of the arrears due. The answer relied on the general words, as comprising all the estates in the security.

[* 387] * Mr. Martin and Mr. Trower, for the representatives of Andrew Moffatt, plaintiffs in the first cause; Mr. Leach and Mr. Horne for the co-heiresses-at-law of John Moffatt; Sir Arthur Piggott, Sir Samuel Romilly, Mr. Heald, and Mr. Raithby for the other parties claiming his personal property.

For the representatives of Andrew Moffatt, and the co-heiresses of John.

A mortgagee having acquired the equity of redemption, the effect is, that his interest ceases to be considered as a mortgage; unless by some clear act, equivalent to a declaration, he evinces his intention to keep alive the charge. The circumstance, that the original mortgage in this instance was of an equity of redemption, makes no difference; and the Court will treat it precisely as a legal estate under the same circumstances. The mortgagee taking the estate under his brother's will, and having a right as between his own representatives to keep the charge still subsisting, which, if he does not manifest that intention, would be considered as extinguished, they must show that intention. What third person here has a right to say, this is money? John Moffatt, being the only person responsible for this debt, the sole possessor of the funds applicable to its discharge, and continuing for several years to unite in his own person the characters of debtor and creditor, no rational purpose, for which he should wish the mortgage to exist, can be stated.

This does not, however, rest upon the accidental union of characters in the individual, but is confirmed by his acts. The acts of entering into possession, and selling parts of the estate, simply

stated, though they may assist in forming the conclusion, are not decisive; * but possession taken, not in the usual [* 388] way as a mortgagee, must be referred to the devise; and, as evidence of the intention to accept it, goes far towards the conclusion, that he did not mean the mortgage to continue, — a conclusion confirmed by the sales which followed. If the possession could be referred to the mortgage, he would be a mere trustee for himself and the others; and can it be conceived that any person holding possession as a trustee would proceed to expend on improvements, not only the produce of the estate, but beyond that a considerable sum, his own property, without any communication with the *cestui que trust?*

With regard to the other fact stated, that he sold parts of these estates, conveying them in fee simple, as mortgagee he could sell only subject to the equity of redemption. If it was necessary to show acts inconsistent with his character of mortgagee, these acts are directly so; but to these acts of John Moffatt are opposed, first, the accounts kept by him, and their title, "the estate of Aaron Moffatt deceased, in account current with John Moffatt." This account, showing only the annual supplies sent out to the estate, and the produce, proves nothing inconsistent with the intention as between the representatives not to consider the mortgage as subsisting. It was not unlikely that the parties taking the estate might wish to see how that account stood. Uniting in himself the two characters of real and personal representative, he might conceive that it was necessary for him to keep such an account, in case he should be called on by other creditors of Aaron. This, therefore, affords no evidence against the general rule, that, if an intention to keep alive the incumbrance is not manifest, the contrary must be presumed.

As to the payment of £5000, whether solely out of * the [* 389] assets, as executor, or partly out of the rents, does not appear; instead of dividing that sum between the two mortgages in the proportions in which they were entitled, he pays the whole into the bank; and it does not appear that afterwards he kept any account. That must be taken as a payment on account of the other mortgage, and is conclusive as to his intention, being in possession of the legal estate, as owner of the equity of redemption, not to keep alive his own mortgage; that he considered it merged in his other title, and the £27,000 as the only subsisting mortgage.

Being executor of Aaron, he had a right to retain as a creditor in equal degree. His conduct, therefore, in that instance is utterly inconsistent with the notion that he was acting upon the strict principle of a mortgagee in possession.

With regard to the registry of the deed, the intention of all parties is clear, that this, being a family transaction, should be kept secret during the life of Aaron, lest the registry in Jamaica should disclose his embarrassments. As executor of Aaron, he was bound to do what Aaron ought to have done; and, though there were two mortgages, the deed was entire.

For the personal representatives of John Moffatt it was contended that the sales and the payment of £5000, the only acts giving any colour to the inference that he considered his debt as extinguished, afforded by no means a satisfactory conclusion: the sales being of parts not specifically included in the mortgage; and the payment being much less than was due from him, as personal representative of Aaron, liable to account for all his personal property; and that these equivocal acts were opposed by the clear acts of taking possession, registering the deed, and keeping the [* 390] account, as mortgagee, and the impolicy * of relinquishing a specific lien on a West India estate, giving a preference to all debts by simple contract.

The MASTER OF THE ROLLS (Sir WILLIAM GRANT):—

Under the circumstances of this case the question arises between the real and personal representatives of John Moffatt; whether the mortgage for the sum of money due to him is to be considered as still subsisting; in which case his personal representatives are entitled to it; or is extinguished by the union of the characters of owner and mortgagee in John Moffatt, or by any acts done by him after he became owner.

It is very clear that a person, becoming entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate, and keep up the charge. Upon this subject a Court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and, where that is the case, it

will be held to sink, unless something shall have been done by him to keep it on foot.

The first consideration therefore is, whether John Moffatt has done anything to determine that election [*391] which he undoubtedly had; if not, the question will be upon the presumption of law under the circumstances of the case. It is disputed between the real and the personal representatives whether John Moffatt took possession in his character of owner or of mortgagee. It must, I think, be taken that he entered as devisee. There is no trace of any of the steps that a mortgagee takes to get in possession. He sold parts of the estates, which, though not specifically named in the mortgage, were included in it by general words; and as to his keeping an account with Aaron Moffatt's estate, and therein crediting the produce of the devised estates, he could not with propriety do otherwise; for as they were subject to Aaron Moffatt's debts, the account must have been kept until the debts were paid. But this, I apprehend, goes no way towards the decision of the question.

The owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate. The election he has to make is not, whether he will take the estate or the charge; but whether, taking the estate, he means the charge to sink into it, or to continue distinct from it. The circumstance that John Moffatt caused the mortgage deed to be registered in Jamaica was relied on by the personal representatives, as showing an intention to keep the charge on foot; but the co-heirs say, that as the mortgage to Andrew Moffatt's estate was included in the same deed, it was the duty of John, as surviving trustee, to register it for the benefit of the *cestuis que trusts*.

It is impossible to determine upon which motive he acted: but I think this weighs something in favour of the personal representatives; for, though the deed, containing both mortgages, must have been registered, as it stood, yet, if acting [*392] merely for the benefit of the owners of the £27,000 mortgage, he might have entered some memorandum on the record, signifying that the other mortgage no longer subsisted. It is hardly to be supposed he could wish publicly to represent his estate as more heavily burdened than he really meant it to be.

The real representatives rely on the payment of £5000 generally, without any apportionment of that sum between the two

mortgages. This appears to have been within about £500, the whole balance at that time in his hands from the produce of the real estate; and the argument is, that, as he did not apportion that sum between the two mortgages, he must have considered his own mortgage as no longer subsisting. That, however, is far from being a necessary conclusion. He paid the sum, and took the receipt, as executor of his brother. The whole estate, real and personal, being in his own hands, it would not occur to him formally to set apart the same proportion of his own debt that he paid to others. From his paying the interest of another mortgage it cannot be inferred that he meant to abandon his own. John Moffatt's acts therefore furnish no conclusive evidence of actual intention on the subject of this mortgage.

With regard to presumptive intention, it was evidently most advantageous to John Moffatt that this mortgage should be kept on foot; for otherwise he would have given priority to the other mortgage and all the debts of his brother. The reasonable presumption therefore is, that he would choose to keep the mortgage on foot. Where no intention is expressed, or the party is incapable of expressing any, I apprehend the Court considers what is most advantageous to him. Upon that principle it was held in *Thomas* v. *Kemish*, 2 Vern. 348, that the charge should [* 393] * not sink; as that was for the advantage of the infant, who, having attained the age of nineteen, had made a nuncupative will, devising all that was in her power to devise, to her mother. This could be of no avail as an election by the infant, for she could make none. Her interest must have been the ground of the decision.

In the case of *Lord Compton* v. *Oxenden*, 2 Ves. Jr. 261, 264, Lord ROSSLYN says: "The cases of infants turn upon a supposed intent. The Court saw in *Thomas* v. *Kemish* that it was much more beneficial to the infant that it should continue personal property; because an infant has the use and disposition of that before twenty-one; but he could have no disposable interest in a real estate till that age."

In *Wyndham* v. *The Earl of Egremont*, Amb. 753, the limitation was to Lord Thomond for life, with remainder to trustees to preserve contingent remainders, to his first and other sons in tail male, and to his right heirs. Yet it was determined that the charge should be raised for the benefit of his personal representa-

tives. What the counsel for the personal representatives contended was, that the charge should not merge; unless at some period in Lord Thomond's life it was indifferent to him whether the term should be kept on foot or not.

Upon looking into all the cases in which charges have been held to merge, I find nothing which shows that it was not perfectly indifferent to the party in whom the interests had united, whether the charge should, or should not, subsist; and in that case I have already said it sinks.

There is a case of *Gwillim* v. *Holland*, referred to in *Lord Compton* v. *Oxenden*, which, I believe, is not [* 394] reported anywhere; but which, from the statement given of it by the counsel who cite it, and by Lord ROSSLYN, seems to be in point to the present. Mrs. Holland had a charge upon an estate which she took by devise from her brother. He had made a mortgage on it. The counsel say, Lord HARDWICKE thought that "was no merger; because it was more beneficial for her to take it as a charge." Lord ROSSLYN says, the intervening incumbrance prevented the merger; and it was more beneficial for the person entitled to the charge to let the estate stand with the incumbrance upon it, than to take it discharged of the incumbrance, and give a priority to the second incumbrancer. Now it was certainly more beneficial for John Moffatt to let the estate stand with the incumbrance upon it than to give a priority to the other mortgage, and to all the debts of his brother Aaron. On the whole, therefore, I think that the mortgage for £13,000 must be considered as still subsisting for the benefit of John Moffatt's personal representatives.

ENGLISH NOTES.

The principle of the rule has been recognised in numerous cases. Thus prior to the Wills Act, 1837 (1 Vict., c. 26), an infant might make a will of personalty. See Blackstone Comm., Bk. 11, ch. 32. Accordingly where a charge was paid off on an estate to which an infant was entitled in fee, there would formerly have been no merger. *Thomas* v. *Kemish* (1696), 2 Vern. 348, 2 Freem. 207. The question now arises chiefly with regard to charges acquired by gift, or upon an intestacy, by a person entitled to an interest in the property over which the charge exists, or the converse case of a person entitled to the charge acquiring an estate in the property. Here, as in all cases of merger, the interposition of an estate will prevent a merger. *Wilkes* v. *Collin* (1869), L. R. 8 Eq. 338, 17 W. R. 878.

The following cases are cited as illustrating the general principle. In *Astley* v. *Milles* (1827), 1 Sim. 298, 27 R. R. 190, the tenant for life of an estate settled in strict settlement bought up some of the charges on the estate, and had them assigned to a trustee. He subsequently purchased the ultimate remainder, which was conveyed to him in fee subject to the intermediate charges. The estates intermediate between his life estate and the ultimate remainder which he had purchased failed at his death. By his will he devised his estate subject to the charges that might exist thereon at his death. It was held that there was a merger. A similar decision was come to in *Lord Selsey* v. *Lord Lake* (1839), 1 Beav. 146, 8 L. J. Ch. 233, and *Swinfen* v. *Swinfen* (1860), 29 Beav. 199. In *Price* v. *Gibson* (1762), 2 Eden, 115, the owner of the fee acquired a charge by testamentary disposition, and it was held that there was a merger.

The following have been regarded as having limited estates or interests: A tenant in tail where the reversion was in the Crown: *Countess of Shrewsbury* v. *Earl of Shrewsbury* (1790), 1 Ves. Jr. 227, 2 R. R. 101; a tenant in tail in remainder: *Wigsell* v. *Wigsell* (1825), 2 Sim. & St. 364, 4 L. J. Ch. 84, 25 R. R. 224; a person absolutely entitled, but whose interest was subject to an executory gift over: *Drinkwater* v. *Coombe* (1825), 2 Sim. & St. 340, 25 R. R. 210. So where a person, having a share merely, pays off an incumbrance affecting the entirety, there will be no merger. *Pitt* v. *Pitt* (1856), 22 Beav. 294, 2 Jur. (N. S.) 1010. In *Re Pride*, *Shackell* v. *Colnett* (1891), 2 Ch. 135, 61 L. J. Ch. 9, 64 L. T. 768, 39 W. R. 471, the equity of redemption in certain hereditaments was devised to the testator's six children equally. One of the children acquired four of the shares in addition to that devised to him. One of the children who had conveyed her share brought an action in which judgment was given in her favour setting aside the conveyance. Pending these proceedings the mortgage was paid off, and a deed executed by which the son had the property reconveyed to him so far as regarded five-sixths of the property, and the mortgage transferred as regarded the sixth share, which he had never purchased. It was held that there was no merger as regarded the share the conveyance of which was set aside.

In connection with the merger of charges reference must be made to the much-canvassed case of *Toulmin* v. *Steere* (1817), 3 Mer. 210, 17 R. R. 67. The property in question had been subject to the following charges: (1) A first mortgage for £5000; (2) a second charge by way of annuity redeemable on payment of £2045 and arrears; (3) a third charge for £3000. The property was then agreed to be purchased, and the purchaser had constructive notice of all these incumbrances. In point of fact the first and third incumbrances only were paid off

out of the purchase-money, and a sum which had been intrusted to an agent in order to redeem the annuity was misappropriated by the agent. It was held that the purchaser could not set up the £5000 or £3000 charges against the annuitant. In view of the modification in the law respecting constructive notice enacted by the Conveyancing Act, 1882 (45 & 46 Vict., c. 39), s. 3, the hardship of *Toulmin* v. *Steere* is in a large measure minimised. It was a case in which a sound principle was applied to work what was little short of an actual injustice. Although the case cannot be said to be overruled, more modern decisions of higher authority have placed the law on a sounder footing, and made the extinguishment of charges depend entirely upon the consideration of what would be for the benefit of the person paying off the charge. *Adams* v. *Angell* (C. A. 1877), 5 Ch. D. 634, 46 L. J. Ch. 352, 36 L. T. 334; *Thorne* v. *Cann*, 1895, A. C. 11, 64 L. J. Ch. 1, 71 L. T. 852; *Liquidation Estates Purchase Co.* v. *Willoughby* (H. L.), 1898, A. C. 321, 67 L. J. Ch. 251. The same principle was applied in the earlier case of *The Earl of Buckinghamshire* v. *Hobart* (1818), 3 Swanst. 186, 19 R. R. 197, where a tenant in tail, believing himself to be tenant in fee, paid off a charge with the intention of extinguishing it, and it was held that there was no merger, as the tenant in tail had acted in error, and had failed to make himself absolute owner.

Parol evidence is admissible to rebut the presumption of merger. *Astley* v. *Milles* (1827), 1 Sim. 298, 27 R. R. 190.

It was customary, prior to the passing of the Satisfied Terms Act, 1845 (8 & 9 Vict., c. 112), for the person who paid off a charge secured by a term of years, to take an assignment of the term in the name of a trustee upon trust to attend the inheritance. As cases bearing on the older law, may be cited *Willoughby* v. *Willoughby* (1756), 1 T. R. 763, 1 R. R. 396; *Capel* v. *Girdler* (1804), 9 Ves. 509, 7 R. R. 289; *Sidney* v. *Miller* (1815), G. Cooper, 206, 19 Ves. 352, 14 R. R. 247; *Tregonwell* v. *Sydenham* (H. L. 1814), 3 Dow. 194, 15 R. R. 40. This statute was adversely criticised by the late Mr. Joshua Williams in the first and second editions of his work on the law of Real Property; but the anticipated difficulties have not arisen in practice; and the statute has been made workable in operation by the decisions upon it. Of these it is sufficient to refer to *Doe d. Cadwalader* v. *Price* (1847), 16 M. & W. 603, 16 L. J. Ex. 159; *Cottrell* v. *Hughes* (1855), 15 C. B. 532, 24 L. J. C. P. 107; *Owen* v. *Owen* (1864), 3 Hurl. & C. 88, 33 L. J. Ex. 237; *Anderson* v. *Pignett* (1872), L. R. 8 Ch. 180, 42 L. J. Ch. 310, 27 L. T. 740, 21 W. R. 150.

AMERICAN NOTES.

Kent says (4 Com. 102*): "Merger is not favored in equity, and is never allowed, unless for special reasons, and to promote the intention of the party. The intention is considered in merger at law, but it is not the governing principle of the rule, as it is in equity; and the rule sometimes takes place without regard to the intention, as in the instance mentioned by Lord Coke. At law, the doctrine of merger will operate, even though one of the estates be held in trust, and the other beneficially, by the same person; or both the estates to be held by the same person on the same or different trusts. But a Court of equity will interpose, and support the interest of the *cestui que trust*, and not suffer the trust to merge in the legal estate, if the justice of the case requires it. Unless however there exists some beneficial interest that requires to be protected, or some just intention to the contrary, and the equitable or legal estates unite in the same person, the equitable trust will merge in the legal title; for as a general rule, a person cannot be a trustee for himself. Where the legal and equitable interests descended through different channels, it has been held that the equitable estate merges in the legal, in equity as well as at law. The rule at law is inflexible; but in equity it depends upon circumstances, and is governed by the intention, either expressed or implied (if it be a just and fair intention), of the person in whom the estates unite, and the purposes of justice, whether the equitable estate shall merge or be kept in existence. If the person in whom the estates unite be not competent, as by reason of infancy or lunacy, to make an election, or if it be for his interest to keep the equitable estate on foot, the law will not imply such an intention.

"It would be inconsistent with the object of these lectures to pursue the learning of merger into its more refined and complicated distinctions; and especially when it is considered, according to the language of a great master in the doctrine of merger, that the learning under this head is involved in much intricacy and confusion, and there is difficulty in drawing solid conclusions from cases that are at variance, or totally irreconcilable with each other."

(In a note on this passage Kent says: "The third volume of Mr. Preston's extensive Treatise on Conveyancing is devoted exclusively to the law of merger. It is the ablest and most interesting discussion in all his works. It is copious, clear, logical, and profound; and I am the more ready to render this tribute of justice to its merits, since there is great reason to complain of the manner in which his other works are compiled. He has been declared, by one of his pupils, to have 'stupendous acquirements as a property lawyer.' The evidence of his great industry, and extensive and critical law learning, is fully exhibited; but I must be permitted to say, after having attentively read all his voluminous works, that they are in general incumbered with much loose matter, and with unexampled and intolerable tautology; *magnitudine laborant sua.*")

Whether a mortgage will merge in the fee where the mortgagee acquires the fee depends on his intention and advantage. *Freeman* v. *Paul*, 3 Greenleaf (Maine), 260; 14 Am. Dec. 237 (citing the principal case); *Lockwood* v. *Sturdevant*, 6 Connecticut, 373 (where a mortgage with covenants of title was

held not merged); *Gardner* v. *Astor*, 3 Johnson Chancery (N. Y.) 53 (citing the principal case); *Gibson* v. *Crehore*, 3 Pickering (Mass.), 475; *James* v. *Johnson*, 6 Johnson Chancery (N. Y.), 417 (citing "the late case of *Forbes* v. *Moffatt*"); *Champney* v. *Coope*, 32 New York, 543; *Clift* v. *White*, 12 New York, 519; *Flanigan* v. *Sable*, 44 Minnesota, 417; *Burton* v. *Perry*, 146 Illinois, 71; *Edgerton* v. *Young*, 43 Illinois, 464; *Lyon* v. *McIlvaine*, 24 Iowa, 9; *Carrow* v. *Headley*, 155 Penn. State, 96; *Stantons* v. *Thompson*, 49 New Hampshire, 274; *Mallory* v. *Hitchcock*, 29 Connecticut, 127; *Keith* v. *Wheeler*, 159 Massachusetts, 161; *Walker* v. *Baxter*, 26 Vermont, 710.

There is no merger where the rights of strangers forbid it. *Moore* v. *Luce*, 29 Penn. State, 260; 72 Am. Dec. 629; *Kellogg* v. *Ames*, 41 Barbour (N. Y. Sup. Ct.), 250.

Where a co-tenant of a life estate acquires the reversion, merger will be worked or not in equity according to justice or the disclosed intent of the parties. *Jameson* v. *Hayward*, 106 California, 682; 46 Am. St. Rep. 268, citing *McClain* v. *Sullivan*, 85 Indiana, 174; *Fowler* v. *Fay*, 62 Illinois, 375; *Andrus* v. *Vreeland*, 29 New Jersey Equity, 394; *Watson* v. *Dundee, &c. Co.*, 12 Oregon, 474.

Where a term for years and the fee meet in one person, there will be no merger if the continuance of the former is necessary to the protection of the owner in fee. *Dougherty* v. *Jack*, 5 Watts (Penn.), 456; 30 Am. Dec. 335.

If the party is a lunatic the Court will presume no intent to merge. *James* v. *Mowrey*, 2 Cowen (N. Y.), 246; 14 Am. Dec. 475 (citing the principal case). The Court said: "From all the authorities which I have been able to examine, I consider the rule well settled, and I think it a rule founded upon good sense and justice, that when the legal and equitable claims are united in the same person, the equitable title is merged, and no longer exists except in special cases. In support of this position the cases of *Gardner* v. *Astor*, 3 Johnson Chancery (N. Y.), 53 (8 Am. Dec. 465); *Mills* v. *Comstock*, 5 id. 214; *Starr* v. *Ellis*, 6 id. 393; and *Compton* v. *Oxenden*, 2 Vesey, Jr., Chancery Reports, 261, are explicit and decisive.

"The only exceptions to this rule are: 1, When there is a declared intention on the part of the mortgagee, that the equitable and legal titles shall continue distinct; 2, Where an intention to continue the mortgage may be fairly presumed from the acts of the mortgagee; and 3, Where the law will presume such intention from the circumstances of the case, without regard to the acts of the mortgagee, which it will do in two cases: 1, When for the interest of the party the mortgage should continue; and 2, When from the situation of the parties, as in the case of an infant, he cannot make his election. These are all the cases to be found in which the mortgage will be deemed a subsisting incumbrance, when the mortgagee has the legal and equitable estates united in himself. But when it is indifferent to the party, whether the charge should or should not subsist, it always merges. *Forbes* v. *Moffatt*, 18 Vesey, 393."

Washburn on Real Property, vol. 2, p. 204, says: "And where it is for the interest of the holder of one of these titles, upon his acquiring the other, that they should be kept distinct in order that both should be protected, they

will not merge unless the contrary intent appear from the language of the deed;" citing the principal case. *Hunt* v. *Hunt*, 14 Pickering (Mass.), 374; *Hatch* v. *Kimball*, 14 Maine, 9; *Bell* v. *Woodward*, 34 New Hampshire, 90; *Dutton* v. *Ives*, 5 Michigan, 515; *James* v. *Morey*, 2 Cowen (N. Y.), 285. And at p. 561: "But there is, after all, a principle recognized by Courts of equity, which controls their decisions in all questions of merger of the equitable in the legal estate; and that is, if it is necessary for purposes of justice, or to effect the intent of the donor, that the two estates should be kept distinct, there will be no merger by their merely coming together in one person; citing the principal case. *Gibson* v. *Crehore*, 3 Pickering (Mass.), 475, and other cases. (The seven-year-old Court of California said of *Hunt* v. *Hunt*, *supra* [*Peters* v. *Jamestown B. Co.*, 5 Cal. 334]: "Unsustained by authority or by the best reasoning," which may be described as the height of impudence, especially as the doctrine of the two cases is totally different).

Pingrey on Real Property, vol. 1, sect. 510, says: "Equity regards intention in applying the rule of merger;" citing the principal case; and at sect. 870: "The rule at law is inflexible; but in equity it depends upon circumstances, and is governed by the intention, either express or implied, if it be a fair and just intention, whether the equitable estate shall merge or be kept in existence;" citing *Campbell* v. *Carter*, 14 Illinois, 286; *Knowles* v. *Lawton*, 18 Georgia, 476; and the principal case.

This doctrine is the subject of a chapter of Jones on Mortgages, sect. 848, citing the principal case, and arranging the American cases by States. Pingrey on Mortgages contains an excellent chapter on the subject, sect. 1053, citing the principal case.

MINES AND MINERALS.

See particularly as to questions relating to water, No. 5 of "ACTION" (*Fletcher* v. *Rylands*), and notes, 1 R. C. 235 *et seq.* See also Nos. 9 & 19 of "LIMITATION OF ACTIONS," 16 R. C. 215 *et seq.* and 328 *et seq.*

SECTION I. — *Mineral Property.*

No. 1. — CASE OF MINES.

REG. *v.* (EARL OF) NORTHUMBERLAND.

(10 ELIZ., HIL. TERM.)

No. 2. — HUMPHRIES *v.* BROGDEN.

(1850.)

RULE.

Primâ facie (in England and Wales) the owner of the surface is entitled to everything beneath it, except mines of gold and silver.

By evidence of long possession, a right to the mines may be shown to exist separately from the right to the surface; but in the absence of express grant, such a right will be presumed to be subject to a right in the owner of the surface to have the surface in its natural state supported.

Case of Mines.

Reg. v. Earl of Northumberland.

Plowden, 310–340.

Mines and Minerals. — Gold and Silver. — Base Metals. — Royal Mines.

All mines of gold and silver throughout the realm belong to the King by prerogative, with liberty to dig, &c., and carry away the same. Metals in which there is no gold or silver belong to the proprietor of the soil.

No. 1. — Case of Mines; Reg. v. Earl of Northumberland, Plowd. 313 a.

A majority of the Judges were of opinion that, if the base metals contained any gold or silver, the mines belonged to the King. But three Judges were of opinion that the criterion was whether the value of the gold and silver exceeded that of the baser metals. [The learned reporter in a note combats the opinion of the majority as unpractical.]

[313 a] The case was recited in this manner. The Queen's attorney has informed the Court, that whereas the Queen by reason of her prerogative royal is entitled to have and enjoy, and ought to have and enjoy, to her proper use, all and singular mines and ores of gold and silver, and of all other metals containing gold or silver, and all things concerning them, which may be found in any lands, tenements, or hereditaments within the realm of England, as well in the proper land and soil of the same Queen, as in the land and soil of any of her subjects; and whereas the said Queen the first day of March, in the eighth year of her reign, was and yet is seized in her demesne as of fee, in right of her Crown, of and in certain waste or mountainous lands called Newlands, in the county of Cumberland, in which are certain veins or mines, and ore or metal of copper, containing in themselves gold or silver, which to the said Lady the Queen belong, as in many records, rolls, and remembrances of the Court of Exchequer more fully appear. And whereas also the said Lady the Queen the said first day of March in the year aforesaid, at Westminster, commanded and assigned Thomas Thurland and Daniel Howseter to cause and procure certain lands and mines for such metal called ore of copper, containing in itself gold or silver within the said waste or mountainous lands called Newlands, for the use of the said Queen, to be searched and dug, and such searching and digging to be continued there during a certain time to come, and to procure such metal from time to time found and dug up there to be carried away, and for the use of the Queen to be melted, fined, or otherwise converted. By force whereof the said Thomas Thurland and Daniel caused the quantity of six hundred thousand pounds weight of ore of copper, containing in itself gold or silver, to be dug up in the said lands called Newlands, and to be there laid ready to be taken and carried away from thence, intending to continue the same search and digging as they were commanded by the Lady the Queen, until Thomas, Earl of Northumberland, the 8th day of October last past, and divers other times into the said lands called Newlands entered and intruded, and interrupted and

disturbed the said Thomas Thurland and Daniel, and other labourers in the said mines, as well from searching and * digging as from carrying away the said six hundred [* 314] thousand pounds weight of the said ore of copper dug up and put upon the land as is aforesaid, to the damage of the Lady the Queen £1000. Against which the Earl, protesting that the Queen ought not to have or enjoy by reason of her prerogative all and singular mines and ore of gold and silver, and of all other metals containing in them gold or silver, with all things concerning them, in the land or soil of any of her subjects, for plea as to the entry into the said lands called Newlands, and as to the interruption and disturbance from and in the searching and digging of five hundred thousand pounds weight of ore of copper, parcel of the said six hundred thousand pounds weight, and from and in the carrying away of the same five hundred thousand pounds weight of copper ore, he says that the same five hundred thousand pounds weight of copper ore were dug in one vein or mine of the said veins or mines of ore within the said waste or mountainous lands called Newlands. And that the same lands, in which are the veins or mines, are, and from time immemorial have been, parcel of ten thousand acres of great waste called Derwentfels, in the said county of Cumberland. And further, he says, that the late King and Queen Philip and Mary were seized of the said ten thousand acres called Derwentfels, whereof, &c., in their demesne as of fee, in right of the Crown of England, and being so seized, by their letters-patent, bearing date at Richmond, the 16th day of August, in the fourth and fifth years of their reign, shown to the Court, of their special grace, certain knowledge, and mere motion, granted to the said Earl of Northumberland the said ten thousand acres called Derwentfels, whereof, &c., amongst other things, by the name of all their honour of Cockermouth, and of their Castle of Cockermouth and Egremond, &c., and of all their manors, lands, tenements, and villages of five villages, Aspater, Newlandraw, &c., Derwentfels, &c., with their appurtenances in the county of Cumberland, late parcel of the possessions and hereditaments of Henry, late Earl of Northumberland; to have and to hold the same to the said Thomas, Earl of Northumberland, and to his heirs males of his body lawfully begotten, the remainder to Henry Percy, his brother, and to the heirs males of his body begotten. By force whereof the said Thomas, Earl of Northumberland, the last day

of August, in the said fourth and fifth years of the reign of the said King and Queen, into the said ten thousand acres called Derwentfels, whereof, &c., entered, and was thereof seized in tail by force of the gift aforesaid. And being so seized, the said 8th day of October, in the information specified, he disturbed and interrupted the said Thomas Thurland and Daniel Howseter, and other labourers in the said mines, as well from and in the making and continuing the search and digging of the said five hundred thousand pounds weight of copper ore, parcel of the said six hundred thousand pounds weight, in the said one vein or mine within the said lands called Newlands, as from and in the taking and carrying away of the same five hundred thousand pounds weight of copper ore, there in form aforesaid dug up, and laid upon the land, as it was lawful for him to do. With this, that the said Thomas, Earl of Northumberland, will aver that the said ten thousand acres called Derwentfels, &c., whereof, &c., and the said mine in the said lands called Newlands, were parcel of the lands, possessions, and hereditaments of the said Henry, late Earl of Northumberland. And with this that the said Earl will aver, that the said one vein or mine of ore or metal of copper was first opened after the said 16th day of August, in the said fourth and fifth years of the reign of the said late King and Queen, that is to say, the first day of April, in the seventh year of the reign of the Queen that now is. And he traverses the seizin of the Queen the said first day of March, and the intrusion, &c., which things he is ready to aver, and demands judgment, and prays to be dismissed. And as to the interruption and disturbance as well from and in the making and continuing the search and digging of one hundred thousand pounds weight of copper ore, being the residue of the said six hundred thousand pounds weight of copper ore, as from and in the taking and carrying away of the same one hundred thousand pounds weight of copper ore, the same Earl says, that the same one hundred thousand pounds weight of copper ore, being the residue, were dug in the residue of the said veins or mines of ore and metal within the said lands called Newlands. And that the said late King and Queen were seized of and in the said veins or mines, being the residue, in which the said one hundred thousand pounds weight of copper ore, being the residue, were dug, in their demesne as of fee, in right of the Crown of England, which veins or mines being the residue, were opened the said 16th day of August, in the

said fourth and fifth years, and long before. And the same King and Queen being so seized, by the said letters-patent here shown to the Court, gave, and of their special grace, certain knowledge, and mere motion, granted to the said Thomas Earl of Northumberland, the said veins or mines, being the residue, in which, &c., by the name of all their honour of Cockermouth, *ut supra;* and also by the name of all and singular their messuages, mills, lands, &c., wrecks of sea, mines, quarries, and all other their rights, privileges, profits, commodities, emoluments, and hereditaments whatsoever, situate, lying, and being in the said towns, fields, parishes, and hamlets of Cockermouth, &c., Derwentfels, &c., to the said honours, manors, &c., appertaining, or as member, part, or parcel of the said honours, manors, &c., then before known, accepted, used, or reputed, and which before time were parcel of the lands, possessions, and hereditaments of the said Henry, late Earl of Northumberland: To have and to hold the same to the said Thomas, Earl of Northumberland, and to the heirs males of his body lawfully begotten, the remainder to Henry Percy, his brother, and to the heirs males of his body begotten, whereby the said Thomas, Earl of Northumberland, was of the said veins or mines, being the residue, seized in his demesne as of fee-tail with the said remainder over, by the form of the gift aforesaid. And the said Earl being so seized, he, the said 8th day of October, the said Thomas Thurland and Daniel, and the other labourers in the said mines, interrupted and disturbed from and in the making and continuing the search and digging of the said one hundred thousand pounds weight of copper ore, being the residue of the said six hundred thousand pounds weight of copper ore, in the said veins or mines, being the residue of the ore and metal aforesaid, in the said lands called * Newlands, and also from [* 315] and in the taking and carrying away of the same one hundred thousand pounds weight of copper ore, being the residue, there in form aforesaid dug up, and laid upon the land, as it was well lawful for him to do. With this that the said Earl will aver that the veins or mines, being the residue in which, &c., were parcel of the possessions and hereditaments of the said late Henry, Earl of Northumberland. All which the said Thomas, Earl is ready to verify, &c., and demand judgment, and prays to be dismissed, &c. Upon which two pleas the Queen's attorney has demurred in law.

And the matter was argued in the Exchequer Chamber, in the

said Term of St. Michael, before all the Justices of England, and the Barons of the Exchequer, by Onslow, apprentice, the Queen's solicitor, Gerard, the Queen's attorney, and Wray and Barham, Queen's serjeants; and on the part of the Earl by Shirborn and Bell, apprentices, and Mead, sergeant. And the matter was divided into three points. The first was, if all mines and ores of gold or silver, which are in the lands of subjects, with power to dig the land, and carry away the ore, and other incidents thereto belong of right to the King of this realm by prerogative or not, inasmuch as this is not recited in the treatise *de Prerogativâ Regis*, and inasmuch also as the digging for it in another's land touches the freehold and inheritance of another. And upon this the two other points depend, for if the King shall not have them, then in the two other points the law is against the Queen; and if the law be that the King shall have them, from this foundation the counsel for the Queen said, it would follow that in the two other points the law is with the Queen. So that they took this to be the principal point. The second point was, whether or no mines and ores of copper containing in them gold or silver, which are in the lands of subjects, with power to dig, and carry away, and other incidents, belong also to the King of this realm by prerogative. The third was, if so be that mines and ores of copper containing gold or silver belong to the King by prerogative, nevertheless if the said grant of King Philip and Queen Mary of the land in the first case, and of all and singular mines in the other case, made by the said charter being *de gratiâ suâ speciali, certa scientia et, mero motu suis*, be sufficient to make the ores and mines pass from them to the said Earl of Northumberland or not.

[These points having been elaborately argued and numerous precedents of charters and letters-patent read in the course of the argument.]

[336] And after these arguments made at the bar, all the Justices and Barons assembled several times the same term to confer together upon the matter. And then they took respite further until Hilary Term then next following, in which term they assembled twice, and at last they gave their several opinions, and the cause thereof, at which I was not present, for there were none present but themselves and the counsel who had argued for the Queen. And (as I was informed by several of them who were there) their resolution was as follows:—

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First, all the Justices and Barons agreed that by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen, or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore.

Also HARPER, SOUTHCOTE, and WESTON, Justices, agreed, that if gold or silver be in ores or mines of copper, tin, lead, or other base metal in the soil of subjects, as well the gold and silver as the base metal entirely belongs of right to the subject, who is the proprietor of the soil, if the gold or silver does not exceed the value of the base metal; but if the value of the gold or silver exceeds the value of the copper, or other base metal, then it was their opinion that the Crown should have as well the base metal as the gold or silver; and in such case it shall be called a mine royal, and otherwise not; but if the base metal exceeds the value of the gold or silver, then it draws the property of the whole to the proprietor of the land. But they three agreed, that forasmuch as the information sets forth that the ore and mine of copper contained in it gold or silver, and the defendant has not denied it, but has fully confessed it, thereby it shall be taken that the gold or silver were of the greater value, for the best shall be intended for the Queen; and therefore they assented with all the other Justices and Barons, that judgment should be given against the Earl, and for the Queen. But all the other Justices and Barons of the Exchequer unanimously agreed, that if the gold or silver in the base metal in the land of a subject be of less value than the base metal is, as well the base metal as the gold or silver in it belong by prerogative to the Crown, with liberty to dig for it, and to put it upon the land of the subject, and to carry it away from thence; and in such case it shall be called a mine royal, for the records don't make any distinction herein, but they are general, and prove that all ores or mines of copper or other base metal containing or bearing gold or silver belong to the King. And where WESTON said, that there is a text in the civil law to this effect, viz., that by the negligence or poverty of the proprietor of the soil *possunt fodi omnia metalla in alieno solo, invito domino, quia utile est reipublicæ, et aliter non;* to this SAUNDERS, Ch. B., said, that the same law says *quòd optima legum interpres est consuetudo,* and here there is *consuetudo,* for the precedents and the accounts prove

that from time to time it has been a custom and usage that the Kings of this realm have had the profit of such mines of base metal containing or bearing gold or silver, without any distinction with regard to the value of the gold or silver, be the same greater or less than the base metal. Wherefore he and all the others (except the three above mentioned) took it that the whole ore and mine belonged to the Queen, although the base metal be of the greater value. And here it is confessed by the defendant, that the ore and mine of copper contains in it gold or silver, so that it agrees with the precedents. And therefore as well the other three as all the rest unanimously agreed that judgment should be given for the Queen upon this plea, although they differed in the matter itself, and in the reasons of the judgment, as it is shown before.

Also they all agreed that if the ore or mine in the soil of a subject be of copper, tin, lead, or iron, in which there is no gold or silver, in this case the proprietor of the soil shall have the ore or mine, and not the Crown by prerogative, for in such barren base metal no prerogative is given to the Crown.

Also they all agreed that a mine royal, whether of base metal containing gold or silver, or of pure gold and silver only, may by the grant of the King be severed from the Crown, and be granted to another, for it is not an incident inseparable to the Crown, but may be severed from it by apt and precise words.

[* 337] * But all the Justices and Barons (except the said three Justices, and they also, if so be these ores and mines in question shall be called Royal) unanimously agreed, that the ores in the first plea specified shall not pass to the Earl by the grant of the land, nor the mine in the second plea specified, by the grant of the mines, although the patent be *de gratiâ speciali, certa scientia, et mero motu*, but the words (land) and (mines) shall be taken to common intent, and shall not make the ores royal nor the mines royal to pass, to convey which there ought to be in the patent precise words expressing them. And the Act of 4 & 5 Philip and Mary will not avail the Earl in this case, because the tenor, words, or purport of the charter don't extend to a mine royal. But the Lord DYER, Chief Justice of the Common Bench, said, that if the Queen has a mine royal in the soil of J. S., and she *ex gratiâ speciali, certa scientia et mero motu suis*, grants to a stranger all mines which she has in the land of J. S., by this grant the mine royal shall pass, for else the words would be void, and

without effect, because she cannot have a base mine in the soil of another; and therefore when she says *ex certa scientia*, and recites that it is in the soil of another, she shall not be taken to be misconusant of the thing, for which reason it shall pass. But it is not so here, for the King and Queen might intend to make base mines pass, so that the words may be satisfied in that intent.

And the Lord DYER said in this case, that although the vein or ore mentioned in the first plea was not open, but close, at the time of the date of the patent, yet it might be termed a mine, *quia de mineris aliquæ sunt occultæ, et aliquæ apertæ*, and that which is not open may be called a mine, in his opinion. And Baron FREVIL held that if there is a vein of copper in the mine without mixture of gold, and in digging further there is a vein of gold with little or no other metal in it, in this case it shall be called a mine of copper and gold, and not a mine of copper only, although in the first vein there was nothing else but copper.

And Mead took exception to the information, because it was not shown in what town or hamlet Newlands lay; so that if the defendant had pleaded not guilty, it was uncertain from whence the visne should come. But all the Justices and Barons agreed that the information was good, because it is but in effect for a trespass, for which the Queen shall recover only damages; and here there is no issue to be tried, inasmuch as there is a demurrer in law, in which case it is not so necessary as it should have been if issue had been joined triable *per pais*. But if it had been in an action real, there it ought to have been shown in what town or place the land was, for otherwise the sheriff could not know where to put the party in seizin if he recovered; whereas here there is no such cause, but damages only are recoverable for the offence, for which reason the exception was disallowed.

And note, that by the Queen's command a copy of the patent made to the Earl was delivered to the Justices, in order to see if there was anything more in it than was in the pleading, which would make the ores and mines pass or not to the Earl; for she was desirous to be fully apprised of the interest in the ores and mines. And the charter was in this form: "Sciatis quod nos tam pro meliore et ampliore sustentatione et manutentione statûs, et dignitatis, et gradûs, ad quem nuper vocavimus et elegimus præcharissimum consanguineum nostrum Thomam Percy comitem Northumbriæ, quam pro bono et strenuo servitio, quod speravimus

præfatus comes et posteritas sua nobis hæredibus, et successoribus nostris facient, prout antecessores sui progenitoribus nostris regibus Angliæ antehac multipliciter fecerint, et ad humilem petitionem ejusdem comitis, de gratiâ nostrâ speciali, ac certâ scientiâ, et mero motu nostris dedimus et concessimus," &c. And it was the opinion of CATLINE, Chief Justice of England, that the words (*ad humilem petitionem ejusdem comitis*) diminish the force of the words (*de gratiâ speciali, ac ex certâ scientiâ, et mero motu*), for the charter shall not be taken to proceed purely from the King's grace, and so to be construed most strongly against the King, and most favourably for the patentee, unless it is merely of the King's own motion, without suit of the party; whereas the words (*ad humilem petitionem ejusdem comitis*) show that the suit of the Earl was one of the causes of making the patent, in which case the patent is not so effectual to make the ores and the mine pass as by the pleading it is confessed to be. And afterwards in the said Hilary Term, 10 Elizabeth, judgment was given for the Queen, and against the Earl, as follows: —

[This further record, after setting forth the various stages of the proceedings, concluded as follows:] —

[338] The premises being seen and understood by the Barons here, and mature deliberation amongst them being thereupon had, because it seems to the same Barons that the aforesaid pleas by the aforesaid Thomas, Earl of Northumberland, in manner and form aforesaid above pleaded, and each of them, and the matter therein contained, as to the aforesaid interruption and disturbance of the aforesaid Thomas Thurland and Daniel Howseter, and other the aforesaid labourers in the mines and ore aforesaid, as well from and in the making and continuing the search and digging aforesaid of the lands and mines for the ore and metal aforesaid, belonging to the said Lady the Queen by reason of her royal prerogative in manner and form in the aforesaid information specified, within the aforesaid Wastlands, called Newlands, in the aforesaid information specified, as from and in the aforesaid taking and carrying away of the aforesaid six hundred thousand pounds weight of ore and metal of copper aforesaid there in form aforesaid dug up and laid upon the land, are insufficient in law to discharge the same Earl from the aforesaid contempts and trespasses, or any of them, by him, of, for, and in the same interruption and disturbance in form aforesaid done and perpetrated; it is

considered by the same Barons that the aforesaid Thomas, Earl of Northumberland, be convicted of the aforesaid contempts and trespasses by him, of, for, and in the aforesaid interruption and disturbance of the aforesaid Thomas Thurland and Daniel Howseter, and other the aforesaid labourers in the ores and mines aforesaid, in form abovesaid done and perpetrated; and that the said Lady the Queen recover against the aforesaid Earl of Northumberland, her damages by occasion of the aforesaid interruption and disturbance sustained. But because it is unknown what damages the same Lady the Queen has sustained by occasion thereof, the sheriff of the aforesaid county of Cumberland is commanded, that by the oath of good and lawful men of his bailiwick, he diligently inquire what damages the said Lady the Queen has sustained by occasion of the interruption and disturbance aforesaid; and that the inquisition, &c. And likewise it is considered by the same Barons here, that the aforesaid Thomas, Earl of Northumberland, as to the aforesaid intrusion by him above in the information aforesaid supposed to be made into the aforesaid waste or mountainous lands called Newlands, in the same information specified, go at present without day, saving always the right of the Queen if at another time, &c.

Nota bene by the Reporter.

There seems to me to be a diversity between a mine of copper containing in it gold, and a mine of gold containing in it copper. For when it is called a mine of copper containing in it gold, it is to be intended that the copper is the greater, and the gold the less, for everything contained is less than the thing which contains it, and that which comprehends another thing is greater than the thing comprehended; and forasmuch as the copper is the greater, the mine takes its name from it, and is called a mine of copper containing gold. And for the same reason if it is called a mine of gold containing copper, the gold from whence the mine has its name is the greater, and the copper the less. And this is agreeable to the notion of those who have treated of minerals, as George Agricola and Christopher Eucelius and others. From whence it follows that the records of the Exchequer, which prove that the King had the mines of copper containing or bearing gold or silver, prove that the King had the whole where the gold and silver were the less. But how the greater or the less shall be esteemed some

are in doubt, that is to say, whether it shall be taken according to the quantity, or according to the value. For some say it shall be esteemed according to the quantity, and therein they confess that true it is, as to the quantity, the thing which comprehends the other is greater than the thing comprehended, as of a hogshead of wine, or a barrel of ale, for the hogshead in quantity is greater than the wine, and the barrel than the ale, but not in value, and yet it takes its name from the greater, and therefore it is called a hogshead of wine; so that the name proceeds from the greater. So in the case of a mine, the mine of copper containing gold has its name from the greater in quantity, but not in value, for it may properly enough be said that of a mine of copper containing gold, the gold may be the greatest in value. And thus it seems to them that the precedents which prove that the King ought to have mines of copper or lead containing gold or silver prove nothing against the assertion of the three Justices. But if so be the mine shall take its name from the greater in value, and not from the greater in quantity, then the precedents prove
[* 339] * directly contrary to the opinion of the three Judges, and confirm the opinion of the others who were the majority. For if it shall be taken that mines of copper containing gold or silver (which is to be understood, where the copper is of greater value, and the gold or silver of less) shall belong entirely to the King by the precedents, *ergo* the precedents prove the law to be directly contrary to the opinion of the three Justices. So that in order to understand the precedents, it is to be known whether in the words (mines of copper containing gold or silver) the copper shall be taken the greater in quantity, or the greater in value. And it seems to many that the name shall be taken from the value, and not from the quantity, for that everything is esteemed according to its value; *quære de hoc.*

And if so be that by the precedents the Crown shall have the whole mine where the gold or silver is of less value than the base metal, yet it seems reasonable to have regard to the value of the gold or silver, for if there is no more than a quilful of gold or silver in a great value of copper, as Bell said, it is not reasonable that so small a quantity should be respected, but the quantity ought to be such as is of some value in itself over and above the charges of getting it, and above the base metal consumed therein. For if the value is not regarded, but the gold or silver, be it ever

so little, shall entitle the Crown to the whole mine, from thence it would follow that the Crown would have all the mines of base metal in the realm, if that be true which these who are skilled in *re metallica* have written. For (as the ancient authors in this art affirm) there are but six kinds of metal in the earth, viz., gold, silver, tin, copper, lead, and iron, for that which is called in Latin *chalibs*, and in English *steel*, is but the harder part of iron, and that which is called in Latin *auricalcum*, and in English *Lattin*, as also that which we call in English *brass*, are not metals of themselves, but are a composition of copper and other things. For there is a stone (whereof we have a great number in this realm, as I have heard) which we call the calamine stone, and which, as I take it, is the same stone that is called in Latin *cadmia*, and by some *lapis calaminaris*, some of which stones have gold in them, and others none, and this stone is fusile, and is used to be melted with copper, and from the copper and this stone, mixed and melted together, *Lattin* is made, which is more valuable than the copper alone, for the said stone being melted along with the copper makes the copper more flexible, and turns the colour of it from red to yellow, like to the colour of gold, and because the copper melted with it is made more precious, it is of greater price, and brass is made of copper mixed and melted along with tin or lead, and because the copper itself is debased by such a composition with a more base metal, it is of less price. So that (as the ancient authors have written) there are but the said six kinds of metals fusil and malleable, which in Latin they call *corpora metallica*, and (as Eucelius, lib. 1, c. 1, says) *constant ex sulphure patre, et argento vivo matre.* For he says: "Principia generationis veluti deus optimus maximus omnium animalium constituit marem et fæminam, &c., tali modo deus in rebus etiam metallicis constituit generationis principia marem et fæminam, et veluit materiam esse omnium metallorum sulphur, ut patrem, et argentum vivum ut matrem, quorum nempe coitu omnia fierent metalla." And afterwards he says: "Etsi autem ex his duobus principiis, sulphure et argento vivo, quasi patre et matre countibus omnia metalla procreantur, quorum multæ sunt species et diversæ, natura tamen semper proponit et contendit ad perfectissimum metallum, scilicet, aurum. Accidentia vero diversa supervenientia diversa transformant metalla, et secundum puritatem et impuritatem sulphuris et argenti vivi pura et impura generantur metalla, veluti

ex leprosis parentibus leprosi procreantur filii." And afterwards he says that gold is to sulphur and quicksilver "quasi filius et perfectissimum metallum naturæ et paululum immutata commixtione argenti vivi, fit argentum, quasi filia ignobilior fratre auro."

And the other metals, viz., tin, copper, lead, and iron, as imperfect metals, proceed from their said father and mother, who were by accidents become imperfect, *veluti leprosi filii ex leprosis parentibus.*

And it seems by the assertion of Agricola (lib. 10, c. 10) in his book *de re metallicâ*, that there is naturally in these base metals some portion of gold or silver, for thus he says: "Naturaliter autem potissimum auri quædam portio inest in argento, et in ære; argenti quædam in auro, in ære, in plumbo nigro, in ferro; æris aliqua in auro in argento, in plumbo nigro in ferro; plumbi nigri aliqua in argento; ferri denique quædam in ære." And he goes further, and shows the way by which the one metal may be divided from the other when it is melting in the vessel; so that according to his authority, gold and silver is naturally in copper, and silver is naturally in iron and lead. And it is to be observed that he uses the word (*æs*) for copper, for that is the proper English for (*æs*), and it has no proper signification that though by a figure much used, Brass and Lattin are called (*æs*), because they consist chiefly of copper. Wherefore if no regard should be had to the quantity of the gold or silver that is found in the base metal (inasmuch as there is naturally some in every base metal), the King would have all mines of base metals in the realm. And then the resolution of all the Justices and Barons, that the subject shall have such mines of base metal which are void of gold or silver in his own land, is vain and of no effect, for by the said author there is no such mine in this realm, or elsewhere; so that such resolution is grounded upon an ignorance of the nature of base mines. And therefore it seems to be reasonable and fit to consider the nature of base mines, and the value of the gold or silver in the base metal, and that it should be at least of such value as to counterbalance the charges of getting it, or else in my opinion it is not reasonable that it should draw to the Crown the property of the base metal, but the proprietor of the soil ought to have the gold and silver also along with the base metal. But this precise point was not left to the Judges to determine, for they were discharged of that by the defendants' confession that the ore contained gold or silver

[* 340] which shall be * intended the best for the Queen, viz., that it was of sufficient value; but the Earl ought to have shown that the ore contained some gold or silver, but not of the greater value, nor as much as would defray the charges of getting it, *absque hoc*, that it contained gold or silver in other manner, and then by this or such like pleading the Judges would have been pressed thereupon in point of judgment, which is now passed over by the pleading.

And for the better understanding, whether any base mines are void of gold or silver, it is good to know authors, and experience, for the truth of this matter ought to direct the judgments of the Judges.

Humphries v. Brogden.

12 Q. B. 739–757 (s. c. 20 L. J. Q. B. 10; 15 Jur. 124; 46 L. T. 457).

Mines. — Surface. — Right to Support.

Action on the case by the occupier of the surface of land for negligently [739] and improperly, and without leaving any sufficient pillars and supports, and contrary to the custom of mining in the country where, &c., working the subjacent minerals, *per quod* the surface gave way. Plea: Not guilty. It was proved on the trial that plaintiff was in occupation of the surface, and defendants of the subjacent minerals; but there was no evidence how the occupation of the superior and inferior strata came into different hands. The surface was not built upon. The jury found that the defendants had worked the mines, carefully and according to custom, but without leaving sufficient support for the surface.

Held, that the plaintiff was, on this finding, entitled to have the verdict entered for him; for that, of common right, the owner of the surface is entitled to support from the subjacent strata; and, if the owner of the minerals removes them, it is his duty to leave sufficient support for the surface in its natural state.

This was an action against the Durham County Coal Company, sued in the name of their secretary. On the trial, before COLERIDGE, J., at the Durham * Spring Assizes, 1850, [* 740] the jury, in answer to questions put by the learned Judge, found the facts specially. His Lordship then directed a verdict for the plaintiff, giving the defendants leave to move to enter a verdict for them upon the findings of the jury. Knowles, in Easter Term, 1850, obtained a rule *nisi* accordingly. In Trinity Term, 1850 (on the 23d and 24th May, 1850, before Lord CAMPBELL, Ch. J., PATTESON, COLERIDGE, and ERLE, JJ.),

Watson and Joseph Addison showed cause, and Knowles and Hugh Hill supported the rule. The judgment of the Court states so fully the nature of the case, the pleadings, and the arguments and authorities adduced on both sides, as to render any further statement unnecessary. *Cur. adv. vult.*

Lord CAMPBELL, Ch. J., now delivered the judgment of the Court.

This is an action on the case. The declaration alleges that the plaintiff was possessed of divers closes of pasture and arable land, situate, &c., yet that the company, so wrongfully, carelessly, negligently, and improperly, and without leaving any proper and sufficient pillars or supports in that behalf, and contrary to the custom and course of practice of mining used and approved of in the country where the mines thereinafter mentioned are situate, worked certain coal mines under and contiguous to the said closes, and dug for and got and moved the coals, minerals, earth, and soil of and in the said mines, that by reason thereof the soil and surface of the said closes sank in, cracked, swagged, and gave way; and thereby, &c. The only material plea was, Not guilty.

[*741] * The cause coming on to be tried before my Brother COLERIDGE at the last Spring Assizes for the county of Durham, it appeared that the plaintiff was possessed of the closes described in the declaration, and that the Durham County Coal Company (who may sue and be sued by their secretary) were lessees, under the Bishop of Durham, of the coal mines under them; but there was no other evidence whatever as to the tenure or the title either of the surface or of the minerals. It appeared that the company had taken the coals under the plaintiff's closes, without leaving any sufficient pillars to support the surface, whereby the closes had swagged and sunk, and had been considerably injured; but that, supposing the surface and the minerals to have belonged to the same person, these operations had not been conducted carelessly or negligently or contrary to the custom of the country. The jury found that the company had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports; and a verdict was entered for the plaintiff for £110 damages, with leave to move to enter a verdict for the defendant, if the Court should be of opinion that under these circumstances the action was not maintainable.

The case was very learnedly and ably argued before us in Easter

and Trinity Terms last. On account of the great importance of the question, we have taken time to consider of our judgment.

For the defendant it was contended that, after the special finding of the jury, the declaration is defective in not alleging that the plaintiff was entitled to have his closes supported by the *subjacent strata*. But we are of opinion that such an allegation is unnecessary to * raise the question in this action, [* 742] Whether the company, although they did not work the mines negligently or contrary to the custom of the country, were bound to leave props to support the surface? If the easement which the plaintiff claims exists, it does not arise from any special grant or reservation, but is of common right, created by the law, so that we are bound to take notice of its existence. In pleading, it is enough to state the facts from which a right or a duty arises. The carefully prepared declaration in *Littledale* v. *Lord Lonsdale*, 2 H. Bl. 267 (*Earl of Lonsdale* v. *Littledale*), for disturbing the right of the owner of the surface of lands to the support of the mineral strata belonging to another, contains no express allegation of the right; and, if the omission had been considered important, it probably would have been relied upon, rather than the objection that a peer of Parliament was not liable to be sued in the Court of King's Bench by bill.

We have therefore to consider, whether, when the surface of land (by which is here meant the soil lying over the minerals) belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals may remove them without leaving support sufficient to maintain the surface in its natural state? This case is entirely relieved from the consideration how far the rights and liabilities of the owners of adjoining tenements are affected by the erection of buildings; for the plaintiff claims no greater degree of support for his lands than they must have required and enjoyed since the globe subsisted in its present form.

* Where portions of the freehold, lying one over another [* 743] perpendicularly, belong to different individuals, and constitute (as it were) separate closes, the degree of support to which the upper is entitled from the lower has as yet by no means been distinctly defined. But, in the case of adjoining closes which belong respectively to different persons from the surface to the centre of the earth, the law of England has long settled the degree

of lateral support which each may claim from the other; and the principle upon which this rests may guide us to a safe solution of the question now before us.

In 2 Rolle's Abridgment, 564, tit. Trespass (I), pl. 1, it is said: "If A., seised in fee of copyhold land next adjoining land of B., erect a new house on his copyhold land" (I may remark that the circumstance of A.'s land being copyhold is wholly immaterial), "and part of the house is erected on the confines of his land next adjoining the land of B., if B. afterwards digs his land near to the foundation of the house of A., but not touching the land of A., whereby the foundation of the house and the house itself fall into the pit, still no action lies at the suit of A. against B., because this was the fault of A. himself that he built his house so near to the land of B., for he could not by his act hinder B. from making the most profitable use of B.'s own land; Easter Term, 15 Car. B. R., *Wilde* v. *Minsterley*. But, *semble* that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into his pit; and for this, if an action were brought, it would lie." This doctrine is recognised by Lord C. B. Comyns, Com. Dig., Action upon the case for a nuisance (A); by Lord TENTERDEN, * in *Wyatt* v. *Harrison*, 3 B. & Ad. 871, 876 (37 R. R. 566); and by other eminent Judges. It stands on natural justice, and is essential to the protection and enjoyment of property in the soil. Although it places a restraint on what a man may do with his own property, it is in accordance with the precept, *sic utere tuo ut alienum non lædas*. As is well observed by a modern writer: "If the neighbouring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone." Gale on Easements, p. 216.

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This right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years, or any longer period. *Pari ratione*, where there are separate freeholds from the surface of the land and the minerals belonging

to different owners, we are of opinion that the owner of the surface, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may of course be removed by the owner of them, so that a sufficient support for the surface is left; but if the surface subsides and is injured by the removal of these strata, although, on the supposition that the surface and the minerals belong to the same owner, the operation may not have been conducted * negligently nor contrary to the custom of the country, [*745] the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which it is entitled from the adjoining surface close, it cannot be securely enjoyed as property; and under certain circumstances, as where the mineral strata approach the surface and are of great thickness, it might be entirely destroyed. We likewise think that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation, or covenant, must be laid down generally without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule; and the attempt to introduce them would lead to uncertainty and litigation: greater inconvenience cannot arise from this rule, in any case, than that which may be experienced where the surface belongs to one owner, and the minerals to another, who cannot take any portion of them without the consent of the owner of the surface. In such cases a hope of reciprocal advantage will bring about a compromise, advantageous to the parties and to the public.

Something has been said of a right to a reasonable support for the surface: but we cannot measure out degrees to which the right may extend; and the only reasonable support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level.

* The defendant's counsel have argued that the analogy as [*746] to the support to which one superficial close is entitled from the adjoining superficial close cannot apply where the surface and the minerals are separate tenements belonging to different owners,

because there must have been unity of title of the surface and the minerals, and the rights of the parties must depend upon the contents of the deeds by which they were severed. But, in contemplation of law, all property in land having been in the Crown, it is easy to conceive that, at the same time, the original grant of the surface was made to one, and the minerals under it to another, without any express grant or reservation of any easement. Suppose (what has generally been the fact) that there has been in a subject unity of title from the surface to the centre: if the surface and the minerals are vested in different owners without any deeds appearing to regulate their respective rights, we see no difficulty in presuming that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and, if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed. Perhaps it may be said that, if the grantor of the minerals, reserving the surface, seeks to limit the right of the grantee to remove them, he is acting in derogation [* 747] of his grant, and is seeking to hinder the * grantee from doing what he likes with his own but, generally speaking, mines may be profitably worked, leaving a support to the surface by pillars or ribs of the minerals, although not so profitably as if the whole of the minerals be removed; and a man must so use his own as not to injure his neighbour.

The books of reports abound with decisions restraining a man's acts upon and with his own property, where the necessary or probable consequence of such acts is to do damage to others. The case of common occurrence nearest to the present is, where the upper story of a house belongs to one man and the lower to another. The owner of the upper story, without any express grant, or enjoyment for any given time, has a right to the support of the lower story. If this arises (as has been said) from an implied grant or covenant, why is not a similar grant or covenant to be implied in favour of the owner of the surface of land against the owner of the minerals? If the owner of an entire house, convey-

ing away the lower story only, is, without any express reservation, entitled to the support of the lower story for the benefit of the upper story, why should not an owner of land, who conveys away the minerals only, be entitled to the support of the minerals for the benefit of the surface?

I will now refer, in chronological order, to the cases which were cited in the argument; and I think that none of them will be found in any degree to impugn the doctrine on which our decision rests.

In *Bateson* v. *Green*, 5 T. R. 411, BULLER, J., says: "Where there are two distinct rights, claimed by different parties, which encroach on each other in the enjoyment of * them, [* 748] the question is, which of the two rights is subservient to the other." And it was held that the lord may dig clay pits on a common, or empower others to do so, without leaving sufficient herbage for the commoners, if such right can be proved to have been always exercised by the lord. So, here, the right of the owner of the minerals to remove them may be subservient to the right of the owner of the surface to have it supported by them.

Peyton v. *The Mayor, &c. of London*, 9 B. & C. 725 (33 R. R. 311), was cited to show the necessity for introducing into the declaration an averment that the plaintiff was entitled to the easement or right which is the foundation of the action: but the easement there claimed was a right of support of one building upon another, which could arise only from a grant actual or implied; and there Lord TENTERDEN says: "The declaration in this case does not allege, as a fact, that the plaintiffs were entitled to have their house supported by the defendants' house, nor does it in our opinion contain any allegation from which a title to such support can be inferred as a matter of law." In the case at bar, we are of opinion that the declaration alleges facts from which the law infers the right of support which the plaintiff claims.

Wyatt v. *Harrison*, 3 B. & Ad. 871 (37 R. R. 566), decided that the owner of a house, recently erected on the extremity of his land, could not maintain an action against the owner of the adjoining land for digging in his own land so near to the plaintiff's house that the house fell down: but the reason given is, that the plaintiff could not, by putting an additional weight upon his land, and so * increasing the lateral pres- [* 749] sure upon the defendant's land, render unlawful any operation in the defendant's land which before would have caused no

damage; and the Court intimated an opinion that the action would have been maintainable, not only if the defendant's digging would have made the plaintiff's land crumble down unloaded by any building, but even if the house had stood twenty years. Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house. *Stansell* v. *Jollard*, 1 Selw. N. P. 457 (11th ed.), and *Hide* v. *Thornborough*, 2 Carr. & Kir. 250. Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favours the preservation of enjoyments acquired by the labour of one man and acquiesced in by another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle.

In *Dodd* v. *Holme*, 1 A. & E. 493, where there is a good deal of discussion respecting the rights of owners of adjoining lands or houses, no point of law was determined, as the case turned upon the allegation in the declaration that * the defendants dug "carelessly, negligently, unskilfully, and improperly," whereby "the foundations and walls" of the plaintiff's house "gave way." The plaintiff's house was proved to have been in a very bad condition; but Lord DENMAN said that the defendant had no right to accelerate its fall.

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The Court of Exchequer, in *Partridge* v. *Scott*, 3 M. & W. 220, concurred in the law before laid down in this Court, that a right to the support of the foundation of a house from adjoining land belonging to another proprietor can only be acquired by grant, and that, where the house was built on excavated land, a grant is not to be presumed till the house has stood twenty years after notice of the excavation to the person supposed to have made the grant; but nothing fell from any of the Judges questioning the right to support which land, while it remains in its natural state, has been said to be entitled to from the adjoining land of another

proprietor. Some land of the plaintiff's not covered with buildings had likewise sunk, in consequence of the defendant's operations in his own land; but the Court, in directing a verdict to be entered for the defendants on the whole declaration, seems to have thought that the sinking of the plaintiff's land was consequential upon the fall of the houses, or would not have taken place if his own land had not been excavated.

The Judges in the Exchequer Chamber held, upon a writ of error from the Court of Common Pleas in *Chadwick* v. *Trower*, 6 Bing. N. C. 1; see *Trower* v. *Chadwick*, 3 Bing. N. C. 334, that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention * to the owner of an adjoining wall which rests [* 751] upon it, and that he is not even liable for carelessly pulling down his wall if he had not notice of the existence of the adjoining wall: but this decision proceeds upon the want of any allegation or proof of a right of the plaintiff to have his wall supported by the defendant's, and does not touch the rights or obligations of conterminous proprietors, where the tenement to be supported remains in its natural condition.

Next comes the valuable case of *Harris* v. *Ryding*, 5 M. & W. 60, which would be a direct authority in favour of the present plaintiff, if it did not leave some uncertainty as to the effect of the averment, in the declaration, of working "carelessly, negligently, and improperly," and as to whether the plaintiff was considered absolutely entitled to have his land supported by the subjacent strata, to whatever degree the affording of this support might interfere with the defendant's right to work the minerals. There one seized in fee of land conveyed away the surface, reserving to himself the minerals with power to enter upon the surface to work them; and it is said to have been held that, under this reservation, he was not entitled to take all the minerals, but only so much as "could be got, leaving a reasonable support to the surface" (p. 70). The case was decided upon a demurrer to certain pleas justifying under the reservation, and the declaration alleged careless, negligent, and improper working, which there must be considered as admitted, whereas here it is negatived by the verdict; but the Barons, in the very comprehensive and masterly judgment which they delivered *seriatim*, seem all * to [* 752] have thought that the reservation of the minerals would

not have justified the defendants in depriving the surface of a complete support, however carefully he might have proceeded in removing them. Lord ABINGER says: "The plea is no answer, because it does not set forth any sufficient ground to justify the defendants in working the mines in such a manner as not to leave sufficient support for the land above, which is alleged by the declaration to be a careless, negligent, and improper mode of working them." PARKE, B., observes: It never could have been in the contemplation of the parties "that, by virtue of this reservation of the mines, the grantor should be entitled to take the whole of the coal and let down the surface, or injure the enjoyment of it;" and, again: "This plea is clearly bad, because the defendants do not assign that in taking away the coal they did leave a sufficient support for the surface in its then state." "The question is," says ALDERSON, B., "whether the grantor is not to get the minerals which belong to him, and which he has reserved to himself the right of getting, in that reasonable and ordinary mode in which he would be authorised to get them, provided he leaves a proper support for the land which the other party is to enjoy?" My Brother MAULE, then a Judge of the Court of Exchequer, says, in the course of his luminous judgment: The right of the defendants "to get the mines is the right of the mine-owners, as against the owner of the land which is above it. That right appears to me to be very analogous to that of a person having a room in a house over another man's room, or an acre of land adjoining another man's acre of land." PARKE, B., that he might not be misunderstood as to the right of the owner of the surface, [*753] afterwards * adds: "I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support." It seems to have been the unanimous opinion of the Court that there existed the natural easement of support for the upper soil from the soil beneath, and that the entire removal of the inferior strata, however skilfully done, would be actionable, if productive of damage by withdrawing that degree of support to which the owner of the surface was entitled, the duty of the owner of the servient tenement forbidding him to do any act whereby the enjoyment of the easement could be disturbed.

The counsel for the defendant cited and relied much upon the case of *Acton* v. *Blundell*, 12 M. & W. 324, in which it was held

that a landowner, who, by mining operations in his own lands, directs a subterraneous current of water, is not liable to an action at the suit of the owner of the adjoining land, whose well is thereby laid dry. But the right to running water and the right to have land supported are so totally distinct, and depend upon such different principles, that there can be no occasion to show at greater length how the decision is inapplicable.

We have now to mention the case of *Hilton* v. *Lord Granville*, 5 Q. B. 701. A writ of error may probably be brought in this case when all the issues at fact have been disposed of; and nothing which I now say is to preclude me from forming any opinion upon it, should I ever hear it argued. If well decided, the plaintiff is justified in relying upon it; for it is strongly in point. This * Court there held that a prescription or [* 754] a custom within a manor for the lord, who is seised in fee of the mines and collieries therein, to work them under any dwelling-houses, buildings, and lands, parcel of the manor, doing no unnecessary damage, and paying to the tenants and occupiers of the surface of lands damaged thereby a reasonable compensation for the use of the surface of the lands, but without making compensation for any damage occasioned to any dwelling-houses or other buildings within or parcel of the manor by or for the purpose of working the said mines and collieries, is void as being unreasonable. Lord DENMAN, Ch. J., said: "A claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument."

The most recent case referred to was *Smith* v. *Kenrick*, 7 C. B. 515, 564, in which the Court of Common Pleas, after great deliberation, held that it is the right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his own mine, as far as the flow of water is concerned, in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner * of the [* 755] adjoining mine; so that such prejudice does not arise from

the negligent or malicious conduct of his neighbour. But no question arose there respecting any right to support; the controversy being only respecting the obligation to protect an adjoining mine from water which may flow into it by the force of gravitation. And in the very learned judgment of the Court, delivered by my Brother CRESSWELL, there is nothing laid down to countenance the doctrine that, in a case circumstanced like this which we have to determine, the owner of the minerals may, if not chargeable with malice or negligence, remove them so as to destroy or damage the surface over them which belongs to another.

We have attempted without success to obtain from the Codes and jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong as separate properties. This penury, where the subject of servitudes is so copiously and discriminately treated, probably proceeds from the subdivision of the surface of the land and the minerals under it into separate holdings being peculiar to England. Had such subdivision been known in countries under the jurisdiction of the Roman civil law, its incidental rights and duties must have been exactly defined, when we discover the right of adjoining proprietors of lands to support from lateral pressure leading to such minute regulations as the following: "Si quis sepem ad alienum prædium fixerit, infoderitque, terminum ne excedito: si maceriam, pedem relinquito: si verò domum, pedes duos: si sepulchrum aut scrobem foderit, quantum profunditatis habuerint, tantum spatii relinquito:
[* 756] * si puteum, passûs latitudinem." Dig. Lib. X. Tit. I. (Finium regundorum) s. 13.

The Code Napoleon likewise recognizes the support to which the owners of adjoining lands are reciprocally entitled, but contains nothing which touches the question for our decision more closely than the following article on "Natural Servitudes."[1] "Les fonds inférieurs sont assujettis, envers ceux qui sont plus élevés, à recevoir les eaux qui en découlent naturellement sans que la main de l'homme y ait contribué." "Le propriétaire supérieur ne peut rien faire qui aggrave la servitude du fonds inférieur." Code Civil, liv. ii. tit. iv. ch. i. art. 640. But reference is here made to adjoining fields on a declivity, not to the surface of land, and the minerals, being held by different proprietors.

[1] "Servitudes qui dérivent de la situation des lieux."

The American lawyers write learnedly on the support which may be claimed for land from lateral pressure, and for buildings which have long rested against each other, but are silent as to the support which the owner of the surface of lands may claim from the subjacent strata when possessed by another. See Kent's Commentaries, Part vi. Lecture lii. vol. iii. p. 434, ed. 1840.

However, in Erskine's Institute of the Law of Scotland, treating of the servitude, *Oneris ferendi*, the very learned author has the following passage, which well illustrates the principle on which our decision is founded: "Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh," "the proprietor of the ground floor is bound merely by the nature and condition of his property, without any servitude, * not [* 757] only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing that weight." "The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower." Book ii. tit. 9, s. 11, vol. i. p. 433 (Ivory's ed. 1828).

For these reasons, we are all of opinion that the present action is maintainable, notwithstanding the negation of negligence in the working of the mines; and that the rule to enter a verdict for the defendant must be discharged. We need hardly say that we do not mean to lay down any rule applicable to a case where the *primâ facie* rights and liabilities of the owner of the surface of the land and of the subjacent strata are varied by the production of title deeds or by other evidence. *Rule discharged.*

ENGLISH NOTES.

If there has been a grant of land by the Crown under a simple reservation of mines, and without reserving any right of entry, the Crown cannot grant to another the right to enter upon the estate and dig up the surface: nor has the Crown any such power in respect of the royal prerogative of mines. But when mines reserved to the Crown are once opened, the Crown can restrain the owner of the soil from working them, and may grant license to others to work them. *Ryddall* v. *Weston* (1739), Atkins (cas. temp. HARDWICKE), vol. 2, p. 19.

The presumption that the owner of the land is entitled to the mines is much insisted on in the case of *Rogers* v. *Brenton* (1847), 10 Q. B. 26, 17 L. J. Q. B. 34, 12 Jur. 263, where a custom was alleged in regard

to waste lands in Cornwall for persons called "bounders" to mark out a claim and search for and get tin within the boundaries. It was held that the custom could not be good in law except under condition of working the tin; and the bounder, in the case before the Court, having ceased to work for many years, could not succeed in his claim to the rights of working within the boundaries.

"The principle of law to be deduced from all the authorities, and directly established by the case of *Harris* v. *Ryding* (1839), 5 M. & W. 60, and *Humphries* v. *Brogden*, is that a grant or reservation of mines in general terms confers a right to work the mines, subject to the obligation of leaving a reasonable support to the surface as it exists at the time of such grant or reservation." Per KELLY, C. B., in *Richards* v. *Jenkins* (1868), 18 L. T. 437, 442. Or as put by CHANNELL, B., in the same case (at p. 444), those two cases "clearly show that, in the absence of any express stipulation enlarging or diminishing the right, what the surface owner is entitled to is reasonable support for the surface in the state in which it existed at the time when the titles to the mines and to the surface came into different hands."

Further authorities relating to the right of support to the surface of land, whether in its natural state or otherwise, will be found under *Dalton* v. *Angus*, No. 8 of "Easement," and notes, 10 R. C. 98 *et seq.*

On the admission of British Columbia into the Dominion of Canada, it was agreed by the Articles of Union that the Dominion should construct a railway through the Province, and that the Province should convey to the Dominion (to be distributed amongst settlers along the line of railway) certain public lands of the Province; and lands were granted accordingly by an Act of the Provincial Legislature. It was held that this grant did not transfer the rights of the Crown assigned to the Province for State purposes by the British North America Act, 1878; nor did the grant convey any right to gold, or gold-mining rights. *Attorney-General of British Columbia* v. *Attorney-General of Canada* (P. C. 1888), 14 App. Cas. 295, 58 L. J. P. C. 88, 60 L. T. 712. Those rights continue, under sect. 109 of the British North America Act, 1867, to be vested in Her Majesty as the Sovereign Head of the Province. *Maritime Bank of Canada* v. *New Brunswick Receiver-General*, 1892, A. C. 437, 61 L. J. P. C. 75, 67 L. T. 126.

AMERICAN NOTES.

Humphries v. *Brogden* is cited in Washburn on Easements as a leading case, and is followed by a careful review of the English cases on subjacent support. That case is also approved in *Jones* v. *Wagner*, 66 Penn. State, 429; 5 Am. Rep. 385 (A. D. 1871), to the effect that in case of separate ownership of the surface and the mines, the miner is bound to leave sufficient supports to uphold the

surface and its buildings. The Court said: "We have no case strictly of authority in our books, nor do I find any in the books of our sister States. In most of them but little subterranean mining exists, and in others the question has not presented itself for adjudication. In none of the cases cited by the learned counsel from our State reports is the question decided or intentionally touched; we therefore must rule the point for ourselves for the first time. The English cases referred to, and others which might be referred to, emanate from great ability, and from a country in which mining, its consequences and effects, are more practical, and the experience greater, than in any other country of which we possess any knowledge. We think it safe, therefore, to follow its lead in this matter, and hold that in the case in hand the recovery was right, predicted as it was of the want of sufficient supports in the mine to prevent the plaintiff's ground, house, and orchard from injury, by subsiding into the cavity made in the earth by the removal of the coal. The upper and underground estates being several, they are governed by the same maxim which limits the use of property otherwise situated, *sic utere tuo ut alienum non lædas*. We have no doubt but all the evils deprecated by the adoption of this rule will disappear under regulations adapted to each case of severance of the soil from the minerals. Contract may devote the whole minerals to the enjoyment of the purchaser, without supports, if the parties choose. If not, the loss by maintaining pillars or putting in props will necessarily come out of the value of the mineral estate. If at any time the public necessities may demand the pillars to be removed for fuel, we may safely assume that the same necessity will provide some rule which will be satisfactory in such a crisis."

The *Humphries* case is also cited in *Horner* v. *Watson*, 79 Penn. State, 242; 21 Am. Rep. 55; and *Jones* v. *Wagner* followed, with the addition that the liability of the miner was the same although he proceeded according to custom. Citing *Hilton* v. *Earl of Granville*, 5 Q. B. 701. Two Judges dissented. See also *Coleman* v. *Chadwick*, 80 Penn. State, 81; 21 Am. Rep. 93, to the same effect. The same Judges dissented. The same doctrine is found in *Wilms* v. *Jess*, 94 Illinois, 464; 34 Am. Rep. 242; *Livingston* v. *Moingona Coal Co.*, 49 Iowa, 369; 31 Am. Rep. 150; *Carlin* v. *Chappel*, 101 Penn. State, 348; 47 Am. Rep. 722; *Williams* v. *Gibson*, 84 Alabama, 228; 5 Am. St. Rep. 368; *Yandes* v. *Wright*, 66 Indiana, 319; 32 Am. Rep. 109; *Marvin* v. *Brewster Iron M. Co.*, 55 New York; 14 Am. Rep. 322; most of them citing and approving the *Humphries* case.

A grant of land presumptively passes the minerals below the surface. *Adam* v. *Briggs Iron Co.*, 7 Cushing (Mass.), 361; *Hartwell* v. *Camman*, 10 New Jersey Equity, 128; *Stratton* v. *Lyons*, 53 Vermont, 641; *Bogg* v. *Merced M. Co.*, 3 Wallace (U. S.), 304.

In this country mines of gold and silver pass to the grantee of the land unless expressly reserved. *Moore* v. *Smaw*, 17 California, 199; 79 Am. Dec. 123. Citing the first principal case with the observation: "No reasons in support of the prerogative are stated in the resolution of the Judges, and those advanced in argument by the Queen's counsel would be without force at the present time." "The State takes no property by reason of 'the excellency

of the thing,' and taxation furnishes all the requisite means for the expenses of government." Per FIELD, J. But the English rule prevails in Oregon. *Gold Hill Q. M. Co.* v. *Ish*, 5 Oregon, 104.

No. 3. — BELL *v.* WILSON.

(1866.)

No. 4. — HEXT *v.* GILL.

(1872.)

RULE.

A RESERVATION of mines and minerals, with power to work the minerals contained in a grant of land, is *primâ facie* intended to reserve all mineral substances which can be got for the purpose of profit, but the power to work them only by means which do not involve destruction of or entry upon the surface.

Bell v. Wilson.

35 L. J. Ch. 337–341 (s. c. L. R. 1 Ch. 303; 12 Jur. (N. S.) 263; 14 L. T. 115; 14 W. R. 493).

[337] *Mines and Minerals. — Freestone. — Reservation. — Conveyance.*

Upon a sale, in 1801, of lands in Northumberland, the conveyance, after reciting that the royalty was reserved to the vendor, reserved to him "all mines and seams of coal, and other mines, metals, or minerals, as well opened as not opened, within and under the closes or parcels of ground hereby granted and released, with full liberty to search for, dig, bore, sink, win, work, lead, and carry away the same:" *Held*, by the Lords Justices, in opposition to Vice-Chancellor KINDERSLEY, that freestone was included in this reservation; but, in accordance with his Honour, that, under the reservation, the stone could not be worked except by means of underground workings.

By Lord Justice TURNER: A mine is a way or passage under ground; a quarry is a stone-pit, a place upon or above, and not under the ground.

The question was, whether the right of working freestone by an open quarry was within a reservation in an indenture of the 10th of February, 1801, by which two closes of land at Long Benton, in Northumberland, were conveyed in fee to the late
[* 338] * Henry Ulrick Reay, through whom the plaintiff, a married woman, claimed.

The indenture of February, 1801, recited that the vendor, Richard Wilson, reserved to himself the royalty of these lands; and in the operative part there was an exception, in favour of him and of all persons seised or entitled either at law or in equity of or to the same lands, of "all mines and seams of coal, and other mines, metals, or minerals, as well opened as not opened, within and under the said closes or parcels of ground mentioned and intended to be hereby granted and released, with full liberty to search for, dig, bore, sink, win, work, take, lead, and carry away the same, and to dig, bore, sink, win, work, and make pit and pits, trench and trenches, groove and grooves, and to drive and make drifts, rains, levels, staples, water-gates, and water-courses of any kind in, over, under, through, or along all or any part of the said closes or parcels of ground, with sufficient ground room and heap room, and to erect fire-engines and other buildings, and to exercise, do, and perform every other liberty, matter, and thing necessary for digging, sinking, winning, and working the said collieries, mines, and minerals, and free way-leave and passage to and from the same collieries, mines, and minerals, in, through, and over the same closes or parcels of ground, or any of them, or any part thereof respectively, with agents, workmen, horses, wagons, carts, and carriages, with liberty to make all such wagon-ways and other ways as shall be necessary and convenient for that purpose, and according to the usage or custom of the country, paying a reasonable satisfaction for all damage or spoil of ground to be occasioned thereby."

The closes of land conveyed by this deed had become vested in the plaintiff Elizabeth Ann Bell, a married woman, for her life for her separate use, with limitations in remainder to several other persons for their lives, with remainders to their issue, and an ultimate remainder, which had become vested in the plaintiff, E. A. Bell. The interest excepted and reserved by the deed had become vested in the defendant, Frederick William Wilson, who, by an indenture bearing date the 2nd of October, 1858, demised the quarries and beds of stones under some of the closes, which were alleged to have been part of the excepted property, for a term of ninety-nine years, to his son, the defendant, George Besley Wilson, who, by an agreement dated the 4th of December, 1862, demised the same quarries and beds of stone to the defendant, John Simpson.

No. 3. — Bell v. Wilson, 35 L. J. Ch. 338, 339.

The closes of land comprised in the deed of the 10th of February, 1801, were on the surface of the clay and shale formation, overlying a bed of freestone, beneath which there was a seam of coal, under which there was another bed of freestone. The first-mentioned bed of freestone was at a depth varying from about 6 feet to about 40 feet below the surface of the closes; and it varied in depth or thickness from about 36 feet to about 70 feet.

In or about 1855 the defendant, F. W. Wilson, began to work the stone under the surface of the closes by open quarrying, that is, by first removing the soil overlying the stone, and then digging out the stone; but these workings, not being then found profitable, were soon afterwards abandoned. In December, 1862, however, the defendant, J. Simpson, began again to work the stone under some of the closes, by the same process of removing the soil to a depth varying from 6 feet to 20 feet below the surface, for the purpose of quarrying the bed of freestone; and thereupon, after some previous correspondence in which objections were made to this course of proceeding, the bill in this cause was filed, on the 24th of June, 1863, by E. A. Bell, by her next friend, N. Ellison, and by Mr. Ellison as her trustee, against F. W. Wilson, G. B. Wilson, J. Simpson and the plaintiff's husband, Matthew Bell, praying an account of the stone got from the land, an assessment of the damages sustained by Mrs. Bell, and an injunction.

The defendant, F. W. Wilson, by his answer to the bill, insisted that the bed of freestone was within the exception contained in the deed of the 10th of February, 1801; and he set up a case of knowledge and acquiescence on the part of the plaintiff, E. A. Bell.

Certain admissions were agreed to between the parties, to the effect, among other things, that the estate at Long
[* 339] * Benton was of the sandstone formation, that part of the bed of sandstone or freestone in the pleadings mentioned was about 6 feet below the surface of the said estate, and that a portion of the said bed was of sufficient thickness to be capable of being worked by means of underground workings, yet that there had been up to that time no instance of any underground workings of freestone in the county of Northumberland. That, by means of the workings of stone in the pleadings in the cause mentioned, a space containing 446 square yards, measured on the surface of the field called the Lodge Field, in the pleadings men-

tioned, had been excavated to the depth of 19 feet by the removal of soil and stone, and that there was at the bottom of this excavation a platform of stone on which water rested; and that a space of 2291 square yards, measured on the surface of the said field called the Lodge Field, had been rendered unproductive for the time being, by the deposit upon it of the soil and rubbish taken out of the said excavation.

The VICE-CHANCELLOR (KINDERSLEY) granted the relief prayed by the bill. By his decree of the 9th of May, 1865, he declared that the plaintiff, Ellison, as trustee for the plaintiff, E. A. Bell, was, according to the true construction of the indenture of the 10th of February, 1801, entitled to the bed of freestone in question, upon the same trusts as those on which the surface of the land was held under which the bed lay. An account was ordered of the stone got by the defendant, Simpson, and of the proceeds of the sale thereof, and an inquiry as to the damages sustained by Mrs. Bell by the working of the stone, the amount found due by the chief clerk to be paid by Simpson to the plaintiff Ellison, as Mrs. Bell's trustee; and a perpetual injunction was awarded against the defendants, F. W. Wilson, G. B. Wilson, and Simpson, who were also ordered to pay the costs of the suit.

F. W. Wilson and G. B. Wilson appealed. The defendant, Simpson, who had been served and had appeared on the hearing before the VICE-CHANCELLOR, was not served. It was arranged, during the hearing of the appeal, that the case should continue, and that, if it appeared to be necessary, Simpson should be served and be heard.

Mr. Baily and Mr. Burdon for the plaintiff. — Freestone was not, in fact, within the intention of the reservation. But the question was mainly one of construction. A mine and a quarry were different things; the distinction between them resting on the difference, not so much in the thing extracted, as in the way of working. The explanation in Jacob's Law Dictionary, ed. Tomlins, in which mines were stated to be "quarries or places whereout anything is dug," was clearly wrong, and opposed to the decisions. *Darvill* v. *Roper*, 3 Drew. 294; s. c. *nom. Davvell* v. *Roper*, 24 L. J. Ch. 779; *Brown* v. *Chadwick*, 7 Ir. Com. Law, 101; *The Countess of Listowel* v. *Gibbings*, 9 Ir. Com. Law, 223; *Harris* v. *Ryding*, 5 M. & W. 60, 8 L. J. (N. S.) Ex. 181; *Rex* v. *Dunsford*, 2 Ad. & E. 568, 4 L. J. (N. S.) M. C. 59.

No. 3. — Bell v. Wilson, 35 L. J. Ch. 339, 340.

Mr. Giffard and Mr. T. Stevens for the defendants, the appellants. — The estate was sold subject to a royalty; and everything lying below the surface was included under a royalty. The word "mine" by no means applied exclusively to underground works, for the works of the Carclaze tin-mine in Cornwall were open ones; and the Railway Clauses Consolidation Act (8 & 9 Vict., c. 20), s. 77, used the word "mine" in reference to slate. The only real difference between a mine and a quarry was, that the latter was a mine worked in a special manner, that is, by open workings. The definition in Johnson's Dictionary, which explained a quarry as equivalent to a stone mine, that in Jacob's Law Dictionary, already referred to, and Bainbridge on Mines, tit. "Quarry," 495, all agreed with the defendants' contention, that the right to work stone might pass under a reservation of mines. The probable etymology of the word, which was the Celtic *maen*, a stone, was also in their favour. In *Brown* v. *Chadwick* the quarries were open at the time, which explained the decision. In *Darvill* v. *Roper*, on which case the VICE-CHANCELLOR, indeed, admitted that he did not rest his judgment in the present instance, the [* 340] quarries in dispute were actually * being worked at the time of the partition. The present case was governed by *The Earl of Rosse* v. *Wainman*, 14 M. & W. 859, 15 L. J. Ex. 67; affirmed, 2 Ex. 800; *Micklethwaite* v. *Winter*, 6 Ex. 644, 20 L. J. Ex. 313; *The Earl of Cardigan* v. *Armitage*, 2 B. & C. 197 (26 R. R. 313).

The plaintiffs, moreover, were precluded from any relief by their long acquiescence since the stone began first to be quarried. Even if the plaintiffs were not absolutely barred by such acquiescence, at all events the decree was wrong in giving them costs.

Lord Justice TURNER (March 8), after stating the facts, proceeded as follows: The questions upon this appeal are, whether, under the exception contained in the deed, the defendants are entitled to the upper bed of freestone, and whether, if they are so entitled, they are entitled to get the stone by the mode of open quarrying which they have adopted. Upon the first of these questions I regret to say that I find myself unable to agree in the conclusion at which the VICE-CHANCELLOR has arrived. The words of this exception are most general and comprehensive; and if it can be held that the freestone is not included in these words, it can only be, as it seems to me, upon one or other of these grounds, —

either that the freestone is not a mineral, or that, being a mineral, the nature or context of the deed shows that it was not intended to be included. But the cases are, I think, decisive upon this point, that freestone is a mineral; and I can find nothing in the nature or context of this deed to show that it was not intended to be included in the exception. The VICE-CHANCELLOR appears to have considered that the intention was to reserve only that which was ordinarily gotten by mines in the county of Northumberland at the time of the execution of the deed. But the deed does not refer to what is ordinarily gotten, and I think this construction goes too far in cutting down the effect of the general words, which, as I take it, in the absence of manifest intention or context to the contrary, ought to have their full effect. This construction would probably operate to prevent the general words extending to many other subjects than freestone. If, indeed, effect could not be given to the exception without destroying the previous grant, this might be considered to show an intention that the exception should not include the freestone; but I do not think this would be the case. It is argued for the plaintiff, that it appears from the deed that the parties must have known the position of the different strata in these closes of land. But this argument cuts both ways; for it may well be that the general words were inserted in consequence of that knowledge. Upon the first question, therefore, I respectfully differ from the VICE-CHANCELLOR.

But upon the other question, I entirely agree in his opinion. I am satisfied that it was not intended by this deed that the freestone should be worked by the means which the defendants have adopted, or otherwise than by underground mining. The language of the exception points, I think, to this conclusion; it is an exception of mines within and under the lands, whether opened or unopened, words which are ordinarily used with reference to underground workings; and although, perhaps, it cannot be said that there are not words in the clause which might be construed to extend to and authorise workings upon the surface of the closes, it cannot, I think, be denied that the clause, taken as a whole, points much more strongly to underground workings.

Some question was made in the course of the argument as to the meaning of the words in the deed, "mines, metals, or minerals," and I am much disposed to agree with the construction which Mr. Burdon put upon these words, that they mean mines whether

of metals or minerals. Then, what is a mine? Upon reference to the lexicographical part of the Encyclopædia Metropolitana, I find it there said that the word "mine" is derived from the Latin word of the lower ages "*minare*," signifying *ducere*, "to lead," and the interpretation of the word is "to draw or lead," that is to say, a way or passage underground, a subterraneous duct, cross, or passage, whether in search of metals or to destroy fortifications, [* 341] &c. The cases of *Rex* v. *The Inhabitants* *of *Sedgley*, 2 B. & Ad. 65, 9 L. J. M. C. 61 (36 R. R. 475), and *Rex* v. *Brettel*, 3 B. & Ad. 424, 1 L. J. (N. S.) M. C. 46, seem to me to support this definition, to this extent at least, that mines are underground workings; and that this is so is, I think, much confirmed by the definition of the word "quarries," which is to be found in the same dictionary. The word "quarry" is there stated to be derived from the French word "quarrière," and the derivation is followed by this description: "In the Latin of the lower ages *quadratarius* was a stone-cutter, *qui marmora quadrat*, and hence 'quarrière,' the place where he quadrates or cuts the stone in squares, the place where the stone is cut in squares, generally a stone-pit," clearly therefore referring to a place upon or above, and not under, the ground.

My opinion, therefore, on this second point, entirely agrees with that of the VICE-CHANCELLOR. The case, then, is in this singular position, that the defendants were entitled to this stone, working it by underground mining, but were not entitled to work it from the surface. The consequence, as I think, must be that the plaintiffs are entitled to the account directed by the decree of what has been got by the improper working. There is not, I suppose, any dispute between the plaintiff and her husband, the defendant, Matthew Bell, and it is not therefore material to consider whether the plaintiff, E. A. Bell, is entitled to the money which may be found due upon the account by virtue of her separate estate for life, or of the remainder in fee which is vested in her. The only question as to these moneys can be, whether the plaintiff, E. A. Bell, is entitled to them as against the persons having estates in remainder prior to the ultimate limitation in fee vested in her; and I think, upon the authority of the case of *Bewick* v. *Whitfield*, 3 P. Wms. 267, that she is so entitled. It was objected, on the part of the defendants, the Wilsons, that they had been improperly saddled with the costs of the suit; but I

think that no decree could have been had against the defendant, Simpson, in their absence, and that they were, therefore, proper parties to the suit; and, as they have contested the rights of the plaintiff, I think they have been properly charged with the costs. In the result, the declaration contained in the decree must be altered to meet the view which I have above expressed; but in other respects the decree will stand.

Lord Justice KNIGHT BRUCE. — My view of the case is the same as that of my learned Brother.

It was arranged that the declaration should be struck out, or be amended to the effect that the defendants were not entitled to work the bed of freestone mentioned in the bill except by means of underground workings.

Hext v. Gill.

L. R. 7 Ch. 699-719 (s. c. 41 L. J. Ch. 761; 27 L. T. 291; 20 W. R. 957).

Mines and Minerals. — Reservation. — China Clay. — Rights of Mine [699] *Owner.*

In 1799 the Duke of Cornwall, as lord of a manor, granted the freehold in a copyhold tenement to the copyholder, reserving "all mines and minerals within and under the premises, with full and free liberty of ingress, egress, and regress, to dig and search for, and to take, use, and work the said excepted mines and minerals," the deed not containing any provision for compensation. Under the tenement was a bed of china clay, the existence of which did not appear to have been contemplated by either party at the time, no china clay having ever been gotten out of the lands of the duchy, though the existence of tin was well known. It was admitted in the cause that china clay could not be gotten without totally destroying the surface, and the process of getting tin by "streaming," which was an ancient, and at the time of the grant the most usual, mode of getting tin, was almost equally destructive. A bill by the owner of the surface to restrain the owner of the minerals from getting china clay having been dismissed by WICKENS, V. C., on the ground that the reservation included china clay with the power to get it: —

Held, on appeal, that the china clay was included in the reservations, but that the surface-owner was entitled to an injunction to restrain the owner of *the minerals from getting it in such a way as to destroy or [*700] seriously injure the surface.

When a landowner sells the surface, reserving to himself the minerals with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to show clearly that he is intended to have that power.

This was an appeal by the plaintiffs from a decree of Vice-Chancellor WICKENS dismissing the bill.

No. 4. — Hext v. Gill, L. R. 7 Ch. 700, 701.

By deed or certificate of contract dated the 4th of January, 1799, under the hand of the Surveyor-general for the Duchy of Cornwall, and executed in accordance with the Acts for the redemption of land tax, the then Duke of Cornwall, as lord of the manor of Treverbyn Courtenay, conveyed to Charles Rashleigh the fee simple and inheritance of "all that customary or copyhold tenement, called Greys, with the appurtenances, parcel of the beforementioned manor of Treverbyn Courtenay, consisting of a house, garden, farm-yard, mowhay and offices, containing by admeasurement 3R. 33P., with divers closes and parcels of ground, containing also by admeasurement 103A. 1R. 39P., or thereabouts (that is to say)" [here followed parcels, concluding with] "and a parcel of land running with Garka Moor, containing 27A. 2R., [*701] which said *tenement, called Greys, is now held for the life of John Hext, gentleman, under the yearly rent of 15*s.* 3*d.*, by copy of court roll bearing date the 20th of September, 1771, together with all timber trees, and other trees, waters, watercourses, roads, ways, easements, commodities, profits, privileges, emoluments, and advantages whatsoever to the said several and respective premises belonging or appertaining." The deed contained the following exception and reservation:—

"Excepting nevertheless and always reserving unto his said Royal Highness the Prince of Wales, his heirs and successors, Dukes of Cornwall, all mines and minerals within and under the said several and respective premises, or any part thereof, together with full and free liberty of ingress, egress, and regress to and for his said Royal Highness, his heirs and successors, and his and their officers, agents, and workmen, and to and for the lessee or lessees of his said Royal Highness, his heirs and successors, and the agents and workmen of such lessee and lessees, into and out of the said several premises and every part thereof, with or without horses, carts, and carriages, to dig and search for, and to take, use, and work the said excepted mines and minerals."

In the next month Rashleigh conveyed the above premises to Samuel Hext (who was entitled to the copyhold interest in the property), his heirs and assigns. The plaintiffs were the successors in title of Samuel Hext.

The plaintiffs alleged that a certain part of Garka Moor, which was not enclosed but was distinguished by certain landmarks, was the 27A. 2R. mentioned in the conveyance. This was distin-

guished in the bill as "the unenclosed part of the Greys estate." Under this land, as well as under the enclosures of the Greys estate, was a bed of china clay. The defendants, Gill and Ivimey, who had become entitled to the mines and minerals comprised in the above reservation, had granted, in 1868, a lease to the defendants, Derry and Scott, of the china clay under certain lands, including the twenty-seven acres and the greater part of the Greys estate. Under this lease Derry and Scott got a quantity of china clay from under that part of the moor which the plaintiffs claimed as the unenclosed part of the Greys estate; and on one occasion, more than a year before the filing of the bill, they entered on some of the enclosed lands * with the intention of [* 702] getting china clay there, which intention, however, they almost immediately abandoned, and did not again enter. The getting of china clay is carried on by open workings, which cause an entire destruction of the surface, and it was admitted on both sides that the clay could not be got otherwise.

The plaintiffs filed their bill alleging that the lessees threatened to enter, if they had not already entered, upon the Greys estate; as well the enclosed as the unenclosed parts thereof; and to commence working for china clay thereon. The plaintiffs charged that the china clay was not a mineral included in the reservation of mines and minerals, and that no one entitled to the mines and minerals under the reservation had any authority to get them by open workings. The bill prayed for an injunction to restrain the defendants from getting china clay out of the Greys estate, and for an account of the china clay already gotten.

The defendants, Gill and Ivimey, by their answer, stated that in or about the reign of Henry VI. the ancient manor of Treverbyn, having devolved upon two co-heiresses, was divided into two manors, Treverbyn Courtenay, and Treverbyn Trevanion, and that certain ancient tenements of the manor of Treverbyn were allotted in severalty to the two new manors; but that the wastes, of which Garka Moor was part, were not so allotted, but were held in common. They went on to say that the Greys estate was allotted to Treverbyn Courtenay; that it consisted entirely of old enclosures, and that there was no unenclosed ground belonging to it; and that the manor of Treverbyn Courtenay was in 1799 the property of the Duchy of Cornwall, the manor of Treverbyn Trevanion belonging to another owner. In 1856 Gill and Ivimey purchased the manor

of Treverbyn Courtenay, with all its rights and appurtenances; and in 1859 the manor of Treverbyn Trevanion. They thus became owners of the soil of the entirety of Garka Moor. They denied the title of the plaintiffs to the unenclosed land alleged to form part of the Greys estate, and denied that any china clay had been gotten out of any land to which the plaintiffs were entitled. They went on to say that the lessees had not "any present intention" of entering upon the Greys estate for the purpose of getting china clay or any other mineral; and that it was the desire of them (Gill and Ivimey) that the Greys estate "should not [* 703] at present be * interfered with;" and that Derry and Scott, in compliance with that desire, had abstained from interfering with it. But they (Gill and Ivimey) insisted that by reason of the reservation they were entitled to the china clay within the limits of the Greys estate, and to work for and get it by open pits and workings from the surface; such being, in fact, the only practicable mode of getting it. They alleged that open workings from the surface, by streaming for tin, had taken place from time immemorial on the Greys estate.

Derry and Scott, by their answer, said that they had entered on part of the Greys estate with the intention of getting china clay, which intention, at the request of Gill and Ivimey, they had almost immediately abandoned; and that having been requested by Gill and Ivimey to desist from working there, they had no present intention of entering upon the estate.

The defendants also stated, by their answer, that they had not done any damage to the Greys estate except once, by accident, when a landslip took place into their workings close to the boundary of Greys.

The process of getting china clay was thus described in the plaintiff's evidence; the correctness of which, in this respect, was not disputed:—

"Granite consists of quartz, felspar, and mica; and china clay consists of decomposed granite in which felspar exists in considerable proportions. To make china clay fit for the market, the felspar, which alone is merchantable, has to be separated from the other component parts of the said decomposed granite. The working for china clay is commenced almost in the same manner as quarrying for building-stone, namely, by the removal of the soil covering the clay, which lies in beds of more or less thickness.

The working is then carried on by turning a stream of water over the head of the clay, when so arrived at, and washing the same forward into channels and reservoirs; in which reservoirs the pure clay is held in solution, and separated from the impurities, by the same impurities, which are heavier, being precipitated to the bottom of the reservoir, while the pure clay is allowed to run forward, over the top of the reservoir, into a pit where it settles down, and is dried and made solid, either by exposure to the sun or by a drying kiln, after which it is fit for sale in the market. The injury done * in clay working to the surface [* 704] of the land is the total, or the almost total, destruction of the surface where the excavations are made; for the clay is excavated to a depth which renders the land useless for agricultural purposes, either by the loss of all soil suitable for such purposes, or by reason of the cost of refilling and levelling the pits excavated being greater than any return to be obtained from the imperfect restoration of the land for agricultural purposes."

"Streaming" for tin appeared from the evidence in the cause to be the usual ancient way of getting tin in Cornwall. It was a process for obtaining grain tin by means of washing; and it was necessarily carried on entirely by means of open workings. There was some conflict of evidence as to whether the surface was irreparably destroyed by it; the plaintiff's evidence going to show that the land was often filled in and levelled, and the soil replaced when the working was over; and the defendant's evidence making the destruction of the surface appear to be as complete as in the case of working for china clay. In modern times tin had been obtained by mining to a much greater extent than before. There was a conflict of evidence as to whether tin works had been carried on within the Greys enclosures. There was some evidence to show that before the grant in 1799, china clay had been gotten in an adjoining parish, but it had never been gotten in the parish in which Greys was situate, nor was any gotten out of any of the lands of the duchy of Cornwall till some years after that time.

With respect to the twenty-seven acres, it appeared in evidence that the tenants of Greys had for a considerable number of years treated themselves as entitled to the exclusive use of it to this extent, that they alone cut the furze and took turf from it, and occasionally for the purpose of sale. It appeared also that the owners of other tenements took turf exclusively from certain other

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portions of Garka Moor; the twenty-seven acres not being fenced off, although distinguished by landmarks. There was a mass of conflicting evidence, upon the result of which the Court came to the conclusion that the twenty-seven acres did not in 1799 form part of the copyhold tenement called Greys. There was, however, nothing else answering to the 27A. 2P. mentioned in the conveyance, nor could the 103 acres be made up without including it.

[* 705] * Vice-Chancellor WICKENS considered that the terms of the reservation justified the defendants in getting the china clay in the way in which they were getting it, and he dismissed the bill.[1] The plaintiffs appealed.

[1] 1872. March 13.

Sir JOHN WICKENS, V. C.:—

This case seems to me to turn upon the effect of the reservation contained in the deed of the 4th of January, 1799.

The cases which have been cited upon the construction of this reservation are very numerous and very embarrassing; the truth is, that the words here used became customary legal words in deeds when natural science was far less advanced than it is now, and that the problem, which has been found difficult by many Judges, has been to give them their proper meaning without doing great and obvious injustice.

The original meaning, probably, of the term "mines and minerals" was mines and substances got by mining; but etymology is a very unsafe guide to meaning, and I must hold that the word "minerals" long ago acquired a meaning of its own, independently of any question as to the manner in which the minerals themselves are gotten. Under the circumstances, however, there is no wonder that some inclination may be thought to have arisen on the part of Judges to give more weight than ought to have been attributed to some small circumstances of context, and to cut down the proper and ordinary meaning of the words "mines and minerals."

According to the evidence, kaolin or china clay is a metalliferous mineral, perfectly distinguishable from and much more valuable than ordinary agricultural earth, and which produces metal in a larger proportion to its bulk as compared with ordinary ores, but which it is not commercially profitable to work in England for the purpose of extracting the metal from it. Therefore kaolin is excepted from the grant under which the plaintiff claims, unless there can be shown some custom of the country, something in the grant itself, or something in the reason of the thing, sufficient to induce the Court to consider the terms as used in a restricted and secondary sense. It was not suggested that I could recognise any custom of the country under which the term "mines and minerals" could have any definite meaning which would exclude kaolin, and I have failed to discover anything in the special expressions of this deed which would do so; the only words which appear to bear upon the point are "within and under." These words were commented upon by the MASTER OF THE ROLLS in the case of *Midland Railway Company* v. *Checkley* (L. R. 4 Eq. 19), where he considers the distinction between "within" and "under," and that "within" denotes something which is not under, and this distinction seems to me rather to point in the defendant's favour.

No doubt the case of *Bell* v. *Wilson* (L. R. 1 Ch. 303) seems to import that under the reservation of minerals contained in the deed which was in question in that case the only reservation was of what could be got by mining proper, and Lord Justice TURNER unquestionably considered that it was necessary, in order to come to

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* Mr. Manisty, Q. C., Mr. Eddis, Q. C., and Mr. Boger, [* 706] for the appellants: —

A reservation of mines and minerals has commonly been understood as applying only to substances got by mining as distinguished from quarrying or open working. *Darvill* v. *Roper*, 3 Drew. 294, *Brown* v. *Chadwick*, 7 Ir. Com. Law, 101, and *Listowel* v. *Gibbings*, 9 Ir. Com. Law, 223, all support this view. The meaning of the word "mine" is shown by *Rex* v. *Brettell*, 3 B. & Ad. 424, *Rex* v. *Dunsford*, 2 A. & E. 568, and *Rex* v. *Inhabitants of Sedgley*, 2 B. & Ad. 65, 9 L. J. M. C. 61 (36 R. R. 475). But even if the words "mines and minerals" cannot be so far restricted, such a construction must be put on the reservation as will not allow it to be destructive of the grant; and it cannot be held to allow a mode of working which will cause a complete destruction of the * surface where there is no provision for [* 707] compensation. *Bell* v. *Wilson*, L. R. 1 Ch. 303, is decisive on this point, and must be overruled if the decision under appeal is to stand. This is supported by the analogy of the cases in which it has been held that, in the absence of very clear words, working

the conclusion at which he arrived, to find something in the context in the deed which cut down the words from their original extensive meaning, and he found the words "opened and unopened." It would, I confess, have seemed to me doubtful whether these words were quite sufficient to authorise the construction put upon that deed; but, as I said before, however that may be, that was the ground upon which the Lord Justice proceeded.

Here I can find nothing whatever in the deed to affect the ordinary construction of the words "mines and minerals," and therefore if kaolin is to be excluded from the reservation, it must be by the reason of the thing, or, in other words, from a supposed inconsistency between there being any such grant as the deed contains and any such reservation as it purports to contain.

Of course it would not advance the plaintiffs' case to say that either party knew or suspected the existence of such a mineral as kaolin in 1799, nor can the Plaintiffs carry their case to the height of asserting that from the reason of the thing no metal or mineral is to be gotten under the reservation except by mining as distinguished from digging; for, not to mention other things, both parties must have had tin in their minds, which appears to be often got by such diggings, or, at least, by operations destructive of the surface, and having nothing in common with mining.

The real difficulty of the case rests in this, that the reservation, if construed according to the full and strict meaning of the words, may be absolutely destructive of the entire grant, and that without compensation. No doubt it is difficult to bring one's mind to accept such a view of the reservation, still the terms must prevail, unless they can be limited on one or other of the grounds mentioned above; they cannot be intended to mean nothing, and if they do not mean that which they import, the question arises, What is the true meaning? To that question no answer has been suggested which commends itself to my mind. I therefore must hold that the reservation of the mines and minerals is a reservation of this china clay, and must dismiss the bill with costs.

which causes a subsidence of the surface is not authorized, though there be a provision as to compensation for damage done to the surface. *Harris* v. *Ryding*, 5 M. & W. 60; *Humphries* v. *Brogden*, 12 Q. B. 739 (p. 407, *ante*); *Smart* v. *Morton*, 5 E. & B. 30. In *Duke of Buccleuch* v. *Wakefield*, L. R. 4 H. L. 377, under very special words, it was held that the mine owner might destroy the surface; but that conclusion evidently would not have been come to if, as here, there had been no provision for compensation. The cases of *Hilton* v. *Earl Granville*, 5 Q. B. 701, *Roberts* v. *Haines*, 6 E. & B. 643, and *Blackett* v. *Bradley*, 1 B. & S. 940, show how strongly the Courts lean against allowing a complete destruction of the surface. *Bullen* v. *Denning*, 5 B. & C. 842 (29 R. R. 431), *Midgley* v. *Richardson*, 14 M. & W. 595, and *Hedley* v. *Fenwick*, 3 H. & C. 349, show the inclination to put a restricted construction on such reservations. The question as to the twenty-seven acres is proper to be tried at law.

[Both parties here concurred in requesting that the Court would decide on the question of title.]

Then we say, on the evidence, that the twenty-seven acres were always part of the Greys, but if not, the grant of 1799 must be held to pass them, as the quantity of land thereby expressed to be conveyed cannot be made up without them.

The Solicitor-General (Sir G. Jessel), Mr. Karslake, Q. C., and Mr. Phear, for the respondents:—

Upon the evidence, we say that the twenty-seven acres never formed part of Greys, but were part of Garka Moor, and the right of the lord of the manor to get every kind of mineral substances from under the moor by open workings is not questioned by the bill. The conveyance of 1799 only purports to convey what constituted the copyhold tenement called Greys; the acreage [* 708] * is mere matter of description, and its being too large does not show an intention to grant more than the copyhold, and if it did, the lord of Treverbyn Courtenay had only an undivided moiety of Garka Moor; so that the plaintiffs could not have got the entirety of the twenty-seven acres. Our working on the twenty-seven acres, therefore, cannot be restrained, and there has been nothing but an accidental encroachment on the old enclosures, with an express denial of an intention to work there. The allegation, therefore, that we threaten and intend to interfere with any ground on which we have no right to work is not made

out, and the Court will not interfere to restrain trespass unless a case of irreparable damage is shown. The plaintiffs' case therefore fails. *Gibson* v. *Smith*, 2 Atk. 182; *Mogg* v. *Mogg*, 2 Dick. 670; *Mitchell* v. *Dors*, 6 Ves. 147; *Smith* v. *Collyer*, 8 Ves. 89; *Courthope* v. *Mapplesden*, 10 Ves. 289; *Kinder* v. *Jones*, 17 Ves. 110; *Earl Cowper* v. *Baker*, 17 Ves. 128; *Thomas* v. *Oakley*, 18 Ves. 184 (11 R. R. 181); *Davenport* v. *Davenport*, 7 Hare, 217; *Haigh* v. *Jaggar*, 2 Coll. 231; *London and North-Western Railway Company* v. *Lancashire and Yorkshire Railway Company*, L. R. 4 Eq. 174. But we say that, even under the old enclosures, we are entitled to get the china clay by the usual mode of working. The reservation includes the china clay, which certainly comes within the term "minerals." *Micklethwait* v. *Winter*, 6 Ex. 644; *Midland Railway Company* v. *Checkley*, L. R. 4 Eq. 19; *Earl Rosse* v. *Wainman*, 14 M. & W. 859. The words "mines and minerals" cannot be cut down unless there is some explanatory context to restrict them. The reservation of minerals includes a right to get them, though to the destruction of the surface. *Rowbotham* v. *Wilson*, 8 H. L. C. 348; *Duke of Buccleuch* v. *Wakefield*, L. R. 4 H. L. 377. We therefore must be entitled to get the china clay in the only way in which it can be gotten; and, moreover, express power to dig for it is given. The cases in which it was held that the surface must not be let down were cases where the Court had not before it the instrument under
* which the mine owner derived title, and do not apply [* 709]
where the instrument gives a right to work. Still less
can they apply where the mineral is one which can only be got by destroying the surface. They only show that workings must not be carried on in such a way as to produce damage which may be avoided. It is clear that this reservation includes tin and the right to get it. But at the time of the grant the usual mode of getting tin was streaming, which is as destructive to the surface as the getting of china clay.

[They also referred to *Earl Beauchamp* v. *Winn*, L. R. 4 Ch. 562.]

Mr. Manisty, in reply, referred to *Dugdale* v. *Robertson*, 3 K. & J. 695, and *Roads* v. *Overseers of Trumpington*, L. R. 6 Q. B. 56.

July 22. Sir G. MELLISH, L. J.:—

This is a suit instituted by the owners of a small estate called Greys, in the county of Cornwall, against the lords of the manors of Treverbyn Courtenay and Treverbyn Trevanion and their ten-

ants, to restrain them from getting china clay under the property called Greys, which is alleged in the bill to consist of old enclosures and of about twenty-seven acres of unenclosed land. The title of the plaintiffs to the enclosed part is not disputed, but as respects the unenclosed part the defendants deny the title and also the possession of the plaintiffs, and say that what is in the bill styled the unenclosed part of Greys is in fact part of Garka Moor, and that they, as lords of the two manors, are entitled to the soil of that moor. This raises a question of title which ought properly to be tried at law by an action of ejectment; but both parties have requested us to decide the question instead of sending them to law, and therefore before I go into the remaining questions I will deal with that question of title.

[His Lordship then stated the cases made by the plaintiffs and defendants as to the unenclosed twenty-seven acres, and the evidence as to the extent of the copyhold tenement, and continued: —]

[* 710] * We have to decide as a question of fact what is the result of that evidence. In the first place, nobody can doubt that before the manors were separated Garka Moor was a waste common, the freehold of which was in the lord of the manor of Trevanion, the copyholders having only certain rights over it. That being so, whenever the manor was divided into two it is difficult to say that what was freehold and not copyhold could by any legal means become annexed to the copyhold estate called Greys, so as to become part of it, and whether it could be so annexed except by Act of Parliament is doubtful. It appears to us, judging as a jury would upon the question of fact, that the proper way to reconcile the whole of the evidence is to presume that at some time, possibly at the very time when the manors were separated, the tenants who had a right of common over the Garka Moor common being but few, an arrangement was come to between them, possibly with the consent of the lord, that each of them should enjoy a separate common right to take the pasture and turf off a particular portion of the common instead of their equally enjoying it together.

If we suppose that to have taken place, Mr. Spry, who made for the duchy the old map and terrier which have been produced, finding that state of things, might naturally come to the erroneous conclusion that a certain portion of the waste was part of the

copyhold called Greys, and lay it down in his map as being so. All the evidence will thus be accounted for. The result is that this piece of moor was part of the moor which the two lords held as tenants in common in moieties, and was not part of the copyhold estate called Greys. Then it was argued on behalf of the plaintiffs that because the parcels of the deed of 1799 include a parcel of land running with Garka Moor containing twenty-seven acres, and these twenty-seven acres cannot be found in the enclosed part of Greys, therefore twenty-seven acres (although how we are to get the bounds I do not know) are to be taken out of the moor. That I think is not the true construction of the deed. The deed professes to convey "all that customary or copyhold tenement called Greys," and the rest is simply a description of what is contained in Greys, and it is said besides, "which said tenement called Greys is now held for the life of John Hext, gentleman, under the yearly rent of 15*s.* 3*d.* by copy of Court roll."
It appears to me that nothing * but what was part of the [*711] customary or copyhold tenement called Greys could pass under that, notwithstanding there might be any misdescription in the parcels. If the tenement called Greys was entitled to an exclusive right of common over a portion of the moor which by mistake had been treated as if it were parcel of the copyhold tenement, the consequence would be that the exclusive right of common would pass, but the property in the soil would not pass. Therefore, upon the whole, I come to the conclusion that the plaintiffs have not made out their title to what they call, as I think erroneously, the unenclosed part of Greys, and therefore cannot have any relief respecting it, the bill not being framed for raising the question whether the getting china clay can be complained of by persons only entitled to rights of common over the land.

Then I come to the question whether the plaintiffs are entitled to relief respecting the enclosed part of Greys. Mr. Karslake raised the objection that the defendants have not threatened to get, and have not — except by mere accident — got any china clay in Greys; and therefore that this Court ought not to grant an injunction, or enter into the question whether they are entitled to get it or not.

The facts upon this part of the case are these: It appears that the first two defendants, as lords of the manor, have let to the two

other defendants the right to get china clay in the waste and over a large portion of the estate called Greys, and therefore they profess to exercise the right of ownership over it, and they have professed to give them the power to get china clay from Greys in the ordinary way in which china clay is got in that neighbourhood. It appears that the lessees have entered on one occasion into the estate called Greys with the intention of getting china clay, though they did not get any, and did not remain there. The bill being filed and the question raised, the defendants being sought to be restrained from getting china clay, they say, "We have a title to get china clay out of the estate called Greys, and we are entitled to get it in the way in which it is ordinarily got; but we have no present intention of getting it." We are of opinion that after this it is idle for the defendants to say they do not threaten to get the china clay under the enclosed part of Greys,
[*712] and to contend that * this Court is precluded from deciding the question whether they are entitled to get it in the way in which they say they have a right to get it.

That brings us to the real question on the merits, whether the defendants, having had the manor of Treverbyn Courtenay conveyed to them, have a right to get the china clay under the reservation and exception in the deed of 1799.

The first question to be determined is whether the china clay is within the exception of "mines and minerals." Now china clay is thus described: [His Lordship here read the account of china clay, and the mode of getting it, from the plaintiffs' evidence, as above.]

Is this china clay reserved under the exception of "mines and minerals"? There was a great deal of discussion before us as to the meaning of the word "mines," whether it is confined to underground working, or may possibly extend to open working, or whether it does not apply to the workings at all, but in this sort of reservation means the metal, the veins, and seams themselves, which are in a secondary sense called "mines." I think that it is not necessary here to go into those questions, for whatever may be the meaning of the word "mines" when used alone, it is here combined with the more general word "minerals," and the authorities seem to show that where there is an exception of "mines and minerals," the putting the word "mines" before "minerals" does not restrict the meaning of the word "minerals."

Many authorities, some at law and some in equity, have been brought before us to show what is the meaning of the word "minerals." But the result of the authorities, without going through them, appears to be this: that a reservation of "minerals" includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning. Ought it to have a more limited meaning in the present case? The circumstances, as far as they are material to be stated, are these: The seller was the lord of the manor. What he sold was the freehold of a copyhold tenement. Now the lord of a manor is, beyond all question, entitled to all the minerals, in the most general sense of the word, * under a copyhold tenement. There is nothing to be got out of the soil and sold for a profit which [* 713] the copyhold tenant, in the absence of some special custom, is entitled to get without the permission of the lord; the property of it is in the lord, although it is true that, in the absence of special custom, the lord cannot get it without the license of the tenant. The position of the parties, therefore, furnishes no reason for restricting the meaning of the word "minerals," and there being no special words before "mines and minerals," which might furnish an argument for restricting them to things *ejusdem generis*, I am of opinion that the surface, and all profit that can be got from cultivating the surface, or building on it, or using the surface, is intended to be conveyed, but that the right to everything under the surface, and to all profit that can be got from digging anything out from under it, is intended to be reserved. I am therefore of opinion that china clay is included in the reservation. The only argument against this is that china clay cannot be got without destroying the surface, and that it could not be intended to give power wholly to destroy the surface without compensation. The case of *Bell* v. *Wilson*, L. R. 1 Ch. 303, appears, however, to be a direct authority that the mere circumstance that a mineral cannot be got without destroying the surface, though it may be a very strong ground for holding that the owner of the mineral is not entitled to get it, is not a ground for straining the meaning of the word "mineral." In that respect the Lords Justices differed from Vice-Chancellor KINDERSLEY, and we are bound by their decision.

Then we come to the important question, whether there is

power to get this china clay in the only way in which, according to the concurrent testimony of all the witnesses, it can be got, by a process which utterly destroys the surface of the land. A great number of cases were cited to us upon that point, in none of which was the language exactly similar to that in the case before us, and they must be referred to merely for the purpose of getting a principle from them. Now the cases show that where the ownership of minerals is separate from the ownership of the surface, *primâ facie* the owner of the surface is entitled to have his surface supported by the minerals. That is not confined, as con-
[* 714] tended by the * Solicitor-General, to the case where the Court has not before it the instrument under which the owner of the minerals derives his rights, but it also applies to cases where the Court has the instrument before it, for the purpose of construing the instrument, to this extent, that *primâ facie* the right to support exists, and the burden lies on the owner of the minerals to show that the instrument gives him authority to destroy what is described by the Judges as the inherent right of a person who owns the surface apart from the minerals. The question is, whether the words of the reservation in the present case mean that the ownership of the surface is altogether to be subject to the ownership of the minerals, so that the owner of the minerals may do whatever is necessary for the purpose of enabling him to get them, although it may of necessity utterly destroy the surface; or do the words, according to their true construction, only give a right, in the nature of an easement, to go upon the surface and dig through it for the purpose of getting at the minerals underneath? In my opinion, the short and ambiguous words of this reservation, according to their fair construction, only give a right to create what I may call temporary damage, and do not authorize the owner of the minerals absolutely to destroy or to cause a serious continuous and permanent injury to the surface.

Now if we refer to the authorities we find that there are several cases relating to the right of the owner of minerals to let down the surface in the course of getting the minerals by pure mining, — cases in which the power of getting the minerals has been given in far stronger language than it is in the present case, where, nevertheless, the Courts held that he was not entitled to get the whole of the minerals if that involved the destruction of the surface, but that in getting them he must have regard to the rights of

the owner of the surface to support by the minerals. In *Harris* v. *Ryding*, 5 M. & W. 60, the power was this: "With full liberty of ingress, egress, and regress to come into and upon the thereby appointed and granted and released premises to dig, &c., the said mines, &c., and every part thereof, and to sell and dispose of, take and carry away, whatever might be there found at their or his respective wills and pleasures; and also to sink shafts, &c., for the raising up, working, carrying away, and disposing of the same or any part * thereof, making a fair compen- [* 715] sation to T. P. (the grantee) for the damage to be done to the surface of the said premises and the pasture and crops growing thereon." In *Roberts* v. *Haines*, 6 E. & B. 643, the owner of the minerals was expressly authorized "to search for, dig, get, and raise any coal and ironstone lying and being in or under the commons and waste lands, and to erect any work or works for that purpose, and to dig and take earth for making and to make bricks for any such work or works; and to carry away and dispose of such coal and ironstone to and for his and their own use." In *Smart* v. *Morton*, 5 E. & B. 30, the words were: "With free leave and liberty to sink, work, and win the same in any part of the said premises, and to drive drift or drifts, make watergate or watergates, or use any other way or ways for the better and more commodious working and winning the same in the said hereby granted or intended to be granted premises, or any part thereof." In *Bell* v. *Wilson*, L. R. 1 Ch. 303, which is a most important authority, since it related not merely to the letting down of the surface by working underground, but to the working from above, the words of the reservation are such that the case appears to me almost decisive of the present. I believe it will be found that every single word contained in the present power is contained in the power in *Bell* v. *Wilson*, along with many other words; yet under that reservation, worded in a way more favourable to the owner of the minerals than that with which we have to deal, the Lords Justices held that although stone was reserved as a mineral, yet there was no right to get it by quarrying.

There are, however, two cases which ought to be referred to, in which the House of Lords held an owner of minerals entitled to let down the surface or absolutely to destroy the surface for the purpose of getting the minerals. The first of those cases is the case of *Rowbotham* v. *Wilson*, 8 H. L. C. 348. In that case there

was a covenant which the House of Lords construed to be a grant that the mines should be held and enjoyed, worked and gotten, "without any molestation, denial, or interruption of any other person or persons parties to these presents, and those claiming under them respectively, who for the time being are or [*716] may be * owner or owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action or actions for damage on account of working and getting the said mines for or by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof by sinking in hollows or being otherwise defaced and injured where such mines shall be worked." The instrument, therefore, said in terms that the surface might be let down, and no doubt the House of Lords decided contrary to what was said in the judgment in *Hilton* v. *Earl Granville*, 5 Q. B. 701, that such a grant, where it is clearly expressed, is not void. Again, in the case of the *Duke of Buccleuch* v. *Wakefield*, L. R. 4 H. L. 377, the House of Lords held that power was given absolutely to destroy the surface. That is the only case which resembles the present, in this, that it related to a peculiar kind of mineral which could not be got at all without destroying the surface. But if that case is looked into it will be found to differ from the present in three most material respects. In the first place, the iron ore, which was the mineral then in question, had been got in very large quantities by the lord of the manor before the Act of Parliament for enclosing the waste was passed. It was a most valuable mineral, so that it was impossible to suppose it not to have been in the contemplation of the parties at the time they obtained their Act, and it was proved that the lord of the manor had constantly let similar iron mines in the manor, paying compensation for the damage which was done. In the next place, without stopping to read the whole of the reservation in that case, it will be found that it contains far more extensive words than the reservation in the present case. It contained powers which, as is pointed out in the judgments, clearly enabled, in certain events, the surface to be destroyed. There was an unlimited power to deposit the refuse of the minerals on the surface, and there was unlimited power of erecting buildings upon the surface, and there were at the end most general words enabling every power to be exercised which was necessary to get the minerals. In the

last place, there was a clause which enabled full compensation to be given for any damage that might be done. Taking the whole of these circumstances into consideration, the House of * Lords, reversing the decision of Vice-Chancellor MALINS, [* 717] came to the conclusion that, according to the true meaning of the Act, the lord of the manor was to be entitled, if he found it necessary for the purpose of getting what was known to all parties to be a most valuable mineral, to destroy the surface on making compensation; or, in substance, that, for the purpose of getting the minerals, he should have power to buy the surface back, paying the full value for it. I think that no one can read the judgment without coming to the conclusion that if the provision as to compensation had not been there the House of Lords, notwithstanding the strength of the other words, would in all probability have come to a different conclusion. In the present case there is no reason to suppose that the parties had china clay in contemplation at the time when the deed was executed. There is, indeed, one old man who proves, and I do not dispute the correctness of what he says, that china clay was at the time being got in one neighbouring parish, but it is proved that it was not got in the parish in question for a great many years afterwards. And it is also proved that it was not until years after this that the duchy of Cornwall received any dues for getting china clay. Upon the whole, therefore, I come to the conclusion that the words here used are not sufficiently clear to give the owner of the mines the absolute power of destroying the surface, and that the defendants have not the right they claim.

There is one argument that I should, perhaps, notice. It was urged that streaming for tin had been used in Cornwall from time immemorial; that therefore it was impossible to suppose that the right of streaming for tin was not intended to be reserved; and that, as streaming for tin involved an injury to the surface of the same kind, if not quite to the same extent, as the taking of china clay, the fact that taking the china clay involved the destruction of the surface was no sufficient reason for holding the right to take it not to be reserved. I do not wish to give any decisive opinion whether the right of streaming for tin is reserved or not, as that question is not before us, and may be of very great importance. That question does not stand quite on the same footing as the question relating to the taking of china clay. There is no doubt

that streaming for tin was a thoroughly well-known and common process. At the same time, tin might be got by mining, [* 718] and the * owner of the minerals would not, by being precluded from streaming, be deprived of all power to get it, and, as at present advised, I do not think that the words of the power in the present case are sufficient to confer a right of streaming for tin. When an owner of both surface and minerals sells the surface and reserves the minerals, with power to get them, he ought, if he intends to have the power of destroying the surface in getting them, to frame his power in such language that the Court may be able to say that such was clearly the intention of the parties. The VICE-CHANCELLOR in his judgment fully acknowledged the difficulty that, if the defendants had the right to take china clay, the reservation might be absolutely destructive of the grant, but said he could not see where he was to fix the limit to the reservation if its words were not to be taken according to their full and strict meaning. I feel myself that it is very difficult to say where the limit is to be placed. It is very difficult to lay down exactly what the owner of minerals may do for the purpose of getting them; but I do not think it would be right or just to the owner of the surface to say that his surface may be destroyed because there may be a difficulty in saying exactly what the owner of minerals may do and what he may not do in every case. In the present case I think the result is this, that the general reservation of minerals includes the china clay, a mineral the existence of which, apparently, was not known to the parties at the time when the instrument was executed, and which cannot be got without destroying the surface. It appears to me that the fair result of that state of things is that the lord of the manor is practically in the same position as he would have been in if this had remained a copyhold tenement, viz., that the right to the clay is in him; but inasmuch as he has not reserved the power to destroy the surface, and inasmuch as this clay cannot be got without destroying the surface, he cannot get the clay unless he can make some arrangement with the owner of the surface. I am, therefore, of opinion that the plaintiffs are entitled to have an injunction to restrain the defendants from getting the china clay in such a way as to destroy or seriously injure the surface; but as they have failed in one most essential part of the case, — namely, the part relating to the twenty-seven acres, — they ought to have no costs.

*Sir W. M. JAMES, L. J.: — [*719]

I entirely concur both with the conclusions and reasoning of the LORD JUSTICE. The long and uniform series of authorities appear to me to have established a very convenient and consistent system, giving the mineral owner every reasonable profit out of the mineral treasures, and at the same time saving the landowner's practical enjoyment of his houses, gardens, fields, and woods, without which the grant to him would have been illusory.

But for these authorities I should have thought that what was meant by "mines and minerals" in such a grant was a question of fact what these words meant in the vernacular of the mining world and commercial world and landowners at the end of the last century; upon which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral.

ENGLISH NOTES.

In the case of *Attorney-General* v. *Tomline* (1877), 5 Ch. D. 750, 46 L. J. Ch. 654, 36 L. T. 684, 25 W. R. 802, it was held by FRY, J., citing *Hext* v. *Gill* (*supra*), that coprolites found in a copyhold tenement are the property of the lord of the manor; but, where the lord of the manor has no right of entry to get minerals, if he got them by a trespass, the measure of damages is the value of the coprolites less the compensation which would have been a sufficient inducement to a licensee to get them.

In the case of *The Attorney-General for Isle of Man* v. *Mylchreest* (1879), 4 App. Cas. 294, 48 L. J. P. C. 36, 40 L. T. 764, the question was as to the right of the customary tenants holding of the lords in the Isle of Man, to dig for clay and sand in their tenements. The Act of Settlement of the Isle of Man, 1803, confirmed to the tenants their customary estates, "saving always (to the lord *inter alia*) mines and minerals of what kind and nature soever." It was in evidence that the tenants had always been accustomed to dig and work the clay and sand in their tenements; and this evidence was held sufficient to put an interpretation upon the saving clause so as to show that the clay and sand were not within the reservation.

A custom for farm tenants to collect flints turned up in plowing and properly removed in the course of good husbandry, has been held reasonable, and not inconsistent with or excluded by a reservation to the landlord of "all mines and minerals." *Tucker* v. *Linger* (H. L. 1883), 8 App. Cas. 508, 52 L. J. Ch. 941, 49 L. T. 273, 32 W. R. 40.

Where minerals are reserved under a building lease, the lessee has the right to dig foundations for buildings about to be erected under the

lease, and to dispose of the materials dug out for that purpose; but not to dig out and carry on a trade in such materials irrespective of the requirements of the buildings intended to be erected. *Robinson* v. *Milne* (1884), 53 L. J. Ch. 1070.

A landowner, in exercise of a power of leasing under a settlement, demised land to a gas company for ninety-nine years, reserving mines and minerals, but without reserving any power of entry. In making the necessary excavations for a gasometer, an ancient prehistoric boat was discovered embedded in the soil at a depth of from 4 to 6 feet. The property in the boat was adjudged, by CHITTY, J., to the lessors. *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch. D. 562, 55 L. J. Ch. 734, 55 L. T. 831, 35 W. R. 192.

The rule in *Hext* v. *Gill* was followed by the Court of Appeal in *Earl of Jersey* v. *Neath* (*Guardians of the Poor*), 1889, 22 Q. B. D. 555, 58 L. J. Q. B. 573, 37 W. R. 388, notwithstanding the decision of the House of Lords in *Glasgow* (*Lord Provost*) v. *Farie* (No. 8, *infra*), which was contended in argument to be inconsistent with it. In this case of *Earl of Jersey* v. *Neath* (*Guardians of the Poor*) there was a conveyance of lands reserving to the grantor "all mines and minerals of coal, culm, iron, and all other mines and minerals whatsoever, except stone quarries within or under the said lands, with ample and sufficient powers for working the same, and for making any roads, &c., through, over, or upon the lands for the purpose of raising and carrying away such coal, &c., provided that the surface shall not be disturbed without the previous consent in writing of the [grantee], his heirs, &c." The defendants, acting as rural sanitary authority, obtained from the grantee the right to lay certain main sewer pipes through the land. The pipes were laid about six feet below the surface, and in executing the work the defendants removed a portion of a bed of brick-earth and clay capable of being used for the manufacture of bricks, &c. The Court of Appeal, Lord ESHER, M. R., BOWEN, L. J., and FRY, L. J., concurred in holding that this brick-earth, &c., was the property of the grantor, and that he was entitled to compensation accordingly. Lord Justice BOWEN, after observing that, in his opinion, *Hext* v. *Gill* was not, and was not intended to be, overruled by the decision of the House of Lords (*Glasgow, Provost of*, v. *Farie*, No. 8, *infra*), said: "Speaking for myself, I think that the rule of construction laid down in *Hext* v. *Gill* as to ordinary reservations in ordinary grants of land is absolutely right. It is a rule which seems to me to be perfectly intelligible in principle. There is, in the first place, a grant of the whole land, and then out of it there is reserved something which is called 'minerals.' Now the object of a reservation of that sort must be the severing of something from the land, and the use of it for purposes distinct from the purpose

for which it is used as land. The object is to take certain constituents of the land from it for the purpose of using them, as Sir HORACE DAVEY has said, differently from, and independently of, their use as constituents of the land. That indicates a line or limit down to which the definition of 'minerals' may usefully extend, and beyond which it ought not to be extended. It seems to me, therefore, that the rule laid down in *Hext* v. *Gill* is a rule which arises directly from the character of the transaction, and is a sound rule of construction, unless there is something in the context to control it. But, apart from its being intelligible in principle, the rule is the result of a long chain of authorities, which I need not trace. I will only instance the case of *The Midland Railway Company* v. *Checkley*, L. R. 4 Eq. 19, 36 L. J. Ch. 380, in which The Master of the Rolls, Lord ROMILLY, states the same rule as that afterwards stated by Lord Justice MELLISH. Then comes *Hext* v. *Gill*, decided by Lord Justice JAMES and Lord Justice MELLISH, than whom no greater authorities, I venture to say, have sat in our time in Courts of law. They say that the result of the authorities is this, that a reservation of minerals in a conveyance of land includes every substance which can be got from under the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning. I will only add this observation as to *Hext* v. *Gill*, that ever since that case was decided the rule there laid down has had very great effect upon business transactions, and has now been in existence for seventeen years, and I cannot think that it would now be lightly disturbed by the House of Lords, or without great consideration. But it is to be observed that the rule, like every rule of construction, admits of being modified by the contents of the document itself, and there are many classes of cases in which it is obvious that the rule must be modified. For example, where the surface of the soil is taken as such, and where, whether expressly so stated or not, it is obviously the intention to protect the surface thus dealt with to the extent which the Legislature or the grantor has indicated. It is obvious that the case of *The Lord Provost of Glasgow* v. *Farie* (No. 8, *infra*) is a case of that sort. It is a case in which the Courts had to consider the special language of the legislation vesting certain special interests and giving certain special rights which were apparent from the objects of the Act of Parliament. That case, therefore, cannot destroy the canon of construction laid down by Lord Justice MELLISH. Of course, opinions expressed in the House of Lords are always received with the greatest possible respect, but as to what the LORD CHANCELLOR (Lord HALSBURY) is reported to have said as to *Hext* v. *Gill*, I cannot help thinking that either he has been imperfectly reported, or that he had not at the time in his mind the exact canon of construction

of Lord Justice MELLISH, because the LORD JUSTICE does not say, nor, I think, mean, that the test was whether the minerals could be worked at a market profit at the time, but whether they had a use and value independently of, and separably from, the rest of the soil. Lord WATSON and Lord MACNAGHTEN do not seem to me to reject *Hext* v. *Gill*, though I cannot say whether they would have come to the same conclusion in the first instance if *Hext* v. *Gill* had not been decided. Lord HERSCHELL expressly recognises *Hext* v. *Gill*."

The decisions as to the rights of the lord to work minerals in the waste under a reservation made by an Inclosure Act have much varied according to the special terms of the Act. See *Wakefield* v. *Duke of Buccleuch* (1870), L. R. 4 H. L. 377, 39 L. J. Ch. 441, 23 L. T. 102; *Bell* v. *Love; Love* v. *Bell* (1884), No. 20, *post*, 9 App. Cas. 286; *Attorney-General* v. *Welsh Granite Co.* (C. A. 1887), 35 W. R. 617; *Consett Waterworks Co.* v. *Ritson* (1889), 22 Q. B. D. 318, 702. But the following remarks of A. L. SMITH, J., in the last mentioned case (although in the judgment which was reversed in the Court of Appeal upon the special terms of the Inclosure Act) may be taken as a good statement of the law. "It is," he says (22 Q. B. D. 321), "now settled and undisputed law that where minerals are separated from the surface the mineral owner is not entitled to let down the surface, unless by the deed, instrument, or Act of Parliament, by which the minerals are severed from the surface, it appears that the surface owner has parted with the right of support, or, in other words, that the mineral owner's right to get the minerals is limited to getting them in such a manner as not to occasion injury to the surface owner, which is the same thing. See per BAGGALLAY, L. J., *Bell* v. *Love*, 10 Q. B. D. at p. 558, and the cases there cited, and also per Lord BLACKBURN in *Davis* v. *Treharne*, 6 App. Cas. at p. 466; and this was not disputed at the Bar."

Fishbourne v. *Hamilton* (1890), 25 L. R. Ir. 483, was a case decided on the special terms of an Act of Parliament, 10 Geo. I. (Ir.), c. 5, which was passed for the purpose of promoting mines in Ireland. A grant was made in 1712 of lands in fee-farm, reserving to the grantor all mines and minerals. The effect of this if it had stood alone was held to be that the property in the mines remained with the grantor, but that (on the authority of *Hext* v. *Gill*) he could not have worked quarries which could not have been done without injury to the surface. But, by sect. 4 of the Act (which relates to prior as well as to future grants) reciting that many landowners had set lands in fee-farm with an exception of mines or minerals, it is enacted that the proprietors of the rent under such grants shall have power to work all mines and minerals, and carry away, &c., making compensation to the persons entitled to the possession of the lands; and upon the combined opera-

tion of the reservation in the grant and the Act, it was held by the VICE-CHANCELLOR and by the Court of Appeal that the successors of the grantor were entitled to work quarries upon the land, making compensation to the persons entitled under the grant of the lands.

As to the cases upon the interpretation of the words "mines and minerals" in the reservation clause of the Railways Clauses Consolidation and similar Acts, see Nos. 8 and 9, and notes, p. 485, *et seq.*, *post*.

AMERICAN NOTES.

Hext v. *Gill* is cited in Jones on Real Property, sect. 538, and is cited in *Marvin* v. *Brewster Iron Co.*, 55 New York, 538; 14 Am. Rep. 332, with the following remarks: "The whole estate was at first in Parks. He severed it by his own conveyance to Downs. He transferred to Downs and his grantees only the surface land. It is said that such a transfer is of the surface, and of all profit which can be got from cultivating it, or building upon it, or using it; that thus much is intended to be conveyed. *Hext* v. *Gill*, Law Rep. 7 Chy. App. 700. But as in the same conveyance there is a reserve to the grantor of an important part of the general estate, and of important incidents thereto, it is manifest that if the reserve is effectual and still operative, there is imposed upon the estate conveyed a serious servitude; though it, in its turn, becomes to a certain extent dominant over the estate reserved. The remark in *Hext* v. *Gill*, *supra*, has a limit then, and that which Parks can be reasonably considered to have granted, is the surface land, and such measure of support subjacent, as was necessary for the surface land, in its condition at the time of the grant, or in the estate, for the purpose of putting it into which the grant was made. *Cal. R. W.* v. *Sprot*, 2 Macq. Scotch App. Cases (H. of L.), 451. The plaintiff, then, as the grantee by mesne conveyances from Downs, is the owner of the surface, with all these rights of use and profits of it, subject to such limitations as result from the servitude which his estate is under.

"There is a clause in the deed from Parks to Downs, 'Reserving always all mineral ores, now known or that may hereafter be known, with the privilege of going to and from all beds of ore that may be hereafter worked, on the most convenient route to and from.' The learned Justice has found that this is a reservation of all ore on the premises. It is also of a privilege of way upon the premises.

"The right to work a mine, reserved by the grantor of the surface, carries with it the right to penetrate to the minerals through the surface of the land conveyed, for the purpose of digging them out and removing them. *Gould* v. *G. W. D. C. Co.*, 29 P. 820; s. c. 12 L. T. 842; 13 id. 109; *Rogers* v. *Taylor*, 1 H. & N. 706; *Hext* v. *Gill*, *supra*. This being so, there must be included in the right to break through the surface, the right to do so in such manner as is most advantageous to the owner of the right to mine, so that the surface is not wholly destroyed. By this is meant, that he has a right to sink a shaft vertically, or to drive a way horizontally, or to do both in different places, so that he may reach the minerals and take them out from below

the superjacent earth, following the veins of ore with excavations below the surface; always, however, under the restriction that what he does it is necessary for him to do for the reasonable use and enjoyment of his property in the minerals. We are aware that in *Harris* v. *Rydling, supra*, Lord ABINGER, C. B., is reported as saying to the effect that a reservation of mines and minerals gave no right to sink shafts or drive cuts upon the surface of the land from which the reservation was made. He is the only Judge who there made such utterance. It was not upon a point involved in the case; it was made argumentatively. It is opposed to the general rule to be derived from other decisions. That case turned wholly upon the point, in which all the Judges agreed, that miners were bound to leave reasonable support for the surface. True, BAYLEY, J., in *Cardigan* v. *Armitage, supra*, says the incidental power 'would allow no *use* of the surface as surface, in its unbroken state;' for he was then reasoning toward the conclusion, which he finally reached, that a reservation of coal below the surface, reserved also, as an incidental right, the power of reaching them through the same surface. And in the same case, HOLROYD, J., suggesting to counsel, *arguendo*, said: 'If the coal itself had been accepted, without more, that would have been a right of entry forever.' And see *Hodgson* v. *Field*, 7 East, 613."

No. 5. — BOWSER *v.* MACLEAN.

(1860.)

No. 6. — EARDLEY *v.* EARL GRANVILLE.

(1876.)

RULE.

WHERE the owner of the freehold of inheritance grants the mines (opened as well as unopened) under his land to one, and the land excepting the mines to another, the effect is to carve out the land in superimposed layers; the grantee has the property and exclusive right of possession in the whole space occupied by the layer containing the minerals; and, after the minerals are taken out, is entitled to the entire and exclusive user of that space for all purposes.

But in the case of copyhold land held under the usual copyhold tenure, the lord of the manor, although entitled to the minerals and to have access to work them, is not entitled to the possession of the chamber or space from

which they have been taken, for the purpose of carrying away minerals taken from land outside the manor.

Bowser v. Maclean.

2 De G. F. & J. 415–422 (s. c. 30 L. J. Ch. 273).

Mineral Rights. — Manor. — Copyhold Tenement.

The lord may drive carriages along a tramway under copyholds of the [415] manor, for the purpose of working mines within the manor, but not of working mines beyond its limits, and a bill will lie for an injunction at the suit of a copyholder to restrain the lord from using the tramway for the latter purpose; nor is it an objection to such a bill that the copyholder is not in possession of the surface, but has let it to a tenant.

This was an appeal from the decision of Vice-Chancellor STUART allowing a demurrer to the plaintiff's bill, and refusing a motion for an injunction with costs.

The material statements on the bill, which was filed by R. Bowser, J. Humphries, and T. Peacock, against Sir Charles F. Maclean, were to the following effect: —

The plaintiff, Richard Bowser, is in equity seised to him and his heirs of the lands, tenements, hereditaments, and premises called the Cockton Hill estate, situate in * the township of Bondgate-in-Auckland and parish of Saint Andrew's Auckland, in the county of Durham, and such estate is copyhold or customary freehold of the manor of Bondgate-in-Auckland, formerly part of the possessions of the see of Durham, but now belonging to and vested in the Ecclesiastical Commissioners in right of the said see; and, in accordance with a custom of the said manor in that behalf, the said estate is now vested in the plaintiffs, John Humphries and Thomas Peacock, and their sequels, as tenants on the rolls of the Court of the said manor, upon trust for the plaintiff, Richard Bowser, his heirs and assigns; and the plaintiff, Richard Bowser, has let the said estate for nine years past to one Ralph Hutchinson, as farmer of the surface thereof only from year to year. [* 416]

The defendant, Sir Charles Fitzroy Maclean, is the owner or proprietor of a colliery called the Woodhouse Close Colliery, the pit or shaft of which is sunk upon a farm called the Woodhouse Close Farm, which one Francis Johnson holds under lease from the said

see of Durham, and the defendant is lessee of, and works the coal mines of, the said see of Durham under the copyhold or customary lands comprised in the said manor of Bondgate-in-Auckland, and the said defendant draws such coals to the bank or surface at the said Woodhouse Close Colliery.

The plaintiff, Richard Bowser, recently discovered that the defendant, Sir Charles Fitzroy Maclean, had for some time past been working or getting the coal under an estate called the Henknowle estate, the property of Messrs. Seymour, and no part or parcel of the said manor of Bondgate, or of the possessions of the lords or owners of the said manor, or of the lessors of the said Woodhouse Close Colliery, and that the defendant has [* 417] * so worked and brought the said coals from the said Henknowle estate to the surface at the said Woodhouse Close Pit by conveying the same by an underground railway or tramroad through the said Cockton Hill estate of the plaintiff, Richard Bowser, and that the defendant has also drained and ventilated the workings of the said Henknowle coal by roads or ways through the said Cockton Hill estate.

The bill also stated applications to the defendant to desist from using the tramway, and that he had not complied with them.

The prayer was, that the defendant, Sir Charles Fitzroy Maclean, his viewers, agents, and workmen, might be restrained by injunction from conveying any coal or other produce from the said Henknowle estate through the Cockton Hill estate, or any part thereof, and from making or allowing any road or way to remain through the said Cockton Hill estate for the purpose of conveying any such coal or other produce, or for the purpose of draining or ventilating, or in any manner working, or enabling or assisting the defendant to work or get any coal or other produce out of the said Henknowle estate, or any other estate or property not comprised in and held of the manor of Bondgate-in-Auckland. That an account might be taken of all coal and other produce conveyed from the Henknowle estate by the defendant through the Cockton Hill estate, and also of all coal and other produce wrought and gotten out of the Henknowle estate by the defendant which had been drained or ventilated through the Cockton Hill estate, and that the defendant might pay the plaintiff, Richard Bowser, for all the underground wayleave and privileges which he had enjoyed in working and getting the coal, and also the damage sus-

tained by the plaintiff, Richard Bowser, * from the said [*418] acts of the defendant, Sir Charles Fitzroy Maclean.

The arguments urged by counsel upon the appeal are stated in the judgment.

Mr. Malins and Mr. T. Bates, in support of the bill, cited *Mitchell* v. *Dors*, 6 Ves. 146; *Hanson* v. *Gardiner*, 7 Ves. 305, 308; *Lewis* v. *Branthwaite*, 2 B. & Ad. 437 (36 R. R. p. 613, *ante*); *Keyse* v. *Powell*, 2 El. & Bl. 132; *Farrow* v. *Vansittart*, 1 Railw. Ca. 602; *Powell* v. *Aiken*, 4 K. & J. 343; *The Earl of Mexborough* v. *Bower*, 7 Beav. 127; *Thomas* v. *Oakley*, 18 Ves. 184; *Grey* v. *Duke of Northumberland*, 17 Ves. 281.

Mr. W. D. Lewis and Mr. N. Lindley, *contra*, cited *Deere* v. *Guest*, 1 Myl. & Cr. 516; *Jesus College* v. *Bloom*, 1 Amb. 54; *Cowling* v. *Higginson*, 4 M. & W. 245.

Mr. Malins replied. *Judgment reserved.*

The Lord Chancellor (Lord Campbell).

I am of opinion that in this case the demurrer ought to have been overruled.

The objection to the bill chiefly relied upon in the Court below was that the plaintiffs show no title to the place in which the wrong complained of is alleged to * have been [*419] committed, and no possession of the subsoil of Cockton Hill estate, through which runs the way improperly used by the defendant. But the bill alleges that the plaintiffs are seised of Cockton Hill estate, which is described as copyhold or customary freehold of the manor of Bondgate, and that the surface only of this estate is let to one Hutchinson, as farmer thereof from year to year. *Primâ facie* the soil from the surface to the centre of the earth belongs to the plaintiffs, and the possession of the whole, except the surface so let, remains in the plaintiffs. This being copyhold, the property in the minerals is in the lords of the manor, and they have let all the coal mines within the manor of Bondgate to the defendant. For the working of these mines the defendant has a right to make a tramway through the subsoil of the Cockton Hill estate, and to carry along this tramway any coals which he may dig within the manor. But the defendant has no right to drive carriages along this tramway for any other purpose besides working the minerals, &c., within the manor. But the bill avers that he drives along this tramway carriages loaded with

coals dug beyond the limits of the manor, that he may bring them to the surface by a pit within the manor. Now this is clearly an illegal use of the tramway, for the defendant as lessee of the coal strata within the manor is justified only in making such a use of the subsoil of the copyhold tenements as the lord himself might make for working the coal within the manor. Without working the coal within the manor, the lord could not lawfully make a tramway through the subsoil of the manor for the purpose of carrying upon it coals dug elsewhere, and if he did he would be liable to an action of trespass at the suit of the copyhold tenants. As little can he lawfully use the tramroad which he has made lawfully for the carriage of coals within the manor for the [* 420] purpose * of driving along it carriages loaded with coals dug beyond the limits of the manor.

But it is said that the plaintiffs are not in a situation to sue for this wrong as, on account of the leases of the surface and the minerals, they show no title or possession, and they cannot be damnified by the alleged wrong. I am of opinion, however, that the alleged lease of the minerals to the defendant can be no more than a transfer to him of what might have been lawfully done by the lord of the manor for working the minerals. The possession still remains in the copyholder subject to the property of the minerals being in the lord and the easements of the lord in working the minerals. The law upon this subject is fully settled by the two cases of *Lewis* v. *Branthwaite*, 2 B. & Ad. 437 (36 R. R. p. 613, *ante*), and *Keyse* v. *Powell*, 2 El. & Bl. 132. I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, and freehold land leased with a reservation of the minerals, or freehold land, where the surface belongs to one owner and the subsoil, containing minerals, belongs to another, as separate tenements divided from each other vertically, instead of laterally. If this had been such freehold land the owner of the surface could not have complained of the making or of the excess in using a tramway through the subsoil. But the plaintiffs seised in fee of this copyhold, though, at the will of the lord, after letting the surface only, are in possession of the subsoil, subject to the rights of the lord in getting the minerals according to the custom of the manor. Therefore, they are injured by the unlawful use of the tramway. The amount of the injury, if infinitesimally small, is immate-

rial in considering whether this demurrer should be allowed or overruled.

* According to the short-hand writer's note, the VICE- [* 421]
CHANCELLOR rested his decision on this, that "the plaintiff, Bowser, has not averred that the tramway is his." But there was no necessity for such a specific averment if the bill avers facts showing that the subsoil over which the tramway is carried belongs to Bowser and is in his possession, subject to the lord's property in the minerals and the defendant's easement. The bill avers, that the defendant having got coals under the Henknowle estate, beyond the limits of the manor of Bondgate, had brought these coals by the tramroad through the Cockton Hill estate of the plaintiff, Bowser, and also had drained and ventilated the workings of the Henknowle coal by roads or ways through the said Cockton Hill estate. Such allegations seem to me to place the defendant in the same condition of liability as if he had had no interest whatsoever in the minerals under the Cockton Hill estate, or any part of the manor of Bondgate, and he had been a wrongdoer in the making of the tramway, as well as in the use of it. For these reasons the objection, that the plaintiffs show no title in, and no injury to, themselves, seems to me to be untenable.

But the counsel for the defendant have strenuously argued before me that, if this were so, still the plaintiffs are confined to an action of trespass or some other legal remedy. In considering this objection we must bear in mind that the bill complains of a secret and clandestine use of the railway, that the defendant is charged with making a profit by this surreptitious use of the way, and that the bill contains the statement of the defendant having broken the soil in the mines under Cockton Hill estate, belonging to the plaintiffs, for the purpose of making a communication between these mines and another mine in his occupation beyond the limits of the manor, and having ventilated this mine with air from * the mines within the manor, obtained by the barrier [* 422]
between them being thus broken. Can it be said that all this is a mere dry trespass, for which a Court of equity will supply no remedy? *Deere* v. *Guest*, 1 Myl. & Cr. 516, was very properly cited on behalf of the respondent; but, in that case, there were not the circumstances of aggravation which characterise the present case. In subsequent cases, where such circumstances have occurred, an injunction has been granted; and let

me remark that I am not here called upon to decide that an injunction shall be granted, but to consider whether it be so clear that an injunction cannot be granted, that the bill is demurrable.

I do not think that *Thomas* v. *Oakley*, 18 Ves. 184, and similar cases, where there has been an exportation of valuable minerals or a destruction of part of the inheritance, are authorities in support of the present suit. But *Lord Mexborough* v. *Bower*, 7 Beav. 127, *Powell* v. *Aiken*, 4 K. & J. 343, and *Farrow* v. *Vansittart*, 1 Railw. Ca. 602, are at least authorities to show that under such a bill as this it is possible that, consistently with the principles of equity, it may turn out that the plaintiffs are entitled to some part of the remedy which they pray. I am far from saying that the allegations in the bill, if sufficient to require an answer, conclusively show that the plaintiffs are entitled to the injunction prayed for, or to the account or discovery. Upon an answer and evidence it may turn out on the hearing that, from acquiescence and the minuteness of the injury, or some right which the defendant may disclose, the Court may refuse the injunction and dismiss the bill. But the demurrer for want of equity, I think, cannot hold, and, reversing the decision of the VICE-CHANCELLOR, I must order that the demurrer be overruled with costs.

Eardley v. Granville.

3 Ch. D. 826–836 (s. c. 45 L. J. Ch. 669; 34 L. T. 609; 24 W. R. 528).

[826] *Copyholds. — Mines and Minerals, Lessee of. — Possession of Soil by Copyholder. — Carriage of Non-manorial Minerals over and under Copyholds. — Acquiescence. — Injunction.*

In an ordinary copyhold manor the estate of the copyholder is in the soil throughout except as regards trees, mines, and minerals, the property in which remains in the lord. When the lord has removed minerals the space left belongs to the copyholder. The right of the lord is not like that of a vendor of freeholds who has reserved mines, and remains the owner of the vacant space from which minerals have been removed.

In a Crown manor, where the Crown and its lessees were by custom entitled to enter on the land for the purpose of working the minerals, the defendant, the lessee of the Crown mines, who was also lessee of the S. mine outside the manor, claimed a right to use a crut or underground way beneath the land of the plaintiffs, who were copyholders of part of the manor, for the purpose of conveying minerals from the S. mine to the deep pit by which the manorial mines were worked, and thence by a branch railway constructed by the defendant over part of the same copyhold to the main line.

No. 6. — Eardley v. Granville, 3 Ch. D. 826, 827.

Held, that such user was a trespass, and that, no case of acquiescence on the part of the plaintiffs or their predecessor in title having been established, they were entitled to an injunction to restrain the defendant from carrying the S. minerals over or under their copyhold land.

The plaintiffs were copyholders of part of the manor of Newcastle-under-Lyne, as successors in title of one Ann Adams.

The Crown, in right of the Duchy of Lancaster, was seised in fee of the said manor, and of the collieries, mines, seams of coal, and minerals lying beneath the surface of all lands within the manor or lordship. The defendant, Earl Granville, was lessee under the Crown of the said collieries, mines, and minerals.

The defendant alleged that from time immemorial the Crown and its lessees had the right to work the collieries and mines, and for that purpose to enter upon the lands and on such parts of the surface (not being land covered with buildings) as might be required for the purpose of working the mines, making to the tenants and occupiers reasonable compensation; and that such right had been exercised by the Crown and its lessees beyond the * time of legal memory, and that the copyhold tenants of [* 827] the manor held their tenements subject to such custom.

The defendant's predecessors in title had from the year 1731 been lessees, under the Crown, of the said collieries, mines, and minerals, under successive leases for thirty-one years, renewed from time to time, and conferring on the lessees the power to exercise the rights belonging to the Crown.

In 1852 the defendant was lessee under a lease of the 18th of August, 1826, and was working the mines by a pit called "the deep pit."

On one side of the manor was a tract of freehold land then belonging to Ralph Sneyd, containing mines, and beyond Sneyd's land there was some freehold land then belonging to Ann Adams, who was also at that time copyholder of part of the manor between the deep pit and Sneyd's freehold.

In 1851 Ralph Sneyd demised mines lying beyond the manor to one Stanier, who, by an underlease of the 30th of November, 1852, demised the same to the defendant for thirty years.

At the date of the said underlease the defendant was constructing a branch railway from the deep pit within the manor across the copyhold land of Ann Adams and Sneyd's freehold to effect a junction with the North Staffordshire Railway at Etruria. In

order to complete this railway it was necessary to carry it across the freehold land of Ann Adams, who, by a lease dated the 10th of December, 1852 (the works having then been begun), demised to the defendant part of her freehold, containing 2500 square yards, with power to construct a railway thereon, with the necessary works, and to use the same for the term of thirty years from the 29th of September, 1852, at the yearly rent of £30, and it was thereby agreed that the defendant should within two years complete the railway, and that the same should be used for the conveyance of coal and minerals from any lands or mines belonging to or occupied by the defendant, or from any lands or mines belonging to Sneyd, and for no other purposes except to carry coal or minerals belonging to Ann Adams, her heirs or assigns, as therein mentioned, to the North Staffordshire Railway.

By a renewed lease from the Crown, dated the 27th of September, 1855, the manorial collieries, mines, and minerals, [* 828] were * demised to the defendant for the term of thirty-one years from the 29th of September, 1854, at the rents and royalties thereby reserved, and subject to the payment of wayleave for minerals not the property of the Crown, which should be brought through or worked by means of any of the pits made under the powers of the lease, or of any previous lease from the Crown, such wayleave not to extend to any coal or minerals brought from the lands of Sneyd so long as the coal and minerals belonging to the Crown were permitted to be brought without charge through the pits or underground ways made under Sneyd's lands.

The plaintiffs, by their bill, filed in July, 1874, alleged that they had lately discovered that the defendant had, by means of the said railway across the plaintiffs' copyholds, since the 25th of March then last, conveyed large quantities of coal and ironstone from the mouth of the deep pit (which was sunk in copyhold land adjoining the plaintiffs') to the North Staffordshire Railway.

The plaintiffs also alleged that they had lately discovered that the defendant had for some time past been working or getting the coal and ironstone from the Sneyd mines, and had brought the same to the mouth of the deep pit by conveying them by an underground road or crut driven through the subsoil of the plaintiffs' copyhold, which subsoil consisted partly of seams of coal and partly of seams of clay.

The bill prayed, first, that the defendant might be restrained by injunction from conveying any coal or other produce of the Sneyd mines underneath the plaintiffs' copyhold lands, and from making, or using, or allowing any road or way to remain underneath the plaintiffs' copyhold lands for the purpose of conveying any such coal or other produce; secondly, that the defendant might be restrained from using or continuing to use any part of the surface of the plaintiffs' copyhold land for the purpose of a railway for conveying any coal or ironstone of the Sneyd freehold lands, and for consequential relief.

The defendant, by his answer, stated that the taking a lease of the mines under the Sneyd estate, and the taking a lease from Ann Adams of a right to make a railway over her freehold property, and the construction of a complete line from the deep pit over her copyhold, were parts of one scheme for the purpose of
* developing and working the mines and minerals in con- [* 829]
templation of the renewal of the Crown lease; and he submitted that by the said lease Ann Adams gave him permission to construct the railway over her copyhold land, and to use it for the purpose of conveying minerals not only from the Crown collieries but also from the Sneyd estate. He further stated that he had paid to the occupying tenant of the copyhold a small yearly sum as compensation for the user of the surface.

The defendant further stated that the deep pit was sunk in 1848, in a piece of copyhold land adjoining that of Ann Adams, and was used by the defendant in working the mines held under the Crown, and also for working the mines under the Sneyd estate; that the coal and minerals from the Crown property were sometimes conveyed in carts from the pit's mouth and sometimes by means of the defendant's railway from the mouth of the pit to the North Staffordshire Railway, and some of such minerals (both Crown and Sneyd indiscriminately) were conveyed by the underground road or crut, which was constructed after the date of the lease of the 10th of December, 1852, through the mineral ground at a depth of 500 yards below the surface of Ann Adams' copyhold land to the bottom of the pit, and were thence raised to the surface.

The defendant further stated that the use of the railway and the underground passage had been notorious for above twenty years, also that the mineral ground beneath the plaintiffs' copyhold land

where the crut had been made consisted partly of seams of coal and ironstone, and partly of strata of clay, all which seams and strata belonged, as he was advised, to the Crown, and that the right to work and get, and also to use, such seams and strata was vested in him as lessee from the Crown; and that he claimed the right to use such underground passage for bringing minerals from the Sneyd estate for assisting him in working the mines thereunder by virtue of the express provisions of the Crown lease, by which permission was given him to convey minerals from the Sneyd estate without paying any wayleave for the same.

Southgate, Q. C., and C. Batten for the plaintiffs:—

[* 830] The defendant, as lessee under the Crown, is only entitled to * use the railway over the plaintiffs' lands and the underground road for the purpose of carrying the Crown minerals, not those worked in the Sneyd mines, which are outside the manor.

Although the property in mines under copyhold lands is in the lord, the possession of the lands is in the tenant, who can maintain trespass in respect of an unauthorised use of his lands. *Lewis* v. *Branthwaite*, 2 B. & Ad. 437 (36 R. R. p. 613, *ante*); *Keyse* v. *Powell*, 2 E. & B. 132.

In *Bowser* v. *Maclean*, 2 D. F. & J. 415 (p. 453, *ante*), it was held that the lord of a manor might drive carriages along a tramway under copyholds of the manor for the purpose of working mines within the manor, but not of working mines beyond its limits.

The cases which relate to the rights of a lessor of freehold land who has reserved mines and minerals from the demise do not apply. In *Proud* v. *Bates*, 34 L. J. Ch. 406, where the lord of a manor had granted a lease of waste land of a manor with a reservation of the mines, with power to work them and with free wayleave to and from the same, it was held that the lessor and those claiming under him were entitled to an absolute wayleave for minerals not under the demised property. That case, however, will not support the defendant's contention, and does not apply to the case of a copyholder who is entitled to the soil as well as the surface. So, likewise, the case of *Duke of Hamilton* v. *Graham*, L. R. 2 H. L. Sc. 166, has no application.

In *Goodson* v. *Richardson*, L. R. 9 Ch. 221, the Court granted an injunction to restrain the continuance of water-pipes which had

been laid in the soil of a highway without the consent of the owner of the soil. In like manner we contend that the carrying of minerals from the Sneyd mines over or under the plaintiffs' land is a trespass which they are entitled to come to this Court to restrain.

The defence on the ground of acquiescence cannot be sustained.

Chitty, Q. C., and Cozens-Hardy for the defendant: —

When a manor contains minerals which are the property of the lord, he and his lessees are entitled to work them in any way he thinks best; the defendant, therefore, as lessee under the Crown, * is entitled to the use of the underground road or [*831] crut without the interference of the copyholder, who has no ownership in the subsoil. *Lewis* v. *Branthwaite, Duke of Hamilton* v. *Graham.* The case is analogous to that of *Ballacorkish Silver Mining Company* v. *Harrison,* L. R. 5 P. C. 49, where a reservation had been made of minerals in the Isle of Man to the Crown, and it was held that the Crown was entitled to the use of all waters percolating by natural process into the mines when opened.

As regards the use of the railway, the plaintiffs are precluded from raising any objection by the acquiescence of Ann Adams, their predecessor in title, who must be taken to have allowed the railway to be constructed over her copyhold land, by granting a lease of her freehold land for the purpose of carrying the Sneyd minerals, which she knew could only have been carried from the deep pit over her copyhold land. Such acquiescence disentitles the plaintiffs to relief. *Dann* v. *Spurrier,* 7 Ves. 231 (6 R. R. 119); *Duke of Beaufort* v. *Patrick,* 17 Beav. 60; *Master, &c. of Clare Hall* v. *Harding,* 6 Hare, 273.

JESSEL, M. R. : —

This is really an undefended suit; when you come to look at the admissions in the answer, there is no case whatever on the part of the defendant. [His Lordship then stated the facts.] It is said that because Ann Adams, by her lease of the 10th of December, 1852, gave the defendant the right to carry the coals or minerals from any mines belonging to him or belonging to Sneyd (for this purpose it is immaterial) — therefore she gave him a right to carry not only over her freehold, but over the copyhold; and it is said she must have given him the right for this reason, because he afterwards made a communication underground from the pit by

means of a crut to Sneyd's lands on the other side of the copyhold lands, that is, instead of sinking a pit in the freeholds of Sneyd, which adjoined the freehold of Ann Adams, he made a communication underground from the deep pit by a crut through the copyhold land, and then carried the coal up the deep pit and thence along the railway.

[* 832] * But it would appear that at the time Ann Adams granted the lease of a part of her freehold land for the purpose of the railway, and gave the defendant the right to carry coals from any mines which belonged to or were occupied by him — at that period she did not know how he was going to work the mines of Sneyd. She expressly granted the right over her freehold lands, but she did not grant any right over her copyhold lands. Acquiescence is out of the question. The Earl had not only a right to make the works, but he did make almost all the works previously, and he had a right to make them without her consent and in spite of her refusal. There is, therefore, no acquiescence. If he claims a right to carry coals from the Sneyd mines over her copyhold lands, he must make out some legal title. But he has not a shadow of legal title; and as to acquiescence, there is no equitable title: consequently, as far as that is concerned, he is a mere trespasser, and he being a trespasser comes within the well-established doctrine of *Goodson* v. *Richardson*, L. R. 9 Ch. 221, and *Rochdale Canal Company* v. *King*, 2 Sim. (N. S.) 78, where damages would be no compensation for a right to property, and the plaintiffs are entitled to prohibit him by injunction. There may be little or no injury to the estate, but if they restrain him he will be glad to pay a wayleave.

The other part of the case is still more singular when I look at the answer. The crut was made in the way described, and the result was that the coal passing under the copyhold lands of the plaintiffs, formerly of Ann Adams, it was brought from Sneyd's land out of the manor, through an opening or tunnel under the copyhold lands belonging to the plaintiffs without their consent.

The law upon that subject has been well considered, and it has been settled by authority which is certainly binding upon me. The law seems to stand in this way: The estate of a copyholder in an ordinary copyhold (for it is an estate) is an estate in the soil throughout, except as regards for this purpose timber-trees and minerals. As regards the trees and minerals, the property remains

in the lord, but, in the absence of custom, he cannot get either the one or the other, so that the minerals must remain unworked, and the trees must remain uncut. The possession is in the copyholder; the property is in the lord. If a stranger cuts down the trees, the copyholder can maintain trespass [* 833] against the stranger, and the lord can maintain trover for the trees. If the lord cuts down the trees, the copyholder can maintain trespass against the lord; but if the copyholder cuts down the trees, irrespective of the question of forfeiture, the lord can bring his action against the copyholder.

So in the case of minerals. If a stranger takes the minerals, the copyholder can bring trespass against the stranger for interfering with his possession, and the lord may bring trover, or whatever the form of action may be now, against the stranger to recover the minerals. The same rule applies to minerals as to trees. If you once cut down the tree, the lord cannot compel the copyholder to plant another. The latter has a right to the soil of the copyhold where the tree stood, including the stratum of air which is now left vacant by reason of the removal of the tree. So, if the lord takes away the minerals, the copyholder becomes entitled to the possession of the space where the minerals formerly were, and he is entitled to use it at his will and pleasure. If you have a shaft made for working the mines, the copyholder may descend in the shaft, and either walk about in the space below, or use it for any other rational purpose. That is the position of the copyholder. That being so, and there being no minerals in this crut, if that is the law, the Earl, as Crown lessee, cannot have a greater right than the Crown, that is, the lord or lady of the manor. He has, therefore, no right now to trespass on the copyhold for any purpose whatever, because I assume he does not want it for the purpose of working the manorial minerals; for that purpose he has a right to use it; but assuming that he does not want it for that purpose, but only wants it for the purpose of carrying the coal from under Sneyd's estate — that is, foreign coal — he has no right to use it at all. Of course the injunction to be granted will only restrain him from using it for that purpose; it will not affect the other right. It is not trespass while he carries Crown minerals. It is trespass when he uses it for any other purpose.

I take it that the law is clearly settled, and I am surprised to hear it disputed. In the first place, the law is laid down, perhaps

not as accurately as might be wished as regards the words
[* 834] used, * by Lord CAMPBELL in *Bowser* v. *Maclean*, 2 D. F. & J. 420 (p. 453, *ante*): "I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, and freehold land leased with a reservation of the minerals" — he should have said "of the mines," but he has used the words "reservation of the minerals," meaning an exception of the mines — "or freehold land where the surface belongs to one owner and the subsoil, containing minerals, belongs to another, as separate tenements divided from each other vertically, instead of laterally." That is quite intelligible; what he means is this — he does not say it, but he means it — If a freeholder grants lands excepting mines he severs his estate vertically, *i. e.*, he grants out his estate in parallel horizontal layers, and the grantee only gets the parallel layer granted to him, and does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor. The freeholder retains the mineral stratum as part of his ownership; and whether or not he takes the minerals or subsoil out of the stratum, the stratum still belongs to him as part of the vertical section of the land. But he says in the case of a copyholder, that is not so, because the copyholder, though he has no property in the stratum in the sense of being entitled to take the minerals, has property and possession in this sense, that the moment the minerals are taken away the space is in his possession, and he only can interfere with it, the lord having no right to do so.

The same proposition was laid down in the case of *Lewis* v. *Branthwaite*, 2 B. & Ad. 437 (36 R. R. p. 613, *ante*), where Lord TENTERDEN expressly puts it that there is no distinction between trees and minerals as regards the law of copyholds, and so in the case before Lord CAMPBELL of *Keyse* v. *Powell*, 2 E. & B. 132.

Then it has been suggested that the recent case of *Duke of Hamilton* v. *Graham*, L. R. 2 H. L. Sc. 166, has somehow or other altered the law; but it has not. That was a Scotch case, and it was treated as being the same as a grant by an English freeholder. It exactly concurs, therefore, in its reasoning
[* 835] with the decision of Vice-Chancellor * WOOD in the case of *Proud* v. *Bates*, 34 L. J. Ch. 406, and the decision of Lord CAMPBELL in *Bowser* v. *Maclean*, 2 D. F. & J. 415 (p. 453, *ante*), that where a freeholder grants lands excepting the mines,

he intends, first of all, as a matter of construction, to except not merely minerals, but the portion of the subsoil containing the minerals; in other words, to retain a stratum of the property. And if he does that, of course the lessee or grantee has no title whatever to the portion of the stratum reserved. That is all that the case of *Duke of Hamilton* v. *Graham* decided. It decided that the same law applies to Scotland which applies to England. In a case like that the word "mines" meant subsoil containing the minerals, and not merely the minerals themselves.

The only other case that was referred to was the case in the Privy Council from the Isle of Man of *Ballacorkish Silver Mining Company* v. *Harrison*, L. R. 5 P. C. 49. It was a case decided upon exactly the same principle. In that case it was not merely a lord of the manor depending upon his ordinary title as lord of the manor, but also upon the Act of Tynwald, which was an Act of Parliament of the Isle of Man, by which the mines were reserved to him; and Lord PENZANCE, who gave the judgment, said this (L. R. 5 P. C. 62): "The Act affirms that he has excepted out of the grant not only the minerals, but that portion of the soil which contains the minerals, and which constitutes the 'mine.'" Consequently they had only to decide this: that on their own interpretation of the Act the mine, meaning the portion of the subsoil containing the minerals, being excepted, remained in the lord of the manor, and the copyholder had nothing whatever to do with it. That was, therefore, entirely distinguishable from the ordinary case of an English copyholder who had the possession of the minerals. So far from interfering with the law as laid down in other cases, that case confirms it, because the Privy Council would not have had recourse to the Act of Parliament if the law had given it to the lord of the manor as part of the customary law applicable to copyholders, and he would have been entitled to it entirely irrespective of the legislative provisions upon which he relied.

* That being so, it appears to me perfectly clear on this [* 836] part of the case also, that the plaintiffs are entitled to the injunction which they seek. The plaintiffs will have the costs of the suit.

ENGLISH NOTES.

In *Lewis* v. *Branthwaite* (1831), 2 B. & Ad. 437, 36 R. R. 613, it was held that in copyhold lands, although the property of the minerals was in the lord, the possession was in the tenant, and the tenant might maintain trespass against an adjoining owner for breaking and entering the subsoil and taking coal therein, although no trespass is committed on the surface. The judgments in the case are referred to in *Keyse* v. *Powell* (1853), 2 El. & Bl. 132, 22 L. J. Q. B. 305, 17 Jur. 1052, as undoubted law, and applicable to the possession of a leaseholder under a lease where there is no express reservation of mines. The tenant is in possession of the minerals, although he has no right to work them.

The right of the lord of a manor to the minerals in the waste is of a different character, since he is entitled to the whole soil of the waste subject to the rights of the commoners to the pasturage, &c. And therefore where, under an Inclosure Act, the waste was allotted to commoners, reserving to the lord "all mines and minerals . . . in as full, ample, and beneficial manner as he could or might have held and enjoyed the same in case this Act had not been made," with full liberty of digging, sinking, searching for, and working the said mines and minerals, and carrying away the lead ore, lead, coals, ironstone, and fossils to be gotten thereout; — it was held that the reservation must be construed with reference to the original rights of the lord in the soil, and that he was entitled under the reservation to work and carry away a stratum of stone to be used for building as well as the coal and ironstone which lay beneath. *Rosse* (*Earl of*) v. *Wainman* (1845), 14 M. & W. 859, 15 L. J. Ex. 67 (affirmed Ex. Ch.) 2 Ex. 800.

In *Proud* v. *Bates* (1865), 34 L. J. Ch. 406, 12 L. T. 406, a question arose under the following circumstances. A lease of waste land of a manor, recently enclosed by the lessee, contained a reservation to the lessor, the lord of the manor, of the mines and quarries, with full power to win and work the same, with free wayleave and passage to, from, and along the same, on foot or on horseback, with all manner of carriages. The defendants, under a title derived from the lord of the manor under the reservation, had driven a way through the coal seam under the land, which they used for the purpose not only of working and carrying away the coal comprised in the reservation, but also for carrying away coal got from other properties. In order to make the drift-way convenient for working with horses, they had cut away the solid rock above the seam of coal to a height of about one foot six inches; and the plaintiffs claimed an injunction against their using this drift for the outside coal without paying a wayleave. It was held by Wood, V. C., that the defendants under the reservation were justified in cutting the drift

(subject to their obligation to support the plaintiffs' land), and were entitled to use the drift when cut for all purposes. The learned VICE-CHANCELLOR gave his reasons for this decision as follows: "I do not think there is really any substantial difficulty on the whole construction of the lease, looking at the circumstances attendant upon it, and seeing what it is the lessor has reserved. He is lord of the manor, and he makes two leases of this kind; he at the time is owner of all the mines as lord of the manor, and he excepts out of this demise, as he excepted out of the next demise, the whole of the mines; and upon that word 'mines,' there can be no question: it cannot be less than the minerals which the mines contain. Whether the word 'mines' be used in the sense of minerals, the thing dug out of the mines, or that which contains the minerals, that which contains cannot be less than the thing contained; and therefore there is no doubt that the whole containing chamber which has the minerals is the mine; and so far as the mines are concerned, there is no question that they are altogether out of the demise. And as regards any right of using the mines, they never having been demised at all or parted with, the defendants are, of course, at liberty to use them as they may think fit; and the case of *Bowser* v. *Maclean* (p. 453, *ante*) completely explains what the right view is. Lord CAMPBELL says, with regard to copyholds, the copyholder has the whole right demised to him; the whole right is in him, but subject to the right of the lord to work the mines. The copyholder is owner, and the lord cannot use an underground way for the purpose of passing through any of the copyhold premises; but as regards that which is excepted out of the demise by contract, of course the owner can use whatever he excepts just in any way he may think fit; and as regards that part of the case, I should never have had a moment's hesitation or doubt.

"The only point that can raise the question is that small point about the headway of a foot and a half for the use of horses and carriages; and the question is, whether the plaintiff is entitled to demand a wayleave in respect of that. That any such intent existed is perhaps absurd to suppose. We must collect the intent from the instrument, and the instrument alone. I cannot quite follow the argument of Sir Hugh Cairns when he says that a wayleave and right of way are excepted. I do not think anything can be excepted out of a demise except that which is part of the property itself. It is not a right issuing out of the property which can be excepted. You either demise or not the whole of the property. If you do demise the whole property and except anything, then it is by way of re-grant, as in the case of hawking or hunting, which was very much discussed in two cases, in which all the learning on the subject is collected, — the one, *Wickham* v. *Hawker*, 7 M. & W. 63, 10 L. J. (N. S.) Ex. 153, and the other, *Doe* v. *Lock*, 2 Ad. &

E. 705, 743, 4 L. J. (N. S.) K. B. 113; and therefore, I apprehend, that so far this must be considered not to be a reservation of the whole ownership in that sense, but a grant, as it were, to be taken out of the property demised; and the question is, what is the extent of that grant which the landlord has so insisted on, — a grant merely for the purpose of working those particular mines, or has he insisted on a grant giving him an absolute right to this user for any purpose whatsoever? There is no limitation whatever; and furthermore, there is this, that the first exception of the mines would give him the restricted right of working those mines. The exception of mines themselves would carry that right without any other words whatsoever. That is determined in that case of *Lord Cardigan* v. *Armitage*, 2 B. & C. 197, 26 R. R. 313, where it was held that where once you reserve mines you reserve everything that is necessary for working them, of course including the wayleave for carrying away the materials, and especially finding, as I do here, the words 'the right of winning, working,' and so forth. That is therefore one ground for supposing that when the reservation was expressed, as it is here expressed, it was not intended to be restricted to the limited right.

"But, further than that, you have the circumstances of the grant. The lessor was entitled to the property in the whole manor, of which this is part; and if you look at the probable intent and purpose of the parties, it confirms and strengthens the view that what is expressed to be absolute here is meant to be absolute, and that the lessor has reserved to himself the full, complete, and absolute right of going through this property with carriages and horses for any purpose whatever, and for any unlimited object he may think fit. I think, therefore, as to that part of the case, I must dismiss the bill, and dismiss it with costs."

The case of *The Duke of Hamilton* v. *Graham* (1871), L. R. 2 H. L. Sc. 166, was an appeal from Scotland in a case where a former Duke of Hamilton, grantor of a feu charter, had reserved to himself (as the superior), his heirs and successors, "all and sundry the coal and limestone within the bounds of the lands before specified, so as it shall be lawful to the said Duke and his foresaids to set down coal-pits, shanks, and sinks, and win coal and limestone, within the bounds of the said lands, or any part thereof; and to make all engines and easements necessary for carrying on the said coal and limestone work, and free ish and entry thereto for making sale thereof and away taking the same; the said Duke and his foresaids always giving satisfaction for any skaith or damage through downsetting the coal-pits, sinks, or shanks, or by winning the said coal or limestone, or by the roads and passages for away taking the same." The question was whether the pursuer (successor in the superiority) was entitled to make and use a passage through the reserved coal and limestone for the carrying away of coal and lime-

stone from under other lands. The House of Lords (by a majority, Lord HATHERLEY, L. C., Lord WESTBURY, and Lord COLONSAY, *diss.* Lord CHELMSFORD), reversing the judgment of a majority of the Lords of Session, and restoring the judgment of the LORD ORDINARY, held that he had such right.

The LORD CHANCELLOR (Lord HATHERLEY) stated the general principles applicable to the case, as follows: "By the law of England, when you demise a property, excepting a certain part of it, there is no demise of the part excepted. Thus minerals excepted remain in the lessor. The lessee takes no interest or right whatever in them. If, on the other hand, you reserve certain rights and interests, parting with the property, the rights and interests reserved must enure by way of re-grant from the person to whom you make the disposition. I so held in *Proud* v. *Bates*, 34 L. J. Ch. 406. In Scotland there may be a direct feudal title to certain portions of land, and there may be a direct feudal title also to certain strata of land interposed between the centre of the earth and the surface, which may belong to another proprietor by a distinct feudal title, and those titles may be dealt with and disposed of as if they were two separate tenements in every respect; showing very clearly the distinction between a reservation of the land itself, and a reservation of a right or privilege. If you reserve only a servitude, or, as we should call it, an easement, all the Judges agree that the law of Scotland (like our English law) is, that you cannot use a servitude for any other purpose than the particular purpose for which it was originally created, just as you cannot use an easement for any other purpose than that for which it was originally granted."

Lord WESTBURY observed that the effect of the reservation in the grant was to show that the Duke intended to retain the *plenum dominium* over the mines. He combated the position taken in the opinion of Lord CHELMSFORD that the powers, which he considered to be superadded, were to be made use of for limiting or restricting that *dominium*. He held that the absolute estate in the mines was not, and never was intended to be, affected by the feudal grant, and consequently might be enjoyed and dealt with precisely as if there had been no grant of the *dominium utile* of the land. He further observed: "The same thing would take place in England, but I am very reluctant upon a matter of this kind to have recourse to English authorities or English rules at all. Suppose, now, that in one of the chalk counties I granted an estate to a person, retaining to myself the strata of chalk lying beneath the surface, — we all perfectly well know that many a stratum of chalk lying beneath the surface is fifty, sixty, or eighty feet deep, — is it meant to be said that I have not a right to run a tunnel through that stratum of my own property which is thus reserved to me, and to use that tunnel

for any collateral purpose of the estate adjoining that stratum so reserved?"

Lord COLONSAY said: "I think that in the Court below a great deal of difficulty has been introduced into this case by not clearly keeping in view the distinction between a right of property and a right of servitude. The case is, in some respects, a novel one, and I am not surprised that there may have been a difference of opinion in regard to what might be the rights of the parties with respect to certain views of contingent interests such as those arising in the event of the exhaustion of the minerals. And I am not surprised that there has been some difference of opinion with regard to what was the meaning of this reservation. But it is quite obvious to all feudalists, that the right of the Duke of Hamilton rests not upon the deed which he granted to Mr. Graham, but upon his right to the barony and lands under his original infeftment; the deed to Mr. Graham only shows that that part of the Duke's original estate which has been spoken of as having been reserved, has not been given away. It is a great mistake to say that the Duke has no right to use those minerals except for the purpose of bringing them to the surface. He may use them in the way which is most beneficial to himself. For instance, he may have reserved the stratum merely in order to prevent his adjoining minerals from being flooded by water. That would be a beneficial enjoyment of it without bringing it to the surface. He may be the possessor of minerals lying upon a certain inclination east and west of these, and the water may be accumulating upon his minerals to the west, and he may use the stratum of minerals he has reserved for the purpose of enabling him to conduct the water through those minerals down to the lower level on the east, and so get rid of it. There are various ways in which he may turn the minerals to account without bringing them to the surface; and I cannot understand that so long as the stratum of minerals, that is to say the estate which remains to him and is not given away, continues to exist, he cannot use it in any way that is beneficial to himself unless he uses it to the injury of his neighbour."

The subsequent case of *Ramsay* v. *Blair* (also an appeal from Scotland, H. L. Sc. 1876), 1 App. Cas. 701, is instructive as to the effect of reservations of minerals in various degrees of comprehensiveness. In 1825 a parcel of land was granted "reserving (to the grantor, his heirs, &c.) the coal and coal-heughs." In 1857 another parcel was granted "reserving (to the grantor, his heirs, &c.) the coal, with power to dig for, work, and carry away the same, on paying the surface damage." In 1827 a parcel of land, which lay between the two parcels contained in the grants of 1825 and 1857, had been granted "reserving (to the grantor, his heirs, &c.) the whole coal, stone quarries, and all

other metals and minerals (within the lands granted) with power to search for, work, and carry away the same, they always paying (to the grantee, &c.) all damages which may be done to the said lands by the workings."

Mr. Blair, pursuer and appellant, was in right of the grantees of the land; and the defenders, respondents in the appeal, were entitled to the rights under the reservations.

The strata of coal under the three parcels of land lay in a slanting direction; and for the purpose of working the coals in the parcels contained in the grants, and also for the purpose of carrying away coals in other lands, the defenders had driven through the pursuer's land a level, cutting the several seams of coal at a considerable angle. The strata, other than the coal, through which the level was driven, were of no marketable value.

The action (by the proprietor of the land against the mine owners) was for an interdict (or injunction) against carrying through this level, or through any other mine under the land, any coal from outside the lands contained in the three grants, except on payment of a wayleave.

The House decided (in affirmance of the decision of the Court of Session, who had affirmed the judgment of the LORD ORDINARY) that, so far as relates to the parcel of land contained in the grant of 1827, the mine owners were entitled to make their mine through any of the underground strata, whether consisting of minerals of any commercial value or not, and, the mine (or level) having been made, to use it for carrying away minerals wherever got: but that, so far as relates to the parcels contained in the grants of 1825 and 1857, the mine-owners had no proprietary right in the minerals other than the coal, and consequently had no right to cut through the strata other than the coal, or to use any levels or mines so cut, except by way of easement for the purpose of getting the coal reserved by those grants. The result was that the interdict was granted, except as to any mines under the land contained in the grant of 1827; an exception which was probably useless to the defenders, who were sufficiently blocked by the strata not consisting of coal in the land contained in the grants of 1825 and 1857. Lord HATHERLEY, in his judgment, takes occasion to explain the grounds of the decision in the *Duke of Hamilton* v. *Graham* as follows: "In the case of *Duke of Hamilton* v. *Graham* it was clearly pointed out what the exact right of a proprietor was in respect of a property excepted out of a demise; and as to which, therefore, all the original rights of the demising proprietor remained, together with all the incidents to that property necessary to its working and enjoyment, that which the owner has reserved to himself being as much his as other parts of his land of which he has made no demise whatever. In the *Duke of Hamilton's*

Case it did not appear from the evidence that he was exceeding his right; it did not appear that he was using for any purpose whatever anything but that portion of the mineral property which he had actually reserved, and over which he had entire and complete *dominium;* and, therefore, it was held that he was not transgressing his own grant, or departing in any way from it. But as respects the power of working, whether incidental to the reservation of the property, or expressly specified in the instrument, no right of property is attached to that — it is simply a right of availing yourself of that property which you have reserved to yourself in the lands in question."

In the case of *Ballacorkish, &c. Mining Co.* v. *Harrison* (an appeal from the Isle of Man, 1873), L. R. 5 P. C. 49, it was held that all mines and minerals being vested in the Crown, as successor to the lords of the Isle and under their original title to the soil, the lessees of the Crown could not be restrained, at the instance of the farm tenants, from working the mines so as to intercept (on the principle of *Chasemore* v. *Richards,* 1 R. C. 729) all water finding its way by percolation through the soil.

In *Cooper* v. *Crabtree* (1882), 20 Ch. D. 589, 51 L. J. Ch. 544, 47 L. T. 5, 30 W. R. 649, the principal case of *Bowser* v. *Maclean* is cited by the MASTER OF THE ROLLS as an instance of a special class of cases where there is an injury to the reversion which may be restrained by an injunction, although the damages to be obtained in an action may be nothing. The case there was distinguished, being a mere trespass consisting of the erection of a hoarding of an obviously temporary character.

In *Powell* v. *Vickerman* (4 Feb. 1889), 3 Times L. R. 358, the plaintiff and defendant were tenants in common of certain seams of coal and culm, and the defendant held an express grant of the right to get his share of those minerals. The seam being only eighteen inches in height, the defendant worked it — as was necessary — by galleries cut partially into mineral substances not reserved. He used these galleries also for the purpose of working coal belonging to himself from an adjoining property. Mr. Justice KEKEWICH held that he was not entitled to do this, and observed that the cases of *Eardley* v. *Granville*, *Ramsay* v. *Blair*, and *Hamilton* v. *Graham*, *supra*, were not inconsistent with this decision.

In *The Attorney-General* v. *Welsh Granite Co.* (1887), 35 W. R. 617, certain waste lands in Wales were, under an Inclosure Act, allotted, an allotment being made to the King in respect of his rights as lord. The Act gave the Commissioners of Woods and Forests the right to sell this allotment subject to the rights of the King to the "mines, ores, minerals, coal, limestone, or matter whatsoever in or under the same,"

and by a proviso reserved to the King his rights to "any mines, ores, minerals, coal, limestone, or slate" in the waste land, and gave a right of compensation to the owners of the land for any damage done in digging, raising, and carrying away such mines, &c. It was held that the word "minerals" in these reservations included granite; and that the Crown was entitled to win the granite by open workings.

AMERICAN NOTES.

A grant of a mine with mining privileges is not an easement, but carries a freehold. *Caldwell* v. *Fulton*, 31 Penn. State, 475; 72 Am. Dec. 760; *Zinc Co.* v. *Franklinite*, 13 New Jersey Equity, 341; *Knight* v. *Ind. Coal Co.*, 47 Indiana, 105; 17 Am. Rep. 692, to the effect that in this country a grant or exception of the ores of an unopened mine is regarded as a grant of a part of the inheritance, the deed and its registration supplying the place of livery of seisin. See *Lillibridge* v. *Lackawanna C. Co.*, 143 Penn. St. 293; 24 Am. St. Rep. 544; *Forbes* v. *Gracey*, 94 United States, 762.

The owner of a ranch, conveying a portion of it, reserved the oils and minerals, with the right to do whatever was necessary to obtain and transport them, including the erection of machinery and laying of pipes. It was held that having also acquired the oils and minerals in the rest of the ranch, he was not authorized to use the land first conveyed for pumping or storing oil found in the other portions of the ranch. *Dietz* v. *Mission Transfer Co.*, 95 California, 92.

The owner of mining rights cannot use the surface for converting coal into coke. *Williams* v. *Gibson*, 84 Alabama, 228; 5 Am. St. Rep. 368.

Where a landowner has conveyed the coal under his land by grant, the grantee owns the coal, but nothing else save the right of access to it and the right to remove it, and when it is all removed, his estate ends, and the space it occupied reverts to the grantor by operation of law. *Chartiers' B. M. Co.* v. *Mellon*, 152 Penn. State, 286; 34 Am. St. Rep. 645. The Court said: "Our question is over the right of the vendor to reach strata underlying a stratum which he has conveyed to another. Having sold the coal underlying the surface, is he to be forever barred from reaching his estate lying beneath the coal? Prior to the sale of the coal his estate, as before observed, reached from the heavens to the centre of the earth. With the exception of the coal his estate is still bounded by those limits. It is impossible for him to reach his underlying estate, except by puncturing the earth's surface and going down through the coal which he has sold. While the owner of the coal may have an estate in fee therein, it is at the same time an estate that is peculiar in its nature. Much of the confusion of thought upon this subject arises from a misapprehension of the character of this estate. We must regard it from a business as well as a legal standpoint. The grantee of the coal owns the coal but nothing else, save the right of access to it and the right to take it away. Practically considered, the grant of the coal is the grant of a right to remove it. This right is sometimes limited in point of time; in others it is without limit. In either event it is the grant of an estate deter-

minable upon the removal of the coal. It is, moreover, a grant of an estate which owes a servitude of support to the surface. When the coal is all removed the estate ends for the plain reason that the subject of it has been carried away. The space it occupied reverts to the grantor by operation of law. It needs no reservation in the deed because it was never granted. The grantee has the right to use and occupy it while engaged in the removal of the coal, for the reason that such use is essential to the enjoyment of the grant. It cannot be seriously contended that after the coal is removed the owner of the surface may not utilize the space it had occupied for his own purposes, either for shafts or wells, to reach the underlying strata. The most that can be claimed is that pending the removal, his right of access to the lower strata is suspended. The position that the owner of the coal is also the owner of the hole from which it has been removed, and may forever prevent the surface owner from reaching underlying strata, has no authority in reason, nor do I think in law. The right may be suspended during the operation of the removal of the coal to the extent of preventing any wanton interference with the coal mining; and for every necessary interference with it the surface owner must respond in damages. The owner of the coal must so enjoy his own rights as not to interfere with the lawful exercise of the rights of others who may own the estate, either above or below him. The right of the surface owner to reach his estate below the coal exists at all times. The exercise of it may be more difficult at some times than at others, and attended with both trouble and expense."

No. 7.— TOWNLEY *v.* GIBSON.

(1788.)

RULE.

THE word "soil," as used to describe the property of the lord in the waste of a manor, *primâ facie* includes the surface and all that is below it; and where an allotment is made under an Inclosure Act of part of the waste to the lord in lieu of his interest in the soil, and of the residue to tenants of the manor, a general saving clause to the lord of seigniories, rents, &c., does not operate as a reservation to the lord of the mines and minerals under the allotments made to the tenants.

Townley v. Gibson and Others.

2 Term Reports, 701–707 (1 R. R. 600).

Inclosure Act. — Reservation of Seigniories, &c. — No reservation of Mines.

Where by the terms of an Inclosure Act, for inclosing the wastes of a [701] manor, a certain portion was to be allotted to the lord in lieu of his right and interest in the soil, and the residue was to be allotted to the several tenants in fee, discharged from all customary tenures, &c.; a saving clause, reserving to the lord all seigniories incident to the manor, and all rents, fines, services, &c., and all other royalties and manorial jurisdictions whatever, will not reserve mines under the allotments made to the tenants, though it appear there was a subsisting lease of such mines at the time the Act passed, granted by the lord of the manor.

This cause was tried at the last Lancaster Assizes before THOMSON, B.; when the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case. The plaintiff at the time of the trespass was in the possession of the closes in which and under which the mines in question are; which closes were formerly part of the waste lands of the manor of Yealand, in the county of Lancaster, and were allotted to the plaintiff's ancestor, George Townley, by the award made under an Act of the 17 Geo. III., c. 79, for inclosing the waste lands; and Mrs. Sarah Gibson, under whom the defendants derive title, was at the time of passing that Act seised in her demesne as of fee of the said manor of Yealands, and of all the waste lands lying within the manor, subject to certain rights of common. Many tenements within the manor were formerly enfranchised by Robert Gibson, deceased; but there are nine customary tenements still remaining unenfranchised, lying dispersedly in different parts of the manor, and containing in * the whole about three or four [* 702] acres of land. The case then set out several leases reserving rent, made by former lords, of the wastes, and the mines and the minerals thereunder; the last of these by which the mines only were demised was granted on 28th Feb., 1757, to hold from the 25th of the ensuing March for 21 years. Upon the granting of the last-mentioned lease to one Tissington, the mines were worked, and continued to be so till some time in the year 1759; but from that period the lessee discontinued the works. In the year 1777 an Act of Parliament, entitled "An Act for dividing and inclosing the common and waste grounds, and certain common

fields, and also two mosses called Waitham-moss and Hilderstone-moss, within the manor of Yealands, in the parish of Warton, and county palatine of Lancaster," was obtained for inclosing the waste lands, &c., within the said manor of Yealands, upon the terms and under the provisions therein set forth; which Act, amongst other things, contains the following clauses, viz., "That the commissioners shall set out, allot, and assign, unto the said Sarah Gibson 20 statute acres of the said common and waste grounds, in lieu of and as a compensation for her right and interest in and to the soil of the residue of the said common and waste grounds respectively. And then the said commissioners shall allot and assign the residue of the said common and waste grounds unto, for, and amongst, the said Sarah Gibson, for and on account of her messuages, tenements, lands, and hereditaments, within the said manor, in respect whereof she is entitled to right of common upon the same common and waste grounds, and the said George Townley, George Gray, and the several other persons, and bodies politic and corporate, having right of common or other right, interest, property, or privilege, thereon, and to her heirs, assigns, and successors respectively, forever, according and in proportion to their several and respective rights, &c." A subsequent clause directed that "all and every the allotments, &c., to be made under the Act, should be vested in fee simple in the several and respective persons, &c., to whom the same should be set out or allotted, and their heirs, assigns, and successors respectively, for ever, absolutely freed and discharged of and from all customary tenures, rents, fines, boons, and services whatsoever; and that the several shares or allotments, so to be set out as aforesaid, should be in lieu of and in full compensation and satisfac-
[* 703] tion * for all rights of common, and other former property, privilege, right, &c., and that all right of common, together with all former rights, interests, profits, &c., in and upon the same, should from and immediately after that time cease, and be forever barred and extinguished; provided always, and it was further enacted, that nothing in that Act contained should extend to prejudice, lessen, or defeat the right, title, or interest, of the said lady of the said manor, her heirs or assigns, of, in, or to the seigniories incident or belonging to the said manor; but that she and they and every of them should and might at all times thereafter hold and enjoy all rents, fines, services, courts, perquisites,

and profits of courts, goods, and chattels, of felons and fugitives, felons of themselves and put in exigent, deodands, waifs, estrays, forfeitures, and all other royalties and manorial jurisdictions whatsoever, in and upon the said common and waste grounds, thereby intended to be inclosed as aforesaid, to the said manor, or the lord or the lady thereof for the time being, incident, appendant, belonging, or appertaining, and the same in as full, ample, and beneficial manner, to all intents and purposes, as she or they might or could have held and enjoyed the same in case this Act had not been made." At the time of passing the Act, the term in Tissington's lease was unexpired. Allotments were also made to the said Sarah Gibson in pursuance of the said Act.

Ainsley for the plaintiff. — The question is, Whether the lord of the manor be entitled to the mines under the clause of reservation in the Act allotting the inclosures to the several tenants of the manor. That part of the case which sets out the leases only goes to prove that the defendant's ancestors were lords of the manor, and that they were entitled to the soil in the wastes before the passing of the Act. But by the first clause it appears that the commissioners were to set out 16 acres to the lady of the manor, in lieu of and as a compensation for her right and interest in the soil of the residue of the waste grounds: and on the other hand, all the allotments to the several tenants are to be in fee; which the Act declares shall be a full compensation for all rights of common, and other former property, privilege, right, title, interest, claim, and demand whatsoever. If the Act had stopped here, there could have been no doubt but that the lady of the manor would have had no right whatever to the mines in these allotments. *But if the clause of reservation entitled her [*704] to them, and a right still remained in her of digging in those inclosures without making any allowance for the injury sustained by the owner of the soil, all the purposes of the Act would be defeated. It will be argued from this latter clause, that the intention of the parties is apparent that the mines were to be reserved to the lady of the manor; but upon examination the operation of that clause will be found to be very different, for it only provides that she shall suffer no prejudice as to her right to all seigniories incident to the manor, and that she shall still enjoy all rents, fines, services, &c., and other royalties and manorial jurisdictions; but there is nothing in that clause which has the least

reference to the soil of the manor; and the particular enumeration of the several things intended is decisive that mines were not intended to be reserved, otherwise they would have been mentioned. The word " seigniories " in the former part of the clause is explained and defined by the words which follow, and can only mean things of the same nature as those mentioned.

Topping, *contra.* — This being a private Act, passed at the requisition of the parties concerned, is to be construed like all other private agreements; and consequently the Court will consider the probable intention of the parties, to be collected from the situation and state of their several rights, at the time when the Act passed. The ancestor of the defendant was the lady of the manor in which these copyhold tenements are, and therefore, as such, she would have been entitled not only to the mines under the wastes, but also under the copyhold inclosures, unless there had been some custom to exclude her. The right in these mines too existed in the lady separate from the interest in the soil, as appears from the leases of the mines stated in the case; which show that the right of digging for mines was in fact exercised by the lords of the manor from 1714 to 1757, and during the continuance of the latter of these leases the Act in question passed. He admitted that the words in the first clause were large enough to comprehend mines, if such had been the intention of the parties; but that could not have been so intended, for then the subsisting lease would have been affected, and the rents thereby reserved, which certainly could not have been intended, inasmuch as they are reserved expressly by the word " rents " in the saving clause; there being no [* 705] other rents stated in the case to * which that word can relate. In *Kaye* v. *Laxon and others*, 1 Bro. Ch. Cas. 76, a bequest of leasehold ground rents was held to pass the ground itself out of which the rents issued. So here, there being a reservation of rents to the lord, the right to the mines themselves out of which the rents issued will be also reserved to him. Besides, there are other words in the saving clause which are sufficiently comprehensive to reserve this right of digging for mines, such as " seigniories " and " royalties. " — If, therefore, the mines had been intended to be taken out of the lord, there should have been express words for that purpose.

Ainsley, in reply, was stopped by the Court.

Lord KENYON, Ch. J. — I agree that private Acts of Parliament

are to be construed according to the intention of the parties, but then that intention must be collected from the words used by the Legislature, without doing violence to their natural meaning. The defendant's counsel has supposed that mines are a distinct right from the right to the soil: but I do not think so, where they are under the land of the lord of the manor. In cases of copyholds, a lord may have a right under the soil of the copyholder: but where the soil is in the lord, all is resolvable into the ownership of the soil; and a grant of the soil will pass everything under it. The only word, in the saving clause, which affords any ground for argument, is the word "rents;" but when we see how that word is used with the others in that part of the Act, it cannot be taken to include mines. At the time of passing this Act of Parliament, the mines under the waste ground were in the lady of the manor as part of the demesnes; she intended to give up several rights to the tenants, for which she has reserved a satisfaction. Then how do the tenants hold their allotments under the Act? They could not take as copyholders, unless the Act of Parliament had so directed: but they take their allotments as freehold estates of inheritance. It is extremely clear that no new tenure can be created, unless by the authority of Parliament, since the statute of *quia emptores*, 11 Ed. I., c. 1, nor can any person reserve to himself a right of escheat. Then it was urged by the defendant's counsel that the Act of Parliament could not affect the lease which was in existence when it passed; it certainly would not; neither would it have been affected if the lady had sold her estate in the manor, but the alienee would have become the landlord, and entitled to * the beneficial interest reserved by [*706] the lease; so here the lease will remain valid, but the right to the rents of the mines will pass to the person in whose favour the allotment was made under the Act. For we cannot narrow the words of this Act, and that transfers all the right in the soil to the several tenants. There is no doubt but that the mines might have been reserved. If it had been so intended, it would have been by express words; but there is no such reservation here. The word "rents" is explained by the other words used; but those rights which are reserved are mere badges of royalty, incorporeal rights, and other fruits of tenure of the like sort.

ASHHURST, J. — It does not appear to me that mines were in-

tended to be reserved to the lady of the manor. The object of an enclosure is, that the lord of the manor in respect of his seigniory and waste should have some part of the ground to be allotted to himself in lieu of his manorial rights; and the other lands are allotted to the proprietors of the enclosed lands within the manor; and these are not made copyholds, but the grantees take them as freeholds of inheritance. Therefore, *primâ facie*, they are entitled to all mines, &c., belonging to the land. Then what is there in this case to take them out of the grantees, and vest them in the lord? The saving clause only amounts to what, perhaps, the law would otherwise have reserved without such a clause; for as the rights reserved are of an incorporeal nature, they would still have remained in the lady, because there is nothing in the Act to divest her; but they have nothing to do with the soil or freehold in which mines are included.

BULLER, J. — The general object of this enclosure Act was to extinguish all the antecedent rights of the several parties interested, and to create others in lieu of them; in doing which it was thought right to make particular exceptions. Now when the Legislature have made some exceptions, we cannot imply others which they have not made. As to the lease which did not expire till a year after the Act passed, it probably was not thought of by either party at the time; the mine had not been worked since the year 1759; it was perhaps, therefore, abandoned, and not thought to be of any value for the short remainder of the term. However, the Court cannot carry the exception beyond the words of the Act, and all the reservations are of incorporeal rights. By the general words the soil passed by the allotments to the several pro-
[* 707] prietors, and mines are considered * as part of the soil. I do not agree with the defendant's counsel, that the lord may, unless restrained by custom, dig for mines on the copyholder's lands: but it is not necessary to consider that question here.

GROSE, J. — It is extremely dangerous to construe either deeds or Acts of Parliament according to supposition. The question here is, Whether, under this Act of Parliament, the mines passed to the tenants? The soil undoubtedly passed; now what are the mines but part of the soil? And everything which was intended to be reserved to the lady of the manor is expressed; and all those rights are incorporeal hereditaments, and not like mines.

Then not only the general words under which the allotments were made are large enough to carry mines, but the subsequent exception is not broad enough to save them. At the same time it is rather extraordinary that so valuable a part of the property as mines should not have been expressly reserved to the lady of the manor, if it had been so intended. *Postea to the plaintiff.*

ENGLISH NOTES.

In the case of *Wakefield* v. *Buccleuch* (1870), L. R. 4 H. L. 377, 39 L. J. Ch. 441 (appeal from *Duke of Buccleuch* v. *Wakefield*), there was, under the Inclosure Act in question, an express reservation to the lady of the manor (the respondent's predecessor) of the mines and minerals under the waste; and, having regard to this reservation, it was held that the commissioners had no power to make an allotment to any other person so as to include the minerals. The reservation to the lord, under the Act, of the mines and minerals was accompanied by express and particular powers as follows: "with full and free liberty, power, and authority to and for the said duchess, and the person or persons, for the time being so entitled as aforesaid, and all persons licensed or authorised by her or them from time to time, and at all times for ever hereafter, and in all seasons of the year, to enter into and upon the said lands hereby to be directed to be divided and enclosed as aforesaid, or into and upon any of them, or any part or parts thereof, other than and except such part or parts thereof as may be so set out for a stone quarry or stone quarries and watering places for such purposes as aforesaid, to search, bore, and dig for coal, lead, copper, tin, ironstone, and all other mines and minerals whatsoever, and to sink shafts and open veins or quarries in or upon the said lands, or in or upon any part or parts thereof (except as last aforesaid), and to land such coal, lead, copper, tin, ironstone, slate flags, and other minerals to be so gotten as aforesaid, and to lay and deposit the same on the said lands or grounds, and to continue the same thereon so long as she, they, or any of them shall think proper." There were further powers to make cuts and sluices, to build smelting-houses and other buildings, &c.; and then follow the words: "in as full and ample a manner and to all intents and purposes as could and might have been done if the said lands had remained unenclosed as if this Act had not been passed, without any interruptions whatsoever, yet nevertheless making reasonable compensation for damages done by such works as aforesaid to the person or persons sustaining the damage." The learned Lords present (Lord HATHERLEY, L. C., Lord CHELMSFORD, and Lord COLONSAY) held that, the special powers going, as they did, beyond everything that the lord

could have done in absence of these powers, the clause must be construed as in effect a grant and not a mere reservation; and that the powers were not, by the last words of the clause, restricted to things that the lord might have done before the Act. The result was to hold that the reservation conferred on the lord an unlimited right to spoil the surface upon making compensation.

A question as to the presumptive ownership of the soil in a portion of the bed of the river Eden was the subject of contention in the case of *Ecroyd* v. *Coulthard*, 1897, 2 Ch. 554, 66 L. J. Ch. 751. It was proved that the title to a several fishery in the river and to the soil in the bed of the river *usque ad medium filum aquæ* was vested in successive Earls of Carlisle. By an award under an Inclosure Act of 1796 an allotment was made, by measurement, of certain waste land of the manor of which the Earl of Carlisle was lord, adjoining the bed of the river in question; and under this award the defendants claimed the right to the soil of the bed of the river in question *usque ad medium filum aquæ*. In 1890 the Earl of Carlisle conveyed the several fishery to the plaintiff without mention of the bed of the river; and, as the conveyance included the bed of the river in other places, and since the particulars of sale had expressly excluded this part of the bed of the river, it was held that any presumption of intention to include this part of the bed of the river in this grant of several fishery was excluded. The question then came to be whether the defendants could establish their title to this part of the bed of the river. The learned Judge (North, J.) held that they could not; first, because the allotment, being by measurement according to the terms of the Inclosure Act, could not be presumed to include this extra quantity of land; and, secondly, because the bed of the river appeared by the evidence never to have been waste of the manor, but included in the demesne land of the lords (the Earls of Carlisle). The title to this part of the bed of the river was therefore not in either of the parties to the action, but remained vested in the Earl of Carlisle.

No. 8. — LORD PROVOST AND MAGISTRATES OF GLASGOW *v.* FARIE.

(H. L. Sc. 1887.)

No. 9. — MIDLAND RAILWAY CO. *v.* ROBINSON.

(H. L. 1889.)

RULE.

THE words "mines of coal, ironstone, slate, or other minerals" excepted from the lands taken by a Railway Company in accordance with the Railways Clauses Consolidation Act, 1845, have been interpreted as extending to minerals which are ordinarily got by quarrying, but not to include a stratum of clay which forms the immediate subsoil.

Lord Provost and Magistrates of Glasgow v. Farie.

13 App. Cas. 657–699 (s. c. 58 L. J. P. C. 33; 60 L. T. 274; 37 W. R. 627).

Mines and other Minerals. — Compulsory Purchase of Surface. — Whether [657] *Clay is included in "Other Minerals." — Waterworks Clauses Act*, 1847 (10 & 11 *Vict.*, c. 17).

The 18th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict., c. 17), provides that "the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them." The appellants, by virtue of the Act and a conveyance containing a reservation of the "whole coal and other minerals in the land in terms of the Waterworks Clauses Act, 1847," purchased from the respondent a parcel of land for the purpose of erecting waterworks. Under the land was a seam of valuable brick clay. The respondent worked this clay in the adjoining land, and having reached the appellants' boundary, claimed the right to work out the clay under the land purchased by the appellants.

Held, reversing the decision of the Court of Session (14 Court Sess. Cas., 4th Series, 346) (Lord HERSCHELL dissenting), that common clay, forming the surface or subsoil of land, was not included in the reservation in the Act, and that the appellants were entitled to an interdict restraining the respondent from working the clay under the land purchased by them.

Appeal from the First Division of the Court of Session, Scotland.

No. 8. — Lord Provost and Magistrates of Glasgow v. Farie, 13 App. Cas. 657–659.

The Lord Provost and Magistrates of Glasgow, the appellants, raised this action against Allan Farie, the respondent, and proprietor of the lands of Westthorn, near Glasgow, for declarator and interdict that they, as commissioners appointed by and acting under the Glasgow Corporation Waterworks Act of 1855, and Acts explaining and amending the same, are heritable proprietors of two pieces of ground extending to about twenty-one acres, part of the lands of Westthorn, disponed to them by the respondent's predecessor.

[* 658] * The question raised by the action was whether the appellants were the proprietors of a valuable seam of clay forming the subsoil of these twenty-one acres, and entitled to prevent the respondent from working out the same.

The appellants' special Act incorporated the Waterworks Clauses Act, 1847 (10 & 11 Vict., c. 17), and the Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict., c. 19).

By disposition dated the 16th of February, and recorded the 2nd of March, 1871, the respondent's predecessor in the lands, the late James Farie, of Farme and Westthorn, sold to the appellants, in consideration of the sum of £11,000, as the agreed-on price or value of the lands therein disponed, two pieces of ground, described as follows: In the first place, "All and whole that piece of ground lying within the barony parish of Glasgow;" then follow the measurement and boundaries. In the second place, "All and whole that strip or piece of ground," &c., "which two pieces of ground extend together to" nearly twenty-one acres, and are delineated on a plan subscribed by the said James Farie, as relative to the said disposition. The disposition contained this reservation, "excepting always, and reserving to me and my foresaids, the whole coal and other minerals in said lands in terms of the clauses relating to mines in the Waterworks Clauses Act, 1847."

In March, 1885, the respondent had worked the seam of clay to within thirty feet of the boundary of the appellants' land, and intimated to them that, in virtue of the reservation in the conveyance and the 18th section of the Waterworks Clauses Act,[1] he was desirous of working the seam of clay under the ground

[* 659] * acquired by the appellants, and called upon them to

[1] The section is printed in Lord HERSCHELL'S opinion, p. 498 *post*.

state whether they would avail themselves of their right to prevent his working the seam by making compensation.

The appellants maintained that the seam of clay was included in their purchase and did not fall within the terms of the clause of reservation, and raised this action. The respondents maintained that the clay did fall within the reservation in the disposition, and the statute.

The LORD ORDINARY (Lord MCLARENY) decided in favour [662] of the appellants by interlocutor dated the 16th of December, 1885; but this decision was reversed by the Judges of the First Division (the LORD PRESIDENT (INGLIS), Lord SHAND, and Lord ADAM) by interlocutor dated the 21st of January, 1887 (Lord MURE dissenting).

On appeal, the question having been argued by Sir R. E. Webster, A. G., and Balfour Brown, Q. C., for the appellants; and by Sir Horace Davey, Q. C., and E. W. Byrne, for the respondent: —

Judgment after consideration. [668]

Lord HALSBURY, L. C.: —

My Lords, I cannot conceal from myself the importance and the difficulty of the question involved in this case. The consequences * flowing from a decision either way seem to me [* 669] to be very grave, and I desire, therefore, to say at the outset that I wish to decide nothing but what is necessarily involved in the particular case now before your Lordships. That question may be very summarily stated as to whether clay is included in the reservation of mines and minerals under the Waterworks Clauses Act, 1847.

I cannot help thinking that the true test of what are mines and minerals in a grant was suggested by JAMES, L. J., in the case of *Hext* v. *Gill*, L. R. 7 Ch., at p. 719 (p. 447, *ante*), which I shall have occasion hereafter to refer to, and although the LORD JUSTICE held himself bound by authority so that he yielded to the technical sense which had been attributed to those words I still think (to use his language) that a grant of "mines and minerals" is a question of fact "what these words meant in the vernacular of the mining world, the commercial world, and landowners," at the time when they were used in the instrument.

I will not at present say how far I think we are bound by

authority, because, as I have already intimated, I desire to keep myself entirely free if the question should arise in this House with respect to any other statute, or with respect to any grant not controlled by the statute in question in which the words "mines and minerals" occur.

It may be that I am influenced by the considerations to which WICKENS, V. C., referred, *Hext* v. *Gill*, L. R. 7 Ch., note, at p. 705 (p. 434, *ante*), when he said that it might be thought that some inclination had arisen "on the part of Judges to give more weight than ought to have been attributed to some small circumstances of context" in order to cut down the proper and ordinary meaning of the words "mines and minerals." I think no one can doubt that if a man had purchased a site for his house with a reservation of mines and minerals neither he nor anybody else would imagine that the vendor had reserved the stratum of clay upon which his house was built under the reservation of mines and minerals.

There is no doubt that more accurate scientific investigation of the substances of the earth and different modes of extracting them have contributed to render the sense of the word "minerals" less certain than when it originally was used in relation [* 670] * to mining operations. I should think that there could be no doubt that the word "minerals" in old times meant the substances got by mining, and I think mining in old times meant subterranean excavation. I doubt whether in the present state of the authorities it is accurate to say that in every deed or in every statute the word "minerals" has acquired a meaning of its own independently of any question as to the manner in which the minerals themselves are gotten.

MELLISH, L. J., in the case to which I have already referred, sums up the authorities by saying, *Hext* v. *Gill*, L. R. 7 Ch., at p. 712 (p. 440, *ante*), that the word "mines" (to use his Lordship's language) "combined with the more general word 'minerals' does not restrict the meaning of the word 'minerals';" and he says that the result of the authorities appears to be "that a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." I cannot myself assent to such a definition. In the first place it introduces

as one element the circumstance that the substance can be got at a profit. It is obvious to see that if that is an essential part of the definition the question whether a particular substance is or is not a mineral may depend on the state of the market, and it may be that a mineral one year is not a mineral the next.

If, on the other hand, one is to have recourse to etymology or science, and to disregard the mode of working as reflecting any light on the nature of the substance, it is obvious to inquire whether coal is a mineral. Its vegetable origin would to some minds exclude its being regarded as a mineral, while the substance kaolin was held by WICKENS, V. C., *Hext* v. *Gill*, L. R. 7 Ch., note, at p. 705 (p. 434, *ante*), to be a mineral. "According to the evidence, kaolin, or china clay, is a metalliferous mineral perfectly distinguishable from and much more valuable than ordinary agricultural earth, and which produces metal in a larger proportion to its bulk as compared with ordinary ores, but which it was not commercially profitable to work in England for the purpose of extracting metal from it."

* My Lords, the difficulty of dealing with this case is [* 671] not diminished, but rather increased by the state of the authorities upon the question. In *Bennett* v. *Great Western Railway Company*, L. R. 2 H. L. 27, all that was decided in this House was that the common-law principle which would have prevented an owner who had sold his surface land to a railway company from defeating his grant by withdrawing support from the surface land so used, did not apply to a state of things created by the statute in which the statute itself creates the distinction between the surface owner and the mine owner, and gives power to the mine owner to work his minerals unless the railway company purchases or gives compensation to the mine owner for leaving his mines unworked. In that case it was admitted that the word "minerals" was properly applicable to the substances to be worked, and the only question was the application of the common-law principle to which I have adverted. But the Legislature must have meant something by the distinction which it recognises and acts upon in drawing the distinction which, as matter of business and understanding in the mining and commercial world, I think every one must be familiar with.

My Lords, it appears to me that the effect of some of the deci-

sions pushed to their logical consequences would be altogether to efface the distinction which all the statutes recognise. One might summarise these decisions and say a mineral need not be metallic. It need not be subjacent; it need not be worked by a mine; it need not be in any one particular distinguished from any part of the substance of the earth, using the word "earth" as applicable to every portion of this habitable globe. Even the word "organic" must be rejected if referred to some of the substances which form part of the earth. The bones of extinct animals are limestone, and as curiosities for research and scientific inquiry would find a ready market, and would therefore come within that part of the definition which requires that they should be capable of being profitably worked. Are they minerals?

My Lords, I find myself called upon to construe these words with reference to the known usage of the language employed in distinguishing proprietary rights in Scotland, and hav-
[* 672] ing relation * to Scotch land and Scotch mines or minerals. I am not insensible to the observation that this is only one of a group of statutes which may be supposed to have had the same object, and might be, therefore, assumed to use the same phraseology in the same sense. Still I am construing the application of general words to a purchase under the statutes made in Scotland, and if there be any difference in the law of Scotland from that of England the Legislature must be supposed to have been familiar with it and to have legislated accordingly.

Now the case is stated by the LORD ORDINARY thus: "Here the thing which the defender claims to work is the common clay which constitutes the subsoil of the greater part of the land of this country, which never can in any locality be wrought by underground working, but, under all circumstances, is only to be won by tearing up and destroying the surface over the entire extent of the working. When such a right is claimed against the owner of the surface, I ask myself, Did any one who wanted to purchase or acquire a clay-field, whether by disposition or reservation, ever bargain for it under the name of a right of working minerals? In the case of a voluntary sale of land with reservation of minerals, I am satisfied that we should not permit the seller to work the clay to the destruction or injury of the purchaser's estate, because we should hold that the conversion of the estate into a clay-field

was not within the fair meaning of the reservation. That being so, I see no reason for concluding that the statutory reservation of minerals means anything different from a reservation of minerals in a private deed. The consequences of the reservation are different, but the thing to be reserved is to my mind essentially the same, being neither more nor less than the right to work such substances and strata as are ordinarily known by the denomination of minerals in contracts between sellers and purchasers, or superiors and feuars."

My Lords, if that is the correct view, and I find myself unable to differ from it, I think the case of *Lord Breadalbane* v. *Menzies*, 1 Shaw Ap. 225, is a binding authority in this House. There the words were "haill mines and minerals of whatsoever nature or quality," and were held not to include a vein of stone suitable for building.

* I feel it impossible to resist the reasoning of Lord [* 673] MURE[1] in this case, but I hold myself free if the question should arise in England to consider quite independently of this decision what may be the law as applicable to an English case. I only regret that the test which JAMES, L. J., suggested, and which I think would have been the true one, and would have satisfied all difficulties, was not adhered to in *Hext* v. *Gill*, L. R. 7 Ch., at p. 719 (p. 447, *ante*). In that case, as I have pointed out before, the substance which was called china clay was assumed to be metalliferous ore, and it was held that though the lord of the manor had reserved it he could not work it, because he had not also reserved a right so to work it at the expense of the surface owner.

My Lords, I hesitate very much to adopt the reasoning of that case, notwithstanding the high authority by which it was decided.

I am satisfied with the view so clearly put forward by Lord MURE,[1] and upon the reasoning of that learned Lord's judgment I move your Lordships that the interlocutor appealed from be reversed.

Lord WATSON:—

My Lords, the question raised for decision in this appeal, which is one of general importance, has led to differences of judicial

[1] 14 Court Sess. Cas., 4th Series, at p. 354.

opinion in this House, as well as in the Court of Session. For my own part, I have experienced considerable difficulty in forming an opinion upon it, owing to the very indefinite terms which the Legislature has used to describe the minerals reserved by statute to proprietors whose land is compulsorily purchased, for the purposes of railway or waterworks undertakings. The present controversy is between a statutory body of water commissioners, and a landowner who is now asserting his right to work out a seam of clay within a parcel of ground, about twenty-one acres in extent, which they acquired from him, under compulsory powers, in the year 1871; but the question which your Lordships have to consider would, in my opinion, have been precisely the same if the purchasers had been a railway company.

The Court below disposed of the case without inquiry [* 674] into the * facts, and these must consequently be gathered from the statements made by the parties on record, which are, unfortunately, in some respects, conflicting. It appears, however, and it was assumed in the arguments addressed to us, that the seam in dispute is composed of ordinary subsoil clay, such as is generally found throughout the district: that it lies at a depth of not more than two or three feet below the surface of the soil: that it is of considerable, but variable, thickness, and that it has been wrought open cast by the respondent in close proximity to the appellants' land, where its extreme thickness has proved to be from twenty to thirty feet. Since their acquisition of the ground the appellants have constructed upon it two reservoirs, each capable of storing nearly 4,000,000 gallons of water, which have been sunk into, and now rest upon, the clay.

The 18th section of the Waterworks Clauses Act, 1847, is identical, *mutatis mutandis*, with sect. 77 of the English, and sect. 70 of the Scotch, Railways Clauses Act of 1845. [His Lordship read the section.[1]] The Act of 1847 is a British statute, whereas there is separate railway legislation for England and Ireland on the one hand and Scotland on the other; but it does not appear to me to admit of doubt that the Legislature intended the words "mines of coal, ironstone, slate, or other minerals" to have the same meaning in all three countries.

In considering whether subsoil clay, such as we have to deal

[1] The section is printed in Lord HERSCHELL'S opinion, p. 498, *post*.

with in the present case, is one of the " other minerals " meant to be excepted, I have been unable to derive much assistance from such authorities as *Menzies* v. *Earl of Breadalbane*, 1 Shaw Ap. 225, in which it was held that the reservation by a superior, in a feu-contract, of the " haill mines and minerals " that might be found within the lands disponed in feu, did not give him right to a freestone quarry. Irrespective of other considerations which differentiate that case from the present, there is little analogy between a reservation of minerals coupled with an obligation to support the surface, and a reservation not only of the minerals, but of the right to work them without giving support. Nor have I been able to obtain much light from *Hext* v. *Gill*, L. R. 7 Ch. 699 (p. 429, *ante*), and other English * cases referred [* 675] to in the opinion of Lord SHAND, which his Lordship seems to regard as almost decisive of the present question. The only principle which I can extract from these authorities is this; that in construing a reservation of mines or minerals, whether it occur in a private deed or in an Inclosure Act, regard must be had, not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or act embodies. " Mines " and " minerals " are not definite terms: they are susceptible of limitation or expansion, according to the intention with which they are used. In *Menzies* v. *Earl of Breadalbane*, Lord ELDON observed, (1 Shaw Ap. at p. 228,) that the reservation " is not contained in a lease, but in a feu; and I take it, there is a very great difference as to the principles that are to be applied to the construction of a feu and a lease — it is a question of a very different nature." In *Hext* v. *Gill*, L. R. 7 Ch. 699 (p. 429, *ante*), the controversy, which related to china clay, worked for the purposes of obtaining the felspar which it contained, arose between the lord of the manor and the purchaser of the freehold of a copyhold tenement within the manor, under a contract which excepted " all mines and minerals," and in these circumstances it was sufficiently clear that the copyholder had only right to the surface, and had no right to minerals of any kind.

I need not refer in detail to the provisions of the Waterworks and Railways Clauses Acts which follow, and are connected with the sections of these Acts already noticed. The relation which

they establish between seller and purchaser in regard to all minerals which may be held to be excepted, appears to me to be, as Lord WESTBURY said in *Great Western Railway Company* v. *Bennett*, L. R. 2 H. L. 42, clearly defined, useful to the railway company or waterworks undertakers, and at the same time fair and just to the mine owner. The latter, who is forced to part with the surface of his land and all uses for which it is available, is not compelled to sell his minerals, whilst he is not in a position to ascertain their marketable value or the impediments which might be occasioned to the convenient working of his [* 676] mineral field by * his parting with a strip which intersects it. On the other hand those who deprive him of the right to a portion of the surface and its uses by compulsory purchase enjoy the benefit of subjacent and adjacent support to their works without payment so long as the minerals below or adjoining these works remain undisturbed; but it is upon the condition that if they desire such support to be continued they must make full compensation for value and intersectional damage whenever the minerals required for that purpose are approached in working, and would in due course be wrought out.

It appears to me that the policy of the Acts in excepting certain minerals from conveyances to compulsory takers of land, favours a liberal and not a limited construction of the reservation to the seller. The difficulty which I have felt in construing their enactments is due to the fact that they do not deal with " minerals " as something which may be different from and additional to " mines." They do not except mines and minerals, but mines of coal, ironstone, slate, and other minerals; that is to say, they only except minerals which when worked will constitute " mines " within the meaning of sect. 18 of the Waterworks Clauses Act of 1847, and of the corresponding sections of the Railways Clauses Acts. It therefore becomes necessary to consider What meaning ought in these sections to be attributed to the word " mine " ? and also What are the " other minerals," mines of which are specially excepted ? The solution of the second of these queries must necessarily be in a great measure dependent upon the answer to be given to the first.

There is a class of cases in the English books which determine that the word " mine " is, according to its primary meaning, significant merely of the method of working by which minerals are

got; but that is not its only or necessary meaning. Shortly after the passing of the Act 43 Eliz., c. 2, it was established by a series of decisions, the soundness of which has been often doubted, that occupiers of mines other than coal mines are exempted from the incidence of the poor-rate. That point being settled beyond recall, the Courts gave a restricted meaning to the word "mine," and decided that in the sense of the Act of Elizabeth it must be taken to be a subterranean excavation. It was accordingly held * that persons who worked lead, freestone, [* 677] limestone, or even clay by means of a shaft and underground levels were not liable to be rated in respect of their occupancy; whilst others who worked the same substances by means of excavations open to the light of day were held to be liable as occupiers of land. I do not suggest that the Courts erred in limiting so far as they could the exemption which for some reason or other had been established; but I may venture to express a doubt whether any such exemption or distinctions with regard to the mode of working would have been recognised if the Act of 1601 had not become law until the year 1847.

I am unable to assent to the appellants' argument that in sect. 18 of the Waterworks Clauses Act, "mines" must be understood in the same sense which it has been held to bear in the statute of Elizabeth. Such may have been its original meaning; but it appears to me to be beyond question that for a very long period that has ceased to be its exclusive meaning, and that the word has been used in ordinary language to signify either the mineral substances which are excavated or mined, or the excavations, whether subterranean or not, from which metallic ores and fossil substances are dug out. It does not occur to me that an open excavation of auriferous quartz would be generally described as a gold quarry; I think most people would naturally call it a gold mine. The whole frame of sect. 18 indicates, in my opinion, that the Legislature intended it to include minerals got by open working, as well as minerals got by what has been termed mining proper. The clause excepts mines of slate and also of "other minerals" — an expression which must, at the least, include rock strata of the same homogeneous character, and generally worked or capable of being worked by the same methods as slate.

The fact is of sufficient notoriety to be noticed here, that, although in the extreme south-west of the island slate is obtained

by subterraneous workings, the reverse is the rule in North Wales and in Scotland, where it is quarried. The word "quarry" is, no doubt, inapplicable to underground excavations; but the word "mining" may without impropriety be used to denote some quarries. Dr. Johnson defines a quarry to be a stone mine.

[* 678] In * framing sect. 18 and the corresponding railway clauses, the Legislature plainly intended that waterworks undertakers and railway companies should, at the time when they take land by compulsion, pay full compensation for, and become at once proprietors of all surface and other strata which are not excepted. To adopt in these clauses the same construction of "mines" which has been followed for the purposes of the English poor-rate would, in my opinion, lead to consequences which the Legislature cannot have contemplated. In that case, the extent to which minerals in the lands were sold or excepted at the date of the conveyance would depend upon the mode, underground or open cast, by which they might be found, at some future and far distant time, to be workable, or upon the method according to which the landowner might then choose to work them. These factors being indeterminate, it would be well nigh impossible at the date of the purchase to arrive at a fair estimate of the compensation payable for it. I cannot conceive that the Legislature in using the expression "mines of slate," meant to distinguish between the different methods of getting it, and to enact that slate which may never be disturbed, shall be taken and paid for at once, if it would naturally be quarried, but shall not be taken and paid for until it is actually worked, if it would naturally be got by means of an underground level. It was certainly within the contemplation of the Legislature that water or railway works may rest upon excepted minerals; because it is expressly provided that the undertakers or the company are to be entitled to such parts of these minerals as require to be excavated for the purpose of constructing their works. When a railway company or water undertakers excavate in order to obtain a foundation for their works there is no roof to the excepted minerals; and it is difficult to understand how, in these circumstances, they could be got by proper mining.

I am accordingly of opinion that, in these enactments, the word "mines" must be taken to signify all excavations by which the excepted minerals may be legitimately worked and got. If coal, ironstone, or slate crops out at any part of the surface taken for

waterworks or railway purposes, the undertakers or the company acquire, in my opinion, no right save the right to use that * part of the surface; they acquire no right to the minerals [* 679] themselves except in so far as these are dug out or excavated, in order to construct their works. The important question still remains, What are the minerals referred to, other than coal, ironstone, or slate? My present impression is that "other minerals" must necessarily include all minerals which can reasonably be said to be *ejusdem generis* with any of those enumerated. Slate being one of them, I do not think it would be possible to exclude freestone or limestone strata. I may add that, so far as I can see, it is possible that there may be some strata which would pass to the compulsory purchaser, if they lay on the surface, but may possibly be reserved to the seller, if they occur at some depth below it. But I desire to say that, in the view which I take of the present case, it is not necessary to determine any of these points.

The enactments in question describe the excepted mines of minerals, as lying under the land compulsorily acquired; and they appear to me to contemplate that the purchasers, as soon as they obtain a conveyance, shall become the owners of "the land." That expression, as it occurs in these enactments, obviously refers to surface; and the question therefore arises, What, in ordinary acceptation, is understood to be the surface crust of the earth which overlies its mineral strata? It is, of course, conceded that vegetable mould, which commonly forms a large ingredient of the topmost layer of the crust, is not within the exception; but it is also the fact that, in many districts, the cultivable soil is mainly composed of clay, which is a mineral, in this sense, that it is an inorganic substance. I have come to the conclusion that the expression "the land" cannot be restricted to vegetable mould or to cultivated clay: but that it naturally includes, and must be held to include, the upper soil including the subsoil, whether it be clay, sand, or gravel; and that the exceptional depth of the subsoil, whilst it may enhance the compensation payable at the time, affords no ground for bringing it within the category of excepted minerals.

I am accordingly of opinion that the interlocutor of the First Division of the Court of Session ought to be reversed, and that of the LORD ORDINARY restored.

[* 680] * Lord HERSCHELL: —

My Lords, I have the misfortune to differ from the rest of your Lordships, who heard the arguments in this case. I confess that my mind has wavered much as to the proper conclusion to be arrived at, and I need hardly say that I have the less confidence in my opinion when I find it differs from those which your Lordships entertain.

The point for decision in this case is a simple one, and may be shortly stated, but to my mind it is one of very considerable difficulty. The appellants in 1871 purchased a piece of land, for the sum of £11,000, from a predecessor in title of the respondent for the purpose of constructing works authorised by the Glasgow Corporation Waterworks Act, 1866, and have constructed their works upon it. The disposition to the appellants contained a reservation in favour of the sellers of "the whole coal and other minerals in the said lands in terms of the Waterworks Clauses Act, 1847."

The Act just named, which is incorporated with the appellants' private Act, under which the land was purchased, provides (sect. 18) "that the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

I may observe here that I cannot accede to the view that the present case is to be dealt with as if the "coal and other minerals" had been reserved to the respondent by the operation of the disposition alone without regard to the statutory provision I have quoted. It appears to me that whatever the statute excluded from the purchase was excluded in the present case, and that the issue between the parties depends entirely upon the construction to be put upon the statute in relation to the circumstances before us.

Within and under the lands purchased, and the adjoining
[* 681] lands, there is a seam of clay which the respondent * had been for some time working in the adjoining lands, and in March, 1885, he intimated that he was desirous of working it under the ground acquired by the pursuers, and called upon them

to state whether they would avail themselves of their right to prevent his working the seam by making them compensation therefor in terms of the Waterworks Clauses Act, 1847. Hence the present action, the appellants insisting that the clay was included in their purchase, and that the respondent had no title to it.

In the 4th condescendence it is alleged that the seam of clay lies at an average depth of only two feet below the surface, and that it can be worked only by open workings, which would destroy or endanger the appellants' works. This is not admitted by the answer, which alleges that the clay in the ground adjoining has been wrought open cast, "but previous tirring of the surface is not necessary." I understand this to mean that the clay under the appellants' land could be worked otherwise than from the surface. The answer further states that the seam is of great value. No proof was led, the learned LORD ORDINARY being of opinion that it was unnecessary to do so. Upon the allegations I have referred to, the question arises, and I think it is the sole question in the case, whether this seam of clay was reserved within the terms "mines of coal, slate, ironstone, and other minerals," or whether the whole of it lying under the land conveyed, passed by the conveyance.

The real question, then, to be determined is the meaning to be given to the words "mines and other minerals" in construing the Act of 1847. And I doubt whether we are very much assisted by the interpretation which has been put upon the same words appearing in a different collocation or in other instruments or enactments.

Your Lordships were referred to various English authorities for the purpose of showing that clay had been held in a case, *Hext* v. *Gill*, L. R. 7 Ch. 699 (p. 429, *ante*), in the Court of Appeal to be within a reservation of minerals, and that in other cases a definition of minerals had been adopted sufficiently wide to include it. On the other hand, reliance was placed upon some Scotch authorities, and notably on *Menzies'* case, 1 Shaw Ap. 225, [* 682] in your Lordships' House, as establishing that in a contract between superior and vassal a reservation of mines and minerals did not comprise freestone, which could only be obtained by quarrying. Lord MURE,[1] whose judgment in the Court below

[1] 14 Court Sess. Cas., 4th Series, at p. 354.

was in favour of the appellants, based his opinion upon the ground that though it might be settled by the English authorities that minerals had the extensive meaning contended for, yet it was settled by the Scotch law that in an ordinary contract of conveyance a more restricted interpretation must be adopted, and that there was no reason for construing differently the statutory reservation in question. It is to be observed, however, that the enactment with which we have to deal is intended to be incorporated with all waterworks Acts, whether in England or Scotland, and that both the Scotch and English Railways Clauses Acts contain similar provisions. When the object and purview of these various statutes is regarded, it is not to be supposed that the Legislature intended the same or similar enactments in these various statutes to have a different meaning.

What we have to do, then, is, I think, to look at the purview and intent of the Acts, and to consider what the Legislature meant by the language they have employed. It is impossible to peruse the various provisions of the Act we are considering without seeing that the words "mines" and "minerals" are somewhat loosely used. Before proceeding to the interpretation of them, it may be well to inquire what was the object of the Legislature in reserving the minerals, and not vesting them in the undertakers of the works authorised by the Acts with which the general Act is incorporated.

This object is, I think, clearly stated by the learned Lords who delivered their opinions in the case of *Bennett* v. *Great Western Railway Company*, L. R. 2 H. L. 27. I think these provisions were inserted for the common advantage of the landowner and the undertakers. He was not to be compelled to sell minerals which were not needed for the purpose of the undertaking, and they were not to be compelled to purchase and pay for minerals which they did not want, which the owner of them might never [* 683] desire to work, * and as to which it would be often difficult to determine beforehand whether their working would be likely to affect the waterworks or railway constructed on the surface of the land. I think, therefore, that we should expect to find reserved all minerals under the land of such a nature as are commonly worked, and which possess a value independent of the surface.

I propose first to inquire what meaning ought to be attached to

the word "minerals," supposing only the words "coals, slate, ironstone, or other minerals" had been employed without any mention of "mines." I think that the word "minerals" imports, *primâ facie*, and apart from any context, all substances other than the vegetable matters forming the ordinary surface of the ground. In this widest sense clay is unquestionably a mineral. But we have to look to the context to see whether the word is here used in a more limited sense, and if so, what is the limitation to be put upon it. I think the popular use of the word is often narrower, and that when people talk of minerals they frequently use the word in reference to metals or metalliferous ores. But it is impossible to give this restricted meaning to the word in the enactment we are seeking to construe. Coal and slate are specifically mentioned, and the words "other minerals" cannot be confined to metallic substances. Coal, slate, and ironstone are minerals most dissimilar in their character, and I have sought in vain for any mode of restricting the word "minerals" in this section, whether by confining it to things *ejusdem generis* with those specified, or otherwise. There is no common genus within which coal, slate, and ironstone can be comprised, except that they are mineral substances of sufficient value to be commonly worked.

But the words which I have hitherto discussed do not, as has been seen, stand alone. The things reserved are "any mines" of coal, slate, ironstone, or other minerals under the land purchased. It appears to me that this limits the reservation to mines of the substances named, and therefore to "mines" of the other minerals included in the general term. What, then, is the interpretation to be put upon the word "mines"? I think the primary idea suggested to the popular mind by the use of the word is an underground working in which minerals are being
* or have been wrought. It is certainly often used in con- [* 684]
trast to "quarry," as indicating an underground working
as opposed to one open to the surface. But to limit it in the enactment we are construing to an underground cavity, in which minerals are being or have been wrought, would be obviously inadmissible. The enactment was clearly intended to extend to minerals lying underground which had hitherto been undisturbed. Is the true interpretation to be found by limiting the provision to those minerals which are commonly worked by means of underground working? The word "mines" is, I think, in a secondary

sense, very frequently applied to a place where minerals commonly worked underground are being wrought, though in the particular case the working is from the surface. For example, where iron is got by surface workings they are spoken of as iron mines, and so, too, with coal which crops out at the surface. No one, I think, ever heard of a coal or iron quarry. On the other hand, the term "slate quarry" is undoubtedly sometimes made use of, though the workings are underground. I think it is impossible to obtain any assistance from this use of the word "mines" in construing sect. 18. It is no doubt exceptional to obtain coal and iron except by underground workings; but this is not so with slate, and the word "mines" is used alike in reference to all these substances.

I thought for some time that the language used must be construed as applying only to those seams or strata of the specified and other minerals which were capable of being wrought by underground workings. It seems to me that there is much to be said for that view, but after reflection I do not feel that it affords a safe basis for decision, nor is it clear that it would assist the appellants. It must be remembered — and I think this has an important bearing on the view adopted by the learned LORD ORDINARY — that it is part of the scheme of the statute that the undertakers do not purchase any right to the support of the underlying strata of minerals. No one has doubted that if they refuse to purchase the reserved minerals, whatever is really within the reservation may be got, even though the result be to cause a serious subsidence and even dislocation of the surface. In this respect the [*685] case differs from an ordinary reservation in a * deed unaffected by statutory provisions. In such a case the owner of the reserved minerals can only work such portion of them as can be removed without causing disturbance of the surface, or if he remove more he must provide some substituted means of support. Therefore when it is suggested that the reservation in question embraces only such mineral seams as are capable of being worked underground, that cannot mean such as are capable of being so worked without disturbing the surface.

Once this conclusion is arrived at, it is difficult to see any firm basis for a distinction between seams which lie at a considerable depth below the surface, the removal of which would be likely to affect it little, and those which lying near it could not be got

without very seriously affecting it. What valid distinction could be drawn between a seam of coal or ironstone a hundred yards beneath the surface, and one which came within two feet of it? And if the latter would be within the reservation, how can a seam of clay similarly situated be excluded? I have said that it is not clear that the proposed interpretation of the section would be of any advantage to the appellants. For proof not having been led I cannot assume that the clay might not be got otherwise than by surface operations by working on from the adjoining land, though of course its removal would cause subsidence, and great disintegration of the surface. I own I have entertained very grave doubts as to the proper conclusion to be arrived at, but I do not see my way to differ from the judgment of the Court below. I think the reservation must be taken to extend to all such bodies of mineral substances, lying together in seams, beds, or strata, as are commonly worked for profit, and have a value independent of the surface of the land.

I desire to guard myself against being supposed to decide more than I do. The pursuers in this action seek to interdict the defender altogether from working the clay under their land in any manner whatsoever. All that in my opinion arises for decision is whether they are entitled to do so. I say this, because it was contended before us that inasmuch as the statute authorises the use of such part of the minerals as may be necessary for the pursuers' works, and the bed of clay forms the * bottom [* 686] and sides of their reservoir, the defender cannot be entitled to take away this clay. But this point, which is well worthy of consideration, does not appear to me to be raised at the present time. I therefore forbear from expressing any opinion upon it or (assuming it to be well founded) upon the further question how much of the clay can be considered as having been used for the purpose of the waterworks, and therefore as having become the property of the appellants. I think the interlocutor appealed from ought to be affirmed.

Lord MACNAGHTEN:—

My Lords, your Lordships are called upon to determine the meaning of the word "mines" in the 18th section of the Waterworks Clauses Consolidation Act, 1847. That section is the first and the most important section in a group of clauses collected under the heading, "With Respect to Mines." Corresponding

provisions are to be found in the Railways Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845.

The argument before your Lordships proceeded on the ground that so far as the present question is concerned the three Acts must be construed alike, and that in regard to mines under or near lands purchased for the purpose of the undertaking railways are in precisely the same position as waterworks. The case, therefore, is one of considerable importance. But the question lies in a narrow compass, and must, I think, depend for its solution on an examination of the sections in the Waterworks Act which bear upon the subject, with the aid of such light as may be derived from parallel passages in the railway Acts.

Sect. 18 of the Waterworks Clauses Act, 1847 (corresponding with sect. 77 of the English Railways Act and sect. 70 of the Scotch Act), is in the following terms. [His Lordship read it.][1]

The exception in favour of the vendor comprehends, it will be observed, mines of all sorts — mines of coal, ironstone, and slate, and mines of other minerals — but nothing else. Taking the words in their ordinary signification, and in their gram-
[* 687] matical * construction, the exception does not extend to minerals other than minerals of which mines are composed. This seems clear from the latter part of the section, where the expression "such mines" refers to and sums up everything covered by the words of description previously used.

On this exception there is engrafted an exception in favour of the undertakers. It is one of very limited extent. But it throws, I think, considerable light on the meaning of the word "mines." It excepts "only such parts" of the mines under the lands purchased "as shall be necessary to be dug or carried away, or used in the construction of the works."

Now the meaning of the word "mines" is not, I think, open to doubt. In its primary signification it means underground excavations or underground workings. From that it has come to mean things found in mines or to be got by mining, with the chamber in which they are contained. When used of unopened mines in connection with a particular mineral it means little more than veins or seams or strata of that mineral. But however the word may be used, when we speak of mines in this country, there is

[1] See Lord Herschell's opinion, p. 498, *ante*.

always some reference more or less direct to underground working.

In *Darvill* v. *Roper*, 3 Dr. 294, and again in *Bell* v. *Wilson*, L. R. 1 Ch., at p. 308, KINDERSLEY, V. C., had to consider the meaning of the term "mines." In the latter case he asks the question, "What is a mine?" and he answers it thus: "I cannot entertain the smallest doubt that a mine and a quarry are not the same. It would, perhaps, require some labour to define precisely what each is, but we know this, that a mine, properly speaking, is that mode of working for minerals by diving under the earth, and then working horizontally or laterally; whereas a quarry is when the working is *sub dio*. There is not the slightest doubt in my mind as to the difference between them." The case of *Bell* v. *Wilson* was taken to the Court of Appeal. In his judgment on the appeal TURNER, L. J., asks the same question, and after referring to dictionaries answers it in much the same way. As regards that part of the case he expressed his entire concurrence with the VICE-CHANCELLOR. It was admitted that there is no reported case * which throws any doubt on the accuracy of the [* 688] language used by the VICE-CHANCELLOR in defining or describing a mine. If one wanted a recent authority to confirm the VICE-CHANCELLOR and to emphasise the ordinary meaning of the word "mines" one could not, I think, do better than turn to the judgment of KAY, J., in *Midland Railway Company* v. *Haunchwood*, 20 Ch. D., at p. 560. In describing the case before him the learned Judge says: "The subject of litigation in this case is a bed of clay used for making a peculiar kind of brick, and of some value from the circumstance that it contains a certain amount of iron. There are three or four feet of surface earth above this, except at one point where it crops out, but it is in no sense a mine, being got entirely by open workings."

Dealing, therefore, with sect. 18 alone, there seems to be no reason for giving the word "mines" a strained or unnatural meaning. It has, indeed, been suggested that the mention of slate tends to show that the word "mines" is used in a loose way without reference to any particular mode of working, because slate is usually got by open working. But, as everybody knows, there are places where slate is worked underground. The Act excepts mines of slate; it is silent as regards slate quarries. The more natural inference would be that slate mines are excepted, and

that slate quarries are not, — especially as the Railways Clauses Acts make mention of slate quarries in another group of sections. It has also been suggested that the exception in favour of the undertakers points to minerals near the surface, and therefore to minerals which may be got by quarrying. But it seems to me that there is little force in this suggestion. The exception rather tells the other way. In constructing railways and waterworks, in deep cuttings, in tunnelling, or in sinking wells it is at least possible that minerals contained in mines may be met with. On such an event occurring, were it not for the exception, the operations of the undertakers or of the company might be brought to a standstill. And so the Act gives them as included in their purchase such parts of the mines, or, in other words, so much of the minerals contained therein as they are obliged to interfere with in the construction of their works. But it gives them [* 689] nothing more. How strictly railway * companies are tied down when their powers are limited by reference to what is " necessary " is shown by the decisions on sect. 16 of the English Act as to the diversion of roads and rivers. See *Reg.* v. *Wycombe Railway Company*, L. R. 2 Q. B. 310; *Pugh* v. *Golden Valley Railway Company*, 15 Ch. D. 330. The rights of the undertakers or of the company are limited by the necessity of the case. They are not at liberty to interfere with mines or to use the minerals contained therein merely because it may be a convenience or a saving of expense to do so. If the intention of Parliament had been to reserve to the vendor under the exception of " mines " all minerals of every description however they might be worked, and therefore such things as clay, stone, and gravel, which are ordinary materials for constructing or repairing the works, one would have expected to find the undertakers and the company authorised to use not merely such parts of the " mines " as might be necessary, but such parts as might be useful or proper for constructing their works; and, on the other hand, required to pay for what might be so used, and to work under the direction or inspection of the mine owner or his surveyor.

So far there seems to be no difficulty. The difficulty, such as it is, is created by the sections which follow, and which regulate the rights of owners of mineral property (if I may be allowed to use that expression as a neutral term) lying under or near the lands of the undertakers or the company. In these sections we

No. 8. — Lord Provost and Magistrates of Glasgow v. Farie, 13 App. Cas. 689, 690.

find the expressions " mines or minerals," " such mines," " such mines or minerals," " such minerals," " parts of mines," " mines, measures, or strata," all applied to the mineral property within the scope of the enactment.

Now the word " minerals " undoubtedly may have a wider meaning than the word " mines." In its widest signification it probably means every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life. In some of the reported cases it seems to be laid down, or assumed, that to be a mineral a thing must be of commercial value, or workable at a profit. But it is difficult to see why commercial value should be a test, or why that which is a mineral when commercially valuable should cease to be a mineral
* when it cannot be worked at a profit. Be that as it [* 690]
may, it has been laid down that the word " minerals "
when used in a legal document, or in an Act of Parliament, must be understood in its widest signification, unless there be something in the context or in the nature of the case to control its meaning. It has also been held that the use of the word " mines " in conjunction with " minerals " does not of itself limit the meaning of the latter word. At the same time, it cannot be disputed that the term " minerals " is not unfrequently used in a narrower sense, and one, perhaps, etymologically more correct, as denoting the contents or products of mines. Nor, indeed, are the authorities all one way in preferring the wider meaning of the word " minerals." For example, in *Church* v. *Inclosure Commissioners*, 11 C. B. (N. S.) 664, at p. 681, WILLIAMS, J., observed, and apparently the rest of the Court agreed, that " minerals in the ordinary sense " meant " minerals which could be worked in the ordinary way underground, leaving the surface or crust unaffected."

In dealing with the sections which follow sect. 18 it is to be observed that their scope is not like the scope of sect. 18, and the corresponding sections of the railway Acts, limited to mineral property lying under the lands purchased, and excepted or deemed to be excepted out of the conveyance. These sections have a much wider bearing. They extend to mineral property under the lands of the undertakers or the company, however it may have been severed in ownership from those lands. They also extend to mineral property within the prescribed distance, although the lands under which it lies do not belong to the undertakers or the

company. It would therefore not be enough for the respondent to make out that these sections deal with minerals not contained in mines. He must show that on the fair reading of these sections the word "mines" includes minerals, whether got by mining or not. If that could be established it would go far towards proving that the word "mines" must have that meaning in sect. 18 and in the corresponding sections of the railway Acts.

It may be conceded that in several places in these later sections the word "mines" is used as comprehending whatever is [* 691] * comprehended by the term "minerals" as therein used.

But then comes the question, Is the word "minerals" to have its wider signification, and therefore to enlarge the meaning of the word "mines," or is the word "mines" to control the meaning of the word "minerals"? In the absence of an explanatory context or some indication to be gathered from the nature of the case it has been held that the narrower meaning of the word "minerals" is not to be preferred. Still it is not a strained or unnatural meaning. You are giving a strained and unnatural meaning to the word "mines" if you make it include minerals not got by mining. And, therefore, if the question were which of the two words should yield to the other, there could, I think, be no doubt as to the answer. The more flexible word must give way. You must do as little violence as possible to the language you have to construe.

Apart, however, from this argument, it seems to me that if you look at these enactments carefully, comparing one with the other, you will find enough to show that the minerals spoken of are minerals that are "parts of mines," or minerals that are "contained in mines." I will illustrate my meaning by one or two instances. The sentence in sect. 78 of the English Act, "if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway," becomes in the Scotch Act, sect. 71, "if it appear to the company that the working of such mines, either wholly or partially, is likely to damage the works of the railway." In the rest of the latter section the two expressions, "parts of mines" and "minerals" are used indifferently as convertible terms. The section proceeds as follows: "And if the company be desirous that such mines, or any parts thereof, be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they

desire to be left unworked, they shall give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines . . . which they shall desire to be left unworked . . . and in such case such owner, lessee, or occupier shall not work or get the mines or minerals comprised in such notice." In the following section (sect. 72 of the Scotch Act) there is a passage which refers to minerals as *being contained in mines; and the context shows that [*692] the minerals so referred to are the only minerals in the contemplation of the framers of the Act. The section begins with the following sentence: "If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked, and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner, lessee, or occupier" (that is, the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance), "to work the said mines, or such parts thereof for which the company shall not have agreed to pay compensation, up to the limits of the mines and minerals for which they shall have agreed to make compensation, in such manner as such owner, lessee, or occupier shall think fit, for the purpose of getting the minerals contained therein." Now, the expression, "the minerals contained therein," must mean "the minerals contained in the mines." So the purpose to which the owner of the minerals and the purpose to which the owner of the mines is limited are one and the same, and the purpose of the owner of the minerals in working is not to get the minerals, using the word in its widest signification, but to get the minerals contained in the mines.

I ought, perhaps, to refer to the passage in which the word "minerals" originally occurs in these sections. It occurs first in sect. 22, where it is provided that "if the owner, lessee, or occupier of any mines or minerals," lying under or near the works, "should be desirous of working the same," he is to give the prescribed notice, and then certain consequences follow. Every subsequent use of the word may be traced to that passage. Now, if the word "minerals" there means minerals whether got by mining or not, the word "mines" is plainly superfluous, whatever meaning be given to it. But if the word "minerals" be restricted to minerals contained in mines, I doubt whether either

word is superfluous. The risk to be guarded against, as it seems to me, was the loss of support by the withdrawal of minerals from the mines. The minerals might be worked by the owner, lessee, or occupier of the mines. But they might be worked by persons who could not properly be described as owners, lessees, or [* 693] even * as occupiers of the mines. They might be worked by persons having merely a license to enter and search for minerals, and a grant of the minerals when obtained. The word "minerals" may have been added out of abundant caution to meet such a case as that, and as being a less awkward expression for the draftsman's immediate purpose than the expression, "parts of mines," which occurs in sect. 18. At the same time if the word "minerals," in the sense of "parts of mines," or minerals contained in mines regarded as separate from the chamber which contains them, be deemed superfluous, I would point out that less care seems to have been given to the framing of these sections than to the framing of sect. 18. That section and the corresponding sections of the railway Acts, *mutatis mutandis*, are word for word the same. In the sections which follow in each of the three Acts there are changes from the language of the other two, and also variations of expressions in the same Act in many cases where it is impossible to suggest any difference in meaning. These sections seem to have been taken at random from different common forms without any attempt at precision or uniformity of language. In such a composition it is not surprising that a superfluous word should be found. It would be singular that in a short clause like sect. 18 of the Waterworks Act, which exhausts the particular subject dealt with, the leading word should be used in a strained and unfamiliar signification, and that the same peculiarity should be found in all three Acts.

There is no passage in any one of the Acts which requires the wider signification of the word "minerals." On the other hand, the provisions for inspecting mines, both before and during working, and the provisions for the ventilation of the minerals, for making airways and mining communications, all seem to point in the same direction, and to show that the Acts throughout these clauses are dealing with mines, using the word in its proper and usual signification.

Little or no assistance is to be derived from the rest of the Waterworks Clauses Act. But it may be observed that sect. 12

authorises the undertakers to dig and break up the soil of the lands which they enter under the powers of their special Act, and "to remove or use all earth, stone, mines, minerals, trees, [* 694] and other things dug or gotten out of the same." The mention of earth and stone in conjunction with minerals seems to show that these substances were not considered by the framers of the Act to be necessarily comprehended by the term "minerals."

In considering the Railways Clauses Acts it is, I think, worth while to refer to the group of sections prefaced by the heading, "With respect to the temporary occupation of lands near the railway during the construction thereof" (sects. 32 to 43 of the English Act, sects. 27 to 36 of the Scotch Act). These sections empower the company for certain specified purposes to enter upon and use any lands within a distance from the centre of the line not measured by, or necessarily corresponding with, the limits of deviation, and to do so at any time before the expiration of the period limited for the completion of the railway, a period which generally, if not always, extends beyond the duration of the company's powers for the compulsory acquisition of land.

The purposes specified in the Acts include "the purpose of taking earth or soil by side cutting therefrom," and "the purpose of obtaining materials therefrom for the construction or repair of the railway." In exercise of these powers the company is authorised "to dig and take from out of any such lands any clay, stone, gravel, sand, or other thing that may be found therein useful or proper for constructing the railway." Then comes a proviso "that no stone or slate quarry, brickfield, or other like place, which, at the time of the passing of the special Act, shall be commonly worked or used for getting materials therefrom for the purpose of selling or disposing of the same, shall be taken or used by the company."

It is clear, therefore, that in certain cases and for certain purposes a railway company may enter upon lands containing brick earth, and use that brick earth, although the land may not be delineated in the deposited plans, and although the powers of the company to take lands compulsorily may have expired. But while working as temporary occupiers, they are bound (sect. 41) to work in accordance with the directions of the surveyor or agent of the owner of such lands.

Now sect. 42 provides that in all cases where the com-
[* 695] pany * enters upon lands for temporary purposes, the owner may "serve a notice in writing on the company requiring them to purchase the said lands." The company thereupon is "bound to purchase the said lands."

Nothing is said about mines or minerals in this section or in this part of the Act, and, as I have already pointed out, there may be cases when the company is not in a position to serve a counter notice requiring the owner to sell his mines.

Sect. 43 provides that "where the company shall not be required to purchase such lands," compensation shall be made for their temporary occupation, and that such compensation shall include "the full value of all clay, stone, gravel, sand, and other things taken from such land."

It seems to follow from the consideration of these sections that, where lands taken by the company for temporary purposes are purchased in pursuance of a statutory notice given by the owner, the purchase vests in the company, as part of the property purchased, clay, stone, gravel, sand, and other things of that sort, useful or proper for constructing the railway, although not expressly purchased or expressly named in the conveyance and conveyed thereby, and also that after the purchase the company are free to work as they please, without being subject to the directions of the surveyor or agent of the vendor.

This result, however, seems somewhat incompatible with the view which the respondents take of the meaning of the term "mines" in sect. 77. It must be borne in mind that that section is not confined to lands which the company require to purchase for the purpose of their undertaking. It applies to "any land purchased" by the company, and therefore to lands which the owner requires the company to purchase under sect. 42. If the respondent's view be correct, a railway company which has lawfully entered on lands for the purpose of taking clay or gravel therefrom might find its operations suspended by a notice to purchase those lands. If clay and gravel be comprehended in the term "mines," and if the time for compelling the landowner to sell has passed, the company is helpless. Purchase it must. But the purchase will prevent the lands being used for the only pur-
pose for which they were wanted, unless, indeed, you
[* 696] * are prepared to do extreme violence to plain language,

and to read the provision vesting in the company such parts only of the mines under the lands purchased by them as shall be necessary to be used in the construction of the railway, as vesting in them, to an unlimited extent, whatever may be useful or proper for constructing or repairing the railway.

It was urged before your Lordships that the enactments dealing with mines were passed for the benefit of persons authorised to construct waterworks and railways; that, to use KAY, J.'s, language, there was "no reason, therefore, for putting a narrow or restricted construction upon the word 'mines,'" and that, consequently, the word ought to be held to include minerals of every description. I am inclined to think that when you make the word "mines" include that "which is in no sense a mine," you do something more than avoid a narrow and restricted construction. And I am not convinced that it is a proper mode of construing an Act of Parliament to strain the language in favour of those for whose benefit the enactment may be supposed to have been passed.

However that may be, it appears to me that the enactments under consideration were not intended to benefit waterworks or railways at the expense of those whose lands might be required for the purpose of the undertaking. Indeed if Lord CRANWORTH'S suggestion in *Great Western Railway Company* v. *Bennett*, L. R. 2 H. L. 27, be right, the main object of these enactments in their ultimate shape was to prevent the hardships resulting to landowners from the application of common-law rights to compulsory purchases. I doubt whether railway companies were special favourites with the Legislature in those days. I should rather have supposed that Parliament considered the division of property and the adjustment of rights effected by these enactments a fair arrangement, and one equally beneficial to both parties. And so it is if the language used has its ordinary and proper signification. Confine the enactments to mines, and nothing can be fairer. Where lands containing mines are taken by a railway company it would probably be a most serious injury to the vendor to compel him to include his mines in the sale. In most cases he would be selling a long narrow strip of minerals, which [* 697] might form an impassable barrier in the middle of his mines. If the sale were a voluntary sale to an ordinary purchaser, it would be a matter of course to reserve the mines. On the other hand, neither railway companies nor persons who construct water-

works require mines as such, or are capable of working mines for profit. Mines are only useful to them so far as they may contribute to the support of the lands under which they lie. And in many cases they may be worked without interfering with the beneficial enjoyment of the surface.

These considerations, however, do not apply to the case of gravel and clay, and things of that sort, which may be termed surface minerals. Remove surface minerals from under the track, and the railway becomes a heap of rubbish. For the very existence of the line it is necessary that they should be left undisturbed. And yet, according to the respondent's argument, a railway company is not to pay for the use they make of surface minerals which do not belong to them. Why? Because the person to whom they do belong does not actually want his property just yet. In the meantime it is more useful to the railway company than it is to the owner. In other words, to put it plainly, a railway company is to have a forced loan of their neighbour's property without consideration, without any corresponding advantage to him, so long as he may be unable to work it or get it worked at a profit. The doctrine involved seems to me somewhat advanced, and I should hesitate to attribute it to the Legislature unless I found it clearly expressed in the Act of Parliament. Observe how unreasonable the proposition is. The surface minerals must either add to the value of the lands at the time of the purchase or not. If they do not add to the value, why is the railway company paying the full value of the lands not to have the surface minerals? They may be useful for the construction of the line; they are necessary for its existence. On the other hand, if they do add to the value of the lands, why is the landowner not to be paid for them at once, though he may not be able for some time to deal with them profitably when they are separated in ownership from the surface? In the case of surface min-
[* 698] erals there is no peculiar hardship on the landowner * in taking a strip of his minerals. The strip taken would not prevent access to his adjoining minerals accessible from the surface and usually got by open working. If the landowner were selling a strip of his lands to an ordinary purchaser he would, in ordinary course, sell the surface minerals too, and so get a better price. When he is made to sell for the benefit of the public, why should he be compelled to sell his property in slices, and to wait

for half the price (to take the figures from the present case) until he is in a position to intimidate his purchaser? This seems very unreasonable and very unfair to the landowner, who gets nothing by way of compensation if the Act, as interpreted by the respondent, be honestly carried out. But I must say I much doubt whether the Act so interpreted could be carried out honestly. There is no difficulty in valuing lands on the assumption that they contain no mines. But there would, I think, be considerable difficulty in arriving fairly at the value of lands required for a railway, treating them merely as so much surface, not entitled to any right of support, and as separated for the purpose of valuation from such ordinary constituents of the subsoil as gravel, clay, and stone. If the decision under appeal be upheld, railway companies may no doubt protect themselves in future purchases. But I suspect that in many cases of past sales a railway company would be called upon to pay over again for what it has bought and paid for long ago.

It was said that unless the word "mines" be held to include surface minerals railway companies may be exposed to the risk of having the safety of their works endangered by the removal of clay and gravel, and other surface minerals, in the immediate proximity of their lands. The answer is, that railway companies must judge for themselves what extent of land is required, and take sufficient to ensure the stability of their works against accidents which can readily be foreseen when the nature of the subsoil is known.

I desire to base my judgment on what seems to me to be the plain meaning of the words of the Act; but at the same time it is satisfactory to find that the result is consistent with what may be presumed to have been the intention of Parliament, and not likely to lead to inconvenient consequences.

* For these reasons, I am of opinion that the inter- [* 699] locutor under appeal should be reversed.

Interlocutors appealed from reversed; interlocutor of the Lord Ordinary of the 16*th of December*, 1885, *restored; the respondent to pay to the appellants their costs in the Court below and in this House.*

Lords' Journals, 10th August, 1888.

No. 9. — Midland Railway Company, &c. v. Robinson, 15 App. Cas. 19, 20.

Midland Railway Company and Kettering, Thrapston, and Huntingdon Railway Company v. Robinson.

15 App. Cas. 19–36 (s. c. 59 L. J. Ch. 442).

[19] *Railway Company. — Mines and Minerals under or near Railway. — Minerals got by quarrying. — Limestone. — Notice by Owner of Intention to work. — Railways Clauses Act*, 1845 (8 & 9 *Vict.*, *c.* 20), *ss.* 77, 78, 79.

The "mines of coal, ironstone, slate, and other minerals" which sect. 77 of the Railways Clauses Act, 1845, excepts out of the conveyance to the railway company, and the "mines or minerals" under the railway, or within the specified distance, which sect. 78 empowers the owner to give notice of his intention to work, include not only beds and seams of minerals got by underground working, but also such as can only be worked, and according to the custom of the district would be properly worked, by open or surface operations.

So *held* (affirming the decision of the Court of Appeal) by Lords HERSCHELL and WATSON: Lord MACNAGHTEN dissenting and retaining the opinion he expressed in *Lord Provost of Glasgow* v. *Farie* (13 App. Cas. 657).

To justify an owner in giving such a notice it is not necessary that he should intend to work the minerals himself, but there must be a real and *bonâ fide* desire to work either by himself or by his lessees or licensees.

Limestone is a mineral within the meaning of the above sections.

In 1865 the Kettering, Thrapston, and Huntingdon Railway Company purchased under their Act of 1862 from the respondent's predecessor certain portions of his lands in Northamptonshire. The Act incorporated the Railways Clauses Act, 1845. The conveyance contained no special reference to mines or minerals.

Through these lands (for about a mile and a half) the
[* 20] company * made their railway which the Midland Railway Company afterwards acquired statutory power to work.

On the 25th of January, 1886, the respondent gave the Kettering, &c. Company notice under sect. 78 of the Railways Clauses Consolidation Act, 1845, that, as owner of the mines and minerals consisting of ironstone, limestone, and certain other substances lying under portions of the railway and adjoining lands as shown on a plan, he was desirous of working such mines and minerals and intended to work them after the expiration of thirty days from the service of the notice. Negotiations having failed, the appellants brought this action for an injunction to restrain the respondent, his servants, agents, and workmen, from working the mines and minerals described in the notice, so as to injure the railway and works.

No. 9. — Midland Railway Company, &c. v. Robinson, 15 App. Cas. 20, 21.

At the trial before CHITTY, J., it appeared that under the portions of the railway and adjoining lands referred to in the notice were beds of ironstone and limestone at depths varying from six to thirty-six feet. Portions of the beds under the lands adjoining the railway had been leased by the respondent to a coal and iron company. As to the rest of the beds, both those under the railway and those under adjoining lands, there was evidence that the respondent *bonâ fide* intended to work the minerals by his lessees or licensees. The custom in that district was to work ironstone and limestone by open or surface operations.

CHITTY, J., dismissed the action, and that decision was affirmed by the Court of Appeal (COTTON, LINDLEY, and LOPES, L. JJ.), 37 Ch. D. 386.

May 2, 3, 13. Rigby, Q. C., and Sir A. Watson (Beale, Q. C., and W. Baker with them) for the appellants: —

The ironstone, limestone, and other substances referred to in the respondent's notice are not "mines and minerals" within the meaning of the Railways Clauses Consolidation Act, 1845, sect. 77 and following sections. First, because they are to be got by open quarrying instead of underground workings. Upon this point the judgment of Lord MACNAGHTEN, in *Lord Provost of Glasgow* v. *Farie*, 13 App. Cas. 657, 687 (p. 504, *ante*), represents the appellants' contention. The statutory provisions in that case do not materially differ from * those of the Railways [*21] Clauses Act.[1] The original and fundamental idea of

[1] The Railways Clauses Act, 1845 (8 & 9 Vict., c. 20), enacts as follows: —

"And with respect to mines lying under or near the railway, be it enacted as follows: —

"77. The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

"78. If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company and such owner, lessee, or occupier do not agree as to the amount

"mines" is that of an underground working, in the first instance for the purpose of attacking fortifications and thence applied to the getting of underground minerals. In English law the word "mines" is exclusively connected with underground workings. This is clearly the meaning intended by the Railways Clauses Act. The heading of this group of sections is "with respect to mines lying under or near the railway." The power to inspect "mines" given by sect. 77 would not be necessary in the case of quarries or open workings, for they would be visible, and the company can inspect their own line at any time. Nor can the meaning of "mines" be extended by the use of the word [*22] "minerals." "Minerals" are mentioned * to meet the case of a licensee who has the right to search for minerals and take them where he finds them, but who is never owner, occupier, or lessee of a "mine." The question whether mines and minerals are within sects. 77 and 78 depends upon the mode in which the minerals are got according to the custom of the country. Unless they are in such a position that according to the custom of the country they must be got by underground working they are not within these statutory provisions. In very exceptional cases a mine may crop out on the surface but in the mass it is underground. The conveyance to the company passes not a wayleave but the actual surface. The Legislature cannot have intended to give the landowner leave to break up the railway line by quarrying. That is the inevitable result of aboveground working, whereas in underground working, though that result may happen, it is not inevitable, and in most cases does not happen. The distinction between mines and quarries is clearly pointed out in *Darvill* v. *Roper*, 3 Dr. 294, by KINDERSLEY, V. C., whose decision is a strong authority for the appellants; and see *Bell* v. *Wilson*, 2 Dr. & Sm. 395, 400, L. R. 1 Ch. 303, 308. Old Inclosure Acts constantly emphasise the distinction by reserving "mines and quarries." The judgment of KAY, J., in *Midland Ry. Co.* v. *Haunchwood, &c. Co.*, 20 Ch. D. 552, is the only decision at variance

of such compensation, the same shall be settled as in other cases of disputed compensation."

"79. If before the expiration of such thirty days the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate. . . ."

with the appellants' contention. The decision in *Lord Provost of Glasgow* v. *Farie*, 13 App. Cas. 657 (p. 485, *ante*), where the authorities were fully discussed, did not conclude the present point, though the *dicta* of Lords WATSON and HERSCHELL are no doubt against the present appellants.

Secondly, the respondent's notice was bad for more than one reason. Admittedly the respondent did not intend to work by himself; if at all it was by lessees or licensees. But the notice meant by the Act is a notice by the person who intends to work. In the words of Lord CAIRNS in *Smith* v. *Great Western Ry. Co.*, 3 App. Cas. 165, 178, 179, the notice can only be given by a person "who has a right to work and who is prepared to work the mines," and he is the person to whom the company must give the counter-notice. The respondent's notice was also bad because there was no *bonâ* **fide* intention to work either [*23] personally or by others, for the materials could not be got at a profit. It is manifest that this was so as to a great part of the area included in the notice, and a notice which is bad as to part is bad as to the whole. The Legislature could not have intended to give an owner the power by notice to compel a railway company to purchase the minerals, when there was no real intention of working. See per Lord WATSON in *Dixon* v. *Caledonian, &c. Ry. Cos.*, 5 App. Cas. 820, 839. The intention here was nothing more than to give the notice and was merely vexatious. It is no answer to say that the compensation awarded by the jury would be very trifling. Going to arbitration is an expense, and in any case half that expense falls by the Act on the company, possibly the whole.

Sir Horace Davey, Q. C., and Romer, Q. C. (Gye and William Radcliffe with them), for the respondent:—

The present case is free from the difficulty in *Lord Provost of Glasgow* v. *Farie*, 13 App. Cas. 657, 673, 680 (p. 485, *ante*), for "mines of ironstone" are expressly mentioned in the Railways Clauses Act. The benefit intended by that Act to the railway company applies as much to surface minerals as to underground minerals. In sects. 77 and 78 mines and minerals must have the same meaning. If minerals got by quarrying are not within the exception of sect. 77, sect. 78 does not apply to such minerals, and the railway company would not be entitled to the benefit given by that section, and it will be necessary for the company to ac-

quire in the first instance much more land than is needed for the line, for if they do not acquire it within the period of compulsory powers they never can. In these sections "mines" mean beds, seams, veins, and strata of something not yet got. A mine is a body of minerals. The question cannot depend on the local [* 24] custom of working, for if so the mines might * be in the conveyance at one time and not at another, according as the custom varied. Again, the question might not arise till long after the date of the conveyance, when the custom could not be ascertained. In the case of slates the custom in some places is to get both by open and by underground workings. How can the right depend on the custom in such a case? or again, where the coal or iron crops out at the surface? As Lord CRANWORTH said in *Great Western Ry. Co.* v. *Bennett*, L. R. 2 H. L. 27, 40, the Legislature intended by these sections to create a new code as to the relations between owners and companies; when the owner wants to work the mines he is put in the same position as if he had never sold any part of the surface; on the other hand, the railway has the benefit of compelling the owner to sell that which is necessary for the purpose of the railway. As large an application as possible should be given to the mutual benefits intended by this code. Once infringe the wholesome principles laid down in that case, the result is confusion. The questions as to the right of support and subsidence are dealt with in that case and in the cases there cited. There is no difference in principle between stripping off the surface and digging out the minerals, and working underground within six feet of the surface and so letting the railway down.

[Lord MACNAGHTEN referred to *Pountney* v. *Clayton*, 11 Q. B. D. 820, 833, where BRETT, M. R., said, "Even where the mines are to be deemed excepted out of the conveyance to the railway company, any one who by digging the land and not by the operation of mining, were to let down the surface on which was the railway, would be a trespasser, as he would be digging on the land of the railway company."]

Where the mines and minerals are reserved and open quarrying is the usual custom, the right of so getting the minerals is also reserved. If it is necessary for the company to have the support they must buy it. [They also discussed *Aspden* v. *Seddon*, 1 Ex. D. 496; *Davis* v. *Treharne*, 6 App. Cas. 460; *Buchanan*

v. *Andrew*, L. R. 2 H. L. Sc. 286; * *Earl of Jersey* v. [* 25] *Neath Union*, 22 Q. B. D. 555; and the cases cited in *Lord Provost of Glasgow* v. *Farie*, 13 App. Cas. 657.]

As to the notice, it is said that it was too large; but that was for the benefit of the railway company. No objection was made for fifteen months, during which negotiations went on. As for the point that the owner would work by licensees and not by himself, it is for the benefit of the railway company that only one notice should be given. If the owner had created new rights by granting licenses the licensees would have had to be compensated for their profits, as well as the owner for his royalties. Thus there would have been as many arbitrations as there were licenses, besides the arbitration with the owner, and the costs would have been much increased. The intention to work must mean working by himself or by his agents, lessees, or licensees.

Rigby, Q. C., in reply, referred to *R.* v. *Dunsford*, 2 Ad. & El. 568, as to what was a mine for poor-rate purposes.

The House took time for consideration.

1889. Dec. 9. Lord HERSCHELL: —

My Lords, the main question in this case is whether certain beds of ironstone and limestone lying under and near the railway of the appellants are their property or the property of the respondent.

The appellant company, the Kettering, Thrapston, and Huntingdon Railway Company, whose railway and undertaking are now under statutory powers worked by the other appellants, the Midland Railway Company, purchased from the respondent's father and predecessor in title, in the year 1865, certain land on which a portion of their railway has been constructed.

The purchase was made by virtue of the Company's Act passed in 1862, which incorporated the Railways Clauses Consolidation Act, 1845. The grant of the land contained no special provisions relating to the mines and minerals under the same. This being so, sect. 77 of the incorporated Act operated to except * from the grant any "mines of coal, ironstone, slate, or [* 26] other minerals, except such parts thereof as were necessary to be dug or carried away or used in the construction of the works." It is admitted that there lay beneath the lands purchased, at depths varying from six to thirty-six feet, beds of ironstone and limestone, and it is not disputed that these are

" minerals " within the meaning of the enactment just referred to. The principal question for your Lordships' determination is, whether these beds of ironstone and limestone are " mines of " ironstone and other minerals, according to the true interpretation of that enactment, and therefore excepted from the conveyance to the company.

I say this, because although considerable difference of opinion existed amongst those of your Lordships who were parties to the judgment in *Farie's* case, 13 App. Cas. 657 (p. 485, *ante*), I think all were agreed that the words " mines of " had relation not only to the word " coal," but to " ironstone, slate, or other minerals " also. The turning point, therefore, of the decision upon this part of the case must be the interpretation to be put upon the word " mines " in sect. 77 of the Railways Clauses Consolidation Act.

It is contended on behalf of the appellants that the word " mines " is to be construed as applying only to those minerals which, according to the custom of that part of the country where they are situate, would ordinarily be won by underground workings, and that it does not comprehend minerals which, according to such custom, would be got by surface operations. It is contended, on the other hand, that the word comprehends all beds or strata of minerals without any reference to the method of working them.

I have already, in *Farie's* case, expressed my opinion as to the construction to be put upon the same words in a very similar enactment contained in the Waterworks Clauses Act. After carefully considering the able arguments addressed to your Lordships in the present case, I have seen no reason to alter the conclusion I then arrived at. I desire only to say that when I stated that in my opinion the reservation extended " to all such bodies of mineral substances lying together in seams, beds, or strata as are commonly worked for profit and have a value independent
[* 27] * of the surface of the land," I did not intend by these latter words to suggest that the value of the mineral substances at the time of the reservation was the test whether they were reserved or not. I used them in order to emphasise the fact that it was not every scattered piece of mineral lying under the land that could be called a " mine," but only mineral substances lying in seams, or beds, or strata.

In dealing with this case it must be remembered that all that

your Lordships have to do is to interpret the words of this enactment and not to lay down (even if it were possible) any general rule as to the interpretation of the word "mines."

I doubt whether much assistance is to be obtained from the cases in which a construction has been put upon that word in instruments embodying merely agreements between the parties to them, unaffected by any statutory enactment. In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining undisturbed. And if this be true of minerals lying deep below the surface, it would be obviously out of the question to permit it to be disturbed by winning minerals which can only be wrought by surface operations. But in the case of mines reserved under sect. 77 of the Railways Clauses Act the case is different. It is clear that the mines reserved, if not purchased by the company, may be so worked as to interfere with the surface, the only limitation being that the working must be according to the usual manner of working such mines in the district where the same are situate.

The object of the 77th and following clauses was considered and explained in the *Great Western Ry. Co.* v. *Bennett*, L. R. 2 H. L. 27. Lord CRANWORTH said: "It was obviously the intention of the Legislature in making these provisions to create a new code as to the relation between mine owners and railway companies where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the * surface that they must be taken for the purposes of the railway, [* 28] to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface."

The effect of this legislation was obviously very advantageous to the railway companies, and inflicted no wrong upon the owner of the minerals. The company in the first instance paid only for the surface of the land, and for such minerals as had to be taken in the making of the railway. They enjoyed the support of the underlying minerals for an indefinite term without paying for it. The mineral owner, as I have said, suffered no wrong. He still

retained the ownership of the minerals and the right to work them, which was all that he possessed before. The only burden imposed upon him, if it can be so called, was that when desirous of working the mines he should give the company an opportunity of purchasing them. It appears to me that these considerations point to the intention of the Legislature having been to use the word "mines" in the widest sense that can properly be given to it. Why should the Legislature have reserved, and exempted the company from the necessity of purchasing, beds of minerals lying at such a depth below the surface, or with superincumbent strata of such a character that the minerals would ordinarily be worked by underground operations, and compelled the company at once to purchase and pay for beds of minerals which would, in ordinary course, be won by surface operations? It is urged that in the latter case the working of the minerals would remove the very thing which the company had bought. and directly interfere with the existence of the railway. But it must be remembered that the surface might be rendered just as unfit for railway purposes by subterranean workings as it would be by operations from the surface. The learned counsel for the appellants asked what the company could be said to have acquired by the purchase of the land if its very surface could be directly interfered with by mining operations? I fully feel the force of this question and the difficulty which it involves. If this difficulty were altogether got rid of by the construction contended for by the appellants, I admit that a strong ground would be shown for yielding to their [* 29] contention. * But it was properly conceded by the learned counsel for the appellants that this was not the case. Where a "mine," within the meaning attributed to that word by them, cropped out at or near the surface on a part of the railway, the same difficulty would arise. For it was not denied that this would be part of the mine, and therefore within the reservation. So, too, although a seam of minerals may lie at such a depth beneath the surface of the land purchased that it would ordinarily be got by underground workings, yet owing to the works necessary for making the railway, be it a cutting or tunnel, the minerals may come to form the surface on which the railway rests. Such a seam would be a "mine" within the construction suggested, and therefore reserved to the landowner, together with the right to work it, and yet the same question might be asked, Can it have been

intended that such owner should have the right to take away the surface upon which the rails are laid?

It seems to me, too, that the appellants' construction, if adopted, would of itself give rise to serious difficulties and inconveniences. When land was to be taken for the purposes of a railway, it would be necessary to ascertain what minerals lay beneath the land, which would not, according to the usual manner of working in the district, be got by underground workings. For these would become the property of the railway company, and their value must, of course, be taken into account in fixing the price to be paid for the land purchased. And further, the question what minerals were reserved, and therefore whose the property in them was, might have to be determined many years after the purchase by an inquiry, what was the usual mode of working in the district at the time of the conveyance, which perhaps might not have been the same as at the time when the controversy arose. And there are some cases where it might be almost impossible to say what minerals were, and what were not, reserved. Beds of slate, I believe, exist which have been worked both by surface workings at the face, and by levels driven underground. How much of such seams of slate would be reserved, and how much fall to be purchased by the company, would, I think, on the contention of the appellants, be a question almost impossible of solution.

But besides this, under sect. 78, the owner of mines not under *the railway, but within the prescribed distance [*30] from it, is bound to give notice before working, so that the company may have the option of purchasing. If the word "mines" bear the meaning I have attributed to it, the company need not concern themselves about the existence of minerals, whether near the surface or not, within the prescribed distance. But if it is to have the more limited construction contended for by the appellants, it would sometimes be necessary for the company not only to ascertain what minerals lie under the lands adjoining any embankments or other works which would be injured by the working of what I will call surface minerals, but also to purchase these minerals, and the land under which they lie, for the protection of their works from subsidence. For the common-law right of adjacent support does not extend to the increased burden caused by buildings or other works, but is limited to that which the land requires in its natural state. And this is all the railway company

would be entitled to apart from the implied grant of the right to all necessary support for the railway works from adjacent land in the same ownership as that conveyed to the company for the purpose of the railway.

Seeing, then, that the difficulties pointed out by the appellants are not avoided by adopting their view, and that its adoption would give rise to the difficulties and inconveniences I have pointed out, I think your Lordships will do well to construe the language used with the aid of the light that is thrown upon it by the intention of the Legislature as manifested in the provisions relating to mines and minerals lying under and near the railway. And the considerations upon which I have dwelt point to the conclusion I have already indicated, that the widest construction ought to be given to the word "mines" which is possible, without improperly straining the language used.

Is there anything in the terms of the enactment compelling the narrower construction for which the appellants contend? I think not. Applying one's self to the consideration of the word "mines," apart from the document or context in which it is found, I cannot think that its natural meaning imports such beds or strata of minerals only as are ordinarily got by underground working. If [* 31] aid is sought from the lexicons, and the definitions * there given are reviewed, I do not think that they afford support to such a construction. Dr. Johnson, I may observe, defines a "quarry" as a "stone mine." I see no reason to doubt the soundness of the view I expressed in *Farie's* case, 13 App. Cas. 657 (p. 485, *ante*), that in ordinary parlance the word "mines" is not used to describe unwrought beds of minerals. I think it is ordinarily applied only to beds of minerals which are being or have been wrought; but in the enactment with which we are dealing it is obviously impossible so to interpret the word. I have already pointed out why I think the meaning attributed to the word by the Courts, when contracts between individuals have been under consideration, does not afford a guide for construing this enactment.

These are my reasons for adhering to the construction which I put upon the words "mines of coal, ironstone, slate, or other minerals" in *Farie's* case.

So far I have dealt with the case apart from authority; but it is not unworthy of consideration that the decided cases support

the view adopted by the Court below. In the case of the *Great Western Ry. Co.* v. *Bennett*, L. R. 2 H. L. 27, Lord CHELMSFORD said, "That this section reserves to the mine owner all the minerals, however near they may be to the surface, unless the company chooses to purchase them, appears very clearly from the exception of 'the parts necessary to be dug or carried away or used in the construction of the company's works,' as these will, of course, be the minerals lying nearest to the surface." I admit the force of the criticism of the appellants' counsel, that the words quoted by Lord CHELMSFORD do not necessarily lead to the inference he drew from them, inasmuch as in making the railway it might be necessary in cuttings or tunnels to carry away or use minerals lying far below the surface. But the fact remains that the noble and learned Lord intimated the opinion that all the minerals, however near they might be to the surface, were reserved. And the other learned Lords who took part in the judgment not only do not dissent from Lord CHELMSFORD'S view, but use language which, I think, shows that they shared it. An opinion thus expressed ought not to be lightly departed from. It is impossible to say how many transactions in the last twenty years may have been carried through on this view of the law. There has been no * judicial expression of a contrary opinion that I am [* 32] aware of until quite recently in *Farie's* case, 13 App. Cas. 657 (p. 485, *ante*), whilst both in this country and in Scotland the point has been actually decided in accordance with the view taken by the learned Judges in the present case. Indeed, in the case of the *Caledonian Ry. Co.* v. *Dixon* (see 5 App. Cas., at p. 823), where the point was decided against the company by the Court of Session, although the case was brought to your Lordships' House by way of appeal upon another point, the railway company did not seek for a review of the decision of the Court of Session on the question now in controversy.

It remains for me to consider the subsidiary contention of the appellants, that the respondent was not in the present case "desirous of working" the mines. The first objection raised is that he had no intention of working them himself, that is, by his own servants, but only by lessees or licensees. I agree with the Court below that this objection cannot, upon the true construction of the section, be sustained. Then it was urged that there was no real desire to work, but only to compel the appellants to purchase, the

minerals. I quite concur with what COTTON, L. J., said, that "there must be not only an expression of desire, but an honest actual existence of the desire to work either by himself or his lessees, to justify an owner in giving such a notice. If he gave the notice when it was obvious that there were no minerals, or that he could not possibly intend either to let or work them himself, that would be vexatious, and the Court would not allow that to be acted upon." But in the present case the learned Judge who tried the action and the Court of Appeal have come to the conclusion that there was a real and *bonâ fide* desire to work. After considering the arguments insisted upon by the learned counsel for the appellants I find myself unable, upon this point, to differ from the Courts below. I am not a little influenced by the fact that the minerals on either side of the railway in the immediate neighbourhood of those now in question have actually been gotten by lessees of the respondent. It is urged that the minerals under the railway were left unworked, because the respondent thought he had no right to them. This matters not as regards the point I am now concerned with. Indeed, it seems to me to make the case of the respondent stronger.

[* 33] * For the reasons I have submitted to your Lordships I think the judgment appealed from should be affirmed, and the appeal dismissed.

Lord WATSON:—

My Lords, I also am of opinion that both Courts below have come to a right conclusion in this case, and that the judgment of the Court of Appeal sustaining the decision of CHITTY, J., ought to be affirmed.

Questions of nicety have arisen, and may yet arise, as to the particular substances meant to be included in the general words "or other minerals," as these occur in sect. 77 of the English, and sect. 70 of the Scotch, Railways Clauses Act of 1845. I do not think that any substantial question of that kind is presented in this case. The substances to which the argument at the bar has been confined are "ironstone," which is one of the minerals specially excepted in these clauses, and "limestone," which appears to me to be so much *ejusdem generis* with the minerals enumerated that it must necessarily be held to come within the description of "other minerals."

The real point of difficulty which this case presents is due to the

circumstance that the statutory exception is not of "minerals" but of "mines of minerals." It is mutually conceded that the ironstone and limestone beneath the appellants' railway, which the respondent has notified his intention to excavate, can only be worked, and according to the custom of the district would be properly worked, by open cast. But the appellants maintain that, according to the sound construction of the Act of 1845, no minerals are reserved to the landowner except such as are capable of being "mined," using that term in its strictest sense, as signifying operations conducted wholly underground, and not open to the light of day. That is a proposition which your Lordships had recently occasion to consider in *Lord Provost of Glasgow* v. *Farie*, 13 App. Cas. 657 (p. 485, *ante*). In that case I came to the conclusion that every substance, being a mineral within the meaning of these clauses, is reserved to the owner irrespective of the method by which it may be wrought. I there said that, in the enactments * of sect. 18 of the Waterworks Clauses [* 34] Act, 1847 (which are in the same terms with sects. 77 and 70 of the Railways Clauses Acts of 1845), the word "mines" must be taken to signify "all excavations by which the excepted minerals may be legitimately worked and got." I do not think it is necessary to say more than that I adhere to the opinions which I expressed in *Lord Provost of Glasgow* v. *Farie*, 13 App. Cas. 657 (p. 492, *et seq.*, *ante*). On consideration I think it may be more accurate to say that the expression, "mines of coal, &c.," is used by the Legislature to denote the minerals *in situ*, without reference to the manner in which they can be worked; but the result is, in either view, the same and rests upon the same considerations. I concur in the reasons which have been assigned for his judgment by my noble and learned friend (Lord HERSCHELL). After all, this is a mere question as to the period of time at which railway companies must acquire and pay for the subjacent and adjacent minerals necessary for the support of their lines. The general policy of the Railways Clauses Acts, and their special provisions, alike appear to me to point to the result at which the noble and learned Lord has arrived.

In my opinion the appellants have failed to substantiate their averment that the respondent does not entertain a real and *bonâ fide* intention of working the minerals in question, and I therefore concur in the judgment which has been moved.

No. 9. — Midland Railway Company, &c. v. Robinson, 15 App. Cas. 34, 35.

Lord MACNAGHTEN: —

My Lords, the principal question, if not the only question, in this case is, What is the meaning of the word "mines" as used in sect. 77 of the Railways Clauses Consolidation Act, 1845, and in the heading to that part of the Act? On this question I have the misfortune to differ from your Lordships. I abide by the views I expressed in *Farie's* case. I continue to think that the word was used both in the heading and in the section in the sense which, if I am not mistaken, every English Judge who had occasion to consider the meaning of the word before *Farie's* case was decided took to be its ordinary signification. It seems to me that on such a point the opinions of such Judges as KINDERSLEY, V. C., [* 35] TURNER, L. J., and Sir GEORGE JESSEL are probably * a safer guide than any definitions or illustrations to be found in dictionaries. KINDERSLEY, V. C., was clear on the point. So was TURNER, L. J., who agreed with the VICE-CHANCELLOR on that question in *Bell* v. *Wilson*, L. R. 1 Ch. 303, and dealing with an exception of "mines within and under the lands whether opened or unopened," observed that those are "words which are ordinarily used with reference to underground workings." In *Errington* v. *Metropolitan District Ry. Co.*, 19 Ch. D. 559, where, contrary to the view thrown out by some of the noble and learned Lords in *Great Western Ry. Co.* v. *Bennett*, L. R. 2 H. L. 27, it was held that railway companies could acquire mines compulsorily, Sir GEORGE JESSEL remarks: "There are no mines in the ordinary sense under these lands, at least it is not shown there are. What are called mines and what are minerals probably within the meaning of the Act of Parliament are some beds of gravel or some beds of clay lying near the surface, and it is said they can only be worked from the surface."

If it was really the intention of Parliament that all minerals, however worked, should be deemed to be excepted from conveyances to railway companies unless expressly mentioned therein, I cannot conceive why the word "minerals" is not to be found in the heading to this part of the Act, or why the word "minerals" was not used in sect. 77 instead of the expression "mines of coal, ironstone, slate, or other minerals," or why the Legislature in the heading and in that section avoided the use of the common, obvious, and well-understood expression "mines and minerals."

Whether the view of the appellants or that of the respondent be accepted some difficulties and inconveniences unquestionably may present themselves. But I think the appellants were right in saying that the difficulties which attend their construction, however formidable they may appear in argument, are not really practical difficulties, and that those difficulties are reduced to a minimum since it has been decided that railway companies are not disabled from purchasing mines compulsorily if they think fit to do so.

It was said in argument that if the appellants' construction were adopted railway companies might be exposed to danger by * the working of surface minerals on adjacent lands. [* 36] But in answer it was pointed out that if surface minerals are not within the enactment with respect to "mines lying under or near the railway," the ordinary rule as to adjacent support so far as regards surface minerals would be applicable.

Some reliance was placed on certain expressions in Lord CHELMSFORD'S judgment in the *Great Western Ry. Co.* v. *Bennett*, L. R. 2 H. L. 27, which seem to show that in his Lordship's opinion all minerals of whatever kind, and however near the surface, were reserved by the Act to the landowner. But it is to be observed that the question which has arisen in the present case could not possibly have arisen in *Bennett's* case, because the exception in the conveyance under consideration in that case did not follow the words of the Act. It excepted in terms both minerals and mines. The point, therefore, possibly was not present to his Lordship's mind. On the other hand, Lord WESTBURY'S opinion seems to favour the appellants' construction.

That a railway company is not entitled to support from subjacent or adjacent mines is perfectly clear from the Act, as was pointed out in *Bennett's* case. But I do not think that it necessarily follows from that circumstance that a mine owner who is entitled to withdraw support by working his mines in the ordinary course if the company do not compensate him is entitled to enter upon the surface, which unquestionably belongs to the railway company, and break it up by working from the surface.

For these reasons and the reasons I have expressed in *Farie's* case, 13 App. Cas. 657 (p. 485, *ante*), I should, but for your

Lordships' opinion, be disposed to reverse the judgment under appeal.

Order appealed from affirmed and appeal dismissed with costs: Ordered (on the application of the parties by their counsel at the bar) that this judgment be held to be a final judgment in the action, and that the action be dismissed with costs.

Lords' Journals, 9th December, 1889.

ENGLISH NOTES.

The case of the *Earl of Jersey* v. *Neath* (*Guardians*), which was decided by the Court of Appeal subsequently to the decision of the House of Lords in *Lord Provost, &c. of Glasgow* v. *Farie*, has been already stated in the notes to Nos. 3 and 4, at p. 448, *supra*.

Where minerals are expressly excepted from a conveyance of land to a railway company, — particularly where they are described as including a stratum of clay which, according to the decision in *Lord Provost, &c. of Glasgow* v. *Farie*, would not be within the exception of "mines of coal, ironstone, slate, or other minerals," implied in a conveyance according to sect. 77 of the Railways Clauses Consolidation Act, 1845, — such clay is subject to the subsequent clauses relating to mines and minerals generally, and may accordingly, unless the company elect to purchase it, be worked by the owner under the reservation, not only by working from beneath so as to let down the surface, but by entering upon the surface of the land and working it from above, if that is the usual manner of working such material in the district; and, if necessary, for such working, removing the railway. *Ruabon Brick and Terra Cotta Co.* v. *Great Western Railway Co.* (C. A.), 1893, 1 Ch. 427, 62 L. J. Ch. 483, 68 L. T. 110, 41 W. R. 418.

No. 10. — BISHOP OF WINCHESTER *v.* KNIGHT.

(1717.)

No. 11. — BOURNE *v.* TAYLOR.

(1808.)

RULE.

In the case of an ordinary copyhold the property in the minerals beneath the copyhold tenement is vested in the lord as having the freehold of inheritance vested in him; but the lord, as such, and without a custom of the manor, is not entitled to enter upon the copyhold and bore for or work the minerals.

Bishop of Winchester v. Knight.

1 P. Wms. 406–408 (s. c. 2 Eq. Cas. Ab. 226, pl. 7).

Customary and Copyhold Tenants. — Lord's Rights. — Minerals.

Lord of a manor may bring a bill for an account of ore dug, or timber [406] cut, by defendant's testator; otherwise of ploughing up meadow or ancient pasture, or such torts as die with the person.

One held customary lands of the Bishop of Winchester, as of his manor of Taunton-Dean in Somersetshire, in which lands there was a copper mine that was opened by the tenant, who dug thereout, and sold great quantities of copper ore, and died, and his heir continued digging and disposing of great quantities of copper ore out of the said mine.

The Bishop of Winchester brought a bill in equity against the executor and heir, praying an account of the said ore, and alleging that these customary tenants were as copyhold tenants, and that the freehold was in the Bishop, as lord of the manor and owner of the soil, and that the manner of passing the premises was by surrender into the hands of the lord, to the use of the surrenderee.

On the other side it was said that it did not appear the admittance, in this case, was to hold *ad voluntatem domini secundum consuetudinem, &c.*, without which words [*ad voluntatem domini*]

No. 10. — Bishop of Winchester, 1 P. Wms. 407, 408.

[407] it was insisted there could be no copyhold, as had been adjudged (*Crowther* v. *Oldfield*, Salk. 365, and *Gale* v. *Noble*, Carth. 432), in Lord Ch. J. HOLT'S time.

Then, as to the ore dug in the ancestor's lifetime, there was no colour to ask relief; because this being a personal tort, the same died with the person, and that with respect to the ore dug in the heir's own time, there could be no remedy; for that these customary tenants were as freeholders, and there was full proof that they, from time to time, had used to cut down and fell timber from off the premises, and had also dug stone and sold it.

LORD CHANCELLOR (COWPER). — It would be a reproach to equity to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy.

It is true, as to the trespass of breaking up meadow or ancient pasture-ground, it dies with the person; but as to the property of the ore or timber, it would be clear even at law, if it came to the executor's hands, that trover would lie for it; and if it has been disposed of in the testator's lifetime, the executor, if assets are left, ought to answer for it; but it is stronger in this case, by reason that the tenant is a sort of a fiduciary to the lord, and it is a breach of the trust which the law reposes in the tenant, for him to take away the property of the lord; so that I am clear of opinion the executor in such case is answerable.

As to the evidence that the tenant might do one sort of
[408] waste, as to cut down and dispose of the timber, this might be by special grant; but it is no evidence that the tenant has a power to commit any other sort of waste, viz., waste of a different species, as that of disposing of minerals; but a custom empowering the tenants to dispose of one sort of mineral, as coals, may be an evidence of their right to dispose of another sort of mineral, as lead out of a mine.

But this question being doubtful, and at law, let the Bishop bring his action of trover as to the ore dug and disposed of by the present tenant.

Accordingly this was tried, and there never having been any mine of copper before discovered in the manor, the jury could not find that the customary tenant might by custom dig and open new copper mines: so that upon the producing of the *postea* the Court held that neither the tenant without the license of the lord, nor

the lord without the consent of the tenant, could dig in these copper mines, being new mines.

Bourne v. Taylor.

10 East, 189–205 (10 R. R. 267).

Copyhold. — Minerals. — Lord of Manor. — Right of Entry.

The lord of a manor, as such, has no right, without a custom, to enter [189] upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same; and the copyholder may maintain trespass against him for so doing.

But where the defendant justified under the lord, as being seised in fee of the veins of coal lying under the copyhold tenements, together with the liberty of boring for and getting the coal, &c., it is not enough for the plaintiff to reply that as well all the veins of coal under the said closes in which, &c., as the rest of the soil within and under the same, had immemorially been parcel of the manor, and demised and demisable by copy, &c., without any exception or reservation of the coal, &c., unless he also traverse the liberty of working the mines; because the plea claims such liberty not merely as annexed to the seisin in fee to be exercised when in actual possession, but as a present liberty to be exercised during the continuance of the copyholder's estate; and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid it.

Trespass for breaking and entering the plaintiff's close, part of the North Farm, otherwise Lowstead Farm, and another close, part of the Town Farm, in the township of Backworth, in the county of Northumberland, and subverting the soil, and digging and boring the same, &c. The defendant pleaded the general issue and six special justifications of the trespasses, as servants, and by command of the Duke of Northumberland. The 1st of these stated that the Duke, at the times when, &c., was and is seised in fee * of the manor of Tynemouth, with [* 190] the appurtenances, in the said county, of which the closes in question have immemorially been parcel and copyhold tenements of the manor; and that by reason thereof the Duke was entitled to all mines and veins of coal in and under the same closes, &c., and to bore for, dig for, and get such mines and veins of coal. The 2d justification stated the same right in the Duke, he making and allowing to the copyhold tenants of the said closes in which, &c., and their tenants and occupiers thereof respectively, a reasonable satisfaction and compensation for all damages done or

occasioned to them respectively by such boring for, digging for, and getting such veins and seams of coal as aforesaid. The 3d stated that the places in which, &c., from time immemorial have been parcel of the said manor; and that the Duke is seised in fee of and in the veins and seams of coal lying within and under the copyhold tenements within and parcel of the same manor, together with the liberty of boring for, digging for, and getting such veins and seams of coal there, and of doing all such acts as might or may be necessary for those purposes, or any of them. The 4th stated the same right in the Duke as the 3d, he making and allowing to the said copyhold tenants, &c. (as stated in the 2d justification), reasonable satisfaction and compensation for all damages occasioned to them respectively by the boring for, digging for, and getting the said coals, and the doing such necessary acts as aforesaid. The 5th and 6th justifications were like the 3d and 4th, with the additional allegation that the Duke also was seised in fee of the manor of Tynemouth.

The plaintiff demurred specially to the first and second justifications, because they do not allege as a fact that the Duke [* 191] was entitled to bore for, dig for, and get the * coal within or under the copyhold tenements of the manor, but alleges that he was so entitled as a consequence of law, arising from the fact of his being seised in fee of the manor; and because those pleas do not show how the Duke's supposed right to bore for, dig for, and get the same coal, or to enter and dig in the close, &c., for that purpose, arose, — whether by custom, prescription, grant, or how otherwise. And to the other justifications the plaintiff severally replied, that as well all the said veins and seams of coal within and under the same close in which, &c., as the rest of the soil and ground of and within and under the same, from time immemorial have been parcel of the manor, and demised and demisable by copy of court-roll, &c., without any exception or reservation thereout or therefrom of the mines or seams of coal within or under the said closes in which, &c., or either of them or any part thereof. That before the said Duke was so seised of the said manor, the late Duke was lord of the same, and seised thereof, and at a court-baron, &c., granted the said closes in which, &c., to Sir Matthew White Ridley, Bart., and Charles Brandling, Esq., to hold to them and their heirs at the will of the lord, &c., and the survivor of them demised to the plaintiff, &c.

The defendant demurred specially to these replications to the pleas, because they do not directly traverse, nor confess and avoid, the matters of the said pleas, and are argumentative and not issuable. The case was argued in the last term.

Holroyd for the plaintiff. — The principal question is, Whether, without any special custom, or special reservation of the mines, the lord has a right to enter upon the copyholder's land and dig for coals there, either * with or without making [*192] him compensation for the injury done to the surface. The defendant by his pleas admits the lands to be copyhold; and the plaintiff by his replications to some of them alleges that they have been immemorially demisable by copy, without any reservation of the mines of coal. Where there is a grant of the land itself, all above and below the surface passes with it (1 Blac. Com. 18), unless specially reserved. This, indeed, is not the nature of the copyholder's estate, for without a special custom he cannot dig the mines under his copyhold; nor can he cut trees except for special purposes, as for repairs, or toppings and loppings for fire-bote; because, not having the freehold of inheritance in him, it would be waste. If the mines were reserved out of the grant, though no waste could be committed of them, the tenant digging for them would be a trespasser. But where any estate or interest in land is granted, the lessee or grantee takes not only the surface, but all above and below it; and no other can break the soil, without committing a trespass upon the tenant's possession. If mines were opened before, the tenant may dig and take the profit thereof; which shows that the mines themselves are granted, though it be waste in him to dig for any new mine without license. *Saunders' Case*, 5 Co. Rep. 12 a. 12 Co. Lit. 54 b. Where the mines are expressly reserved to the lord, that may be an implied reservation of his right to enter and dig for them; but without such express reservation, or a custom reserving the right to the lord, which is equivalent, it would be derogatory to his grant to enter and dig where he has granted the land generally. The copyholder is clearly entitled to all the profits of the soil, of part of which he must be deprived, * if the lord may enter [*193] upon and dig the soil for coal, which cannot be procured without a great destruction of the surface about the opening of the mine. The lord, therefore, having parted with the right of possession to the whole during the time of the grant, must necessarily

be a trespasser if he enter upon the copyhold. The general rule is, that every grant is to be taken most strongly against the grantor, within the words of it. With respect to the particular case of copyholds, in *The Earl of Kent* v. *Walters*, 12 Mod. 317, Northey having contended that by the general custom of copyholds the lord might cut trees on them, for otherwise, if it were a copyhold in fee, the wood would never be cut, which would be inconvenient; Lord HOLT denied the lord's right, and said that the copyholder had the same interest in the trees that he had in the land. And in *Ashmead* v. *Ranger*, 12 Mod. 378, Com. Rep. 71, and 1 Ld. Ray. 552, this Court held that trespass lay against the lord for entering and cutting down trees on the copyhold; Lord HOLT again affirming his former opinion, that the tenant had the same customary or possessory interest in the trees that he had in the land, and adding, that if the lord had a mind to cut trees, he must compound with the tenant. This judgment was affirmed in the Exchequer Chamber by all the Judges; but it appears (11 Mod. 18, and Salk. 638) to have been afterwards reversed in the House of Lords by 11 against 10; because the tenant could not cut the trees, and if the lord could not, they must rot on the land, for then nobody could. At most that judgment can only conclude that particular case. That mines pass by the general grant of an estate appears from *Clavering* v. *Clavering*, 2 P. Wms. [* 194] 388, * where tenant for life amenable for waste was held entitled to open new shafts for the further working of an old vein of coal. But the point now in judgment seems to have been decided in *Player* v. *Roberts*, W. Jones, 244, where the case is put that a man grants the coal and coal mines within a manor, parcel of which was copyhold, held for life, to J. S.: the lessee (stated by mistake for the lessor) enters on the copyhold, and digs a new pit there, during the life of the copyholder, and takes the coals and converts them to his own use; and the lessee of the coal mine brought trover against the lessor: and held that he might, for neither the lessee nor the lessor could enter on the copyholder to dig the coals; for the copyholder shall have trespass for breaking his close and digging of the coals: but that when the coals were dug out of the pits by the lessor or lessee, or by a stranger, they belonged to the lessee, who should have trover against any one who took them. In *Lyddall* v. *Weston*, 2 Atk. 20, upon a question whether the plaintiff could make a good title, Lord

HARDWICKE, C., said that there was no instance where the Crown had only a bare reservation of royal mines, without any right of entry, that it could grant a license to any person to come upon another man's estate, and dig up his soil and search for mines; and he thought that the Crown had no such power. But when the mines were once opened, the Crown may restrain the owner of the soil from working them, and may work them on its own account, or grant a license to others to do so. In *The Bishop of Winchester* v. *Knight*, 1 P. Wms. 406 (p. 533, *ante*), the facts were, that a customary tenant holding under the Bishop had opened a copper mine where none had been before, and dug out * and sold great quantities of ore, and after his death his [* 195] heir had continued to dig for and dispose of other copper ore. The Bishop filed his bill against the executor and heir for an account. Lord Chancellor COWPER considered that the executor would be liable, if the tenant had no right; but this being a question at law, and doubtful upon the evidence before him, he directed an action of trover to be brought by the Bishop against the then tenant, which the report states was tried; and there never having been any mine of copper before discovered in the manor, the jury could not find that the customary tenant might by custom dig and open new copper mines. So that upon the producing of the *postea* the Court held that neither the tenant without the license of the lord, nor the lord without the consent of the tenant, could dig in these copper mines, being new. And, lastly, in the case of *Grey* v. *The Duke of Northumberland*, 13 Ves. 236, LORD CHANCELLOR restrained the lord of the manor from opening a mine, which he was preparing to do, upon the plaintiff's copyhold land.

The question upon the pleadings was also discussed by the counsel on both sides, but it is sufficient to refer to the opinion of the Court upon this point.

Hullock, *contra*. — It is admitted that the freehold is in the lord, and that he has a right to all mines under the surface of the copyhold; and that when severed and taken by any other, the property is in the lord, and he may recover it in trover. The question then is, Whether, having a clear right of property in the subject-matter, he has not necessarily, incident to that right, the power of * taking it? A copyholder, in the origin [* 196] of the tenure, was a mere tenant at will; and at this day can derive no other rights to his estate than what have in fact been

exercised from all time, and which are therefore given to him by the custom of the manor. In every instance of the exercise of a right of property over his estate, it lies upon him to show a custom for what he claims; and whatever he cannot claim by custom remains in the lord, whose rights are reserved to him by the common law, and are not dependent on the custom. The lord might originally have granted the copyhold with what reservations he pleased; and it must be presumed that he reserved every part of the copyhold which the custom does not show that he granted to the copyholder, with all the powers incident to the enjoyment of such reservation. [Lord ELLENBOROUGH, Ch. J. — In the absence of all other evidence of the grant than the custom, does not the absence of any custom either for the lord or the copyholder to open mines show what the terms of the grant were?] The origin and nature of this kind of estate must be attended to. The copyholder's estate has grown out of encroachments on the lord. Even at this day the grant does not operate as a common law grant would. Nothing passes by it but the mere use of the surface of the soil: the trees and mines still remain in the lord, in whom is the freehold of the whole. The lord's rights must either be taken to have been reserved out of the original grant, if any, or to be excepted by the common law; for certainly they are not derived from the custom. In *Folkard* v. *Hemmett* [*197] *and others*,[1] where, in case by a commoner * against a stranger for digging the soil and erecting buildings on the common, the defendant justified under a grant of the soil by the lord with the consent of the homage according to the custom, Lord Ch. J. DE GREY, after hearing evidence of similar grants by the lord for a long period back, said he would not call it a custom, but a usage, because he considered it as a reserved right of the lord, and that it was legal. If mines be expressly reserved to the lord in a grant, the law would reserve his right of entry and digging there, as incident to such reservation. And the legal effect of an exception or reservation by the law cannot be less beneficial than if it were by the act of the party. The lord's right, however, is rather an exception, which, as Lord Coke (Co. Lit. 47 a) says, is ever of part of the thing granted and of a thing *in esse*, than a reservation, which is always of a thing newly created or reserved out of the land demised. Then the law ex-

[1] Sittings after Easter, 16 Geo. III., C. B. 5 T. R. 417, note.

cepts everything which is incident to the enjoyment of the thing excepted; and when it gives anything to one, it gives impliedly whatsoever is necessary for the taking and enjoying the same. 2 Inst. 306, Co. Lit. 56 a, and Finch's Law, 63. If trees be excepted in a lease, the law gives the lessor and those who would buy of him power to enter and show the trees. So it gives power to him who has a conduit in the land of another to enter and mend it when needful. *Liford's Case*, 11 Co. Rep. 52, and Perk. s. 111, and *vide Hodgson* v. *Field*, 7 East, 613 (8 R. R. 701). In the *Case of Mines* Plowd. 313, 323, 336, it was held by all the Judges that the King, having by his prerogative a right to all gold and silver mines throughout the realm, had also the liberty to dig and lay the same upon the land of the subject, and carry it away from * thence; which is directly against what is [*198] said by Lord HARDWICKE in *Lyddall* v. *Weston*, 2 Atk. 20.

If one have a right of way over another's land, he may enter to repair it. Finch's Law, 63. If this right of the lord affect the copyholder's enjoyment, it is because of the nature of his tenure; and though every grant is to be construed most strongly against the grantor, that only applies to that which is meant to pass, but not to an interest which it is admitted did not pass. The case of *Player* v. *Roberts*, W. Jones, 244, was a question of property between the lord and the lessee of the coal mine, concerning coal severed from the mine; and no doubt the property, when raised, was in the lessee, whether rightly dug or not; and therefore all that was said in respect of the right to dig was beside the point in judgment. But the final determination of the lords in *Ashmead* v. *Ranger*, Salk. 838, and 11 Mod. 18, is a direct authority upon principle to govern this case. The cases of trees and of mines are in every respect analogous. The right to both when severed is in the lord, with the exception of such trees the tenant is entitled to take for repairs. Then if the lord were adjudged to have a right to come upon the land, and cut down and take the timber as incident to his right to it when standing, by the same rule he must have an equal right to take the coal or metals under the surface in the only way in which they can be gotten, by digging for them. The judgment of the Lords there was conformable to the opinion delivered in *Heydon* v. *Smith*, 13 Co. Rep. 67, Brownl. 328, and Godb. 172, where, in trespass by a copyholder against the lord's bailiff for entering his close and cutting down a timber

tree, the fourth resolution was, that the lord cannot take
[* 199] all * the timber trees, but he ought to leave sufficient for the reparation of the customary houses, &c. And in the report of the same case in Godbolt, Lord COKE says, that " without any custom the lord may take the trees, if he leave sufficient to the copyholder for the reparations." There are also other authorities to that effect: 1 Leon. 272, case 365; *Ayray* v. *Bellingham*, Finch's Rep. 199, 2 Brownl. 200. In the case of *The Countess of Rutland* v. *Gie*, 1 Sid. 152, 1 Lew. 107, and 1 Keb. 557, the Court denied a prohibition to restrain a rector from digging for lead in his glebe; saying, that if he could not dig mines in his glebe, all the mines under all the glebes in England must remain unopened. And TWISDEN, J., thought that the lord might open a mine in a copyhold of inheritance; though FOSTER and KEELING, JJ., thought that he could not. Upon the whole, there is no decided case against the lord, and all legal analogies and principles are with him; for it is absurd and against public policy that the owners of so great a mass of property should be precluded by law from the enjoyment of it.

Holroyd, in reply, upon the general question, said that if a mine, lime pit, or stone quarry were once lawfully opened upon the copyhold, the copyholder may dig and enjoy it; which showed that an interest passed to him in the land beyond the mere use of the surface. It is also shown by this, that if the copyholder himself open a new mine, it is waste in him; whereas if no interest passed to him in it, it would be a trespass, and not waste, and therefore not a forfeiture of the copyhold. Even as to trees, it is said in the 5th resolution of *Heydon* v. *Smith*, 13 Co. Rep. 68, 69, that the copyholder may maintain trespass against the
[* 200] * lord for breaking and entering his close and cutting *arborem suam*. And in *Folkard* v. *Hemmett*, the lord's right was claimed and supported by usage, which was evidence of an express reservation in the original grant of the right of common. *Cur. adv. vult.*

Lord ELLENBOROUGH, Ch. J. — This was an action of trespass. The defendant pleaded six justifications. The first stated that the Duke of Northumberland is seised in fee of the manor of Tynemouth; that the places in which, &c., have immemorially been copyhold tenements of that manor; and that by reason thereof the

Duke is entitled to all mines and veins of coal in and under the said closes in which, &c., and to bore for, dig for, and get such mines and veins of coal. The second justification states that the Duke had the right above mentioned, making and allowing to the copyhold tenants of the said closes in which, &c., and their tenants and occupiers thereof respectively, a reasonable satisfaction and compensation for all damages done or occasioned to them respectively, by such boring for, digging for, and getting such veins and seams of coal as aforesaid. To these first two justifications the plaintiff had demurred, and has assigned for cause that the existence of the right (so claimed as aforesaid) is alleged, not as a fact, but as a consequence of law from the Duke's being seised of the manor. The third justification states that the places in which, &c., from time whereof, &c., have been copyhold tenements of the manor of Tynemouth; and that the Duke is seised in fee of all the veins and seams of coal lying within and under the copyhold tenements of the manor, together with the liberty of boring for, digging for, and getting such veins and seams of coal there, and of doing all acts necessary for those purposes; and justifies under that right. * The fourth is the same [* 201] with the third, except that it adds that compensation is to be made for damages, as the second does. The 5th and 6th are like the 3d and 4th, but they add that the Duke is also seised of the manor. To each of these four last justifications the plaintiff has replied, that as well the said veins and seams of coals lying under the said closes in which, &c., as the rest of the soil and ground of and within and under the said closes in which, &c., from time immemorial have been parcel of the said manor, and demised and demisable by copy of court-roll, without any exception or reservation of the mines or seams of coal within or under the said closes, in which, &c., or either of them, or any part thereof; that the said closes in which, &c., were granted to Sir M. White Ridley and Charles Brandling, Esq., to hold to them and their heirs, at the will of the lord, &c. and that they demised them to the plaintiff. To each of these replications the defendant has demurred, and has assigned for cause that they do not strictly traverse, or confess and avoid, any of the matters contained in the pleas, and are argumentative, and not issuable.

Upon these pleadings, therefore, there are two questions: the one, a general one, whether the lord of a manor has, as lord, a

right to enter upon the copyholds within the manor, if there be mines and veins of coals under them, and bore for and work such mines or veins? the other, a question of mere form, whether the replication to the last four justifications sufficiently confess and avoid them; or whether they ought not to have traversed the liberty of digging stated in the justifications?

As to the first, if such a right as is claimed exist, it is singular that it is not noticed in any of the books which treat of [* 202] manors and copyholds; that it is now for the first * time brought forward; that not a single instance is given of the exercise of it; and that with the single exception of a *dictum* in *Rutland* v. *Greene*, what authorities there are upon the point are all against it. *Rutland* v. *Greene* is in 1 Keb. 557, 1 Sid. 152, and 1 Lev. 107. The case was this: a parson opened a mine upon his glebe; the patron moved for a prohibition to restrain him under the equity of the statute, 35 Ed. I. st. 2. The Court thought him entitled to open and work the mine; because, otherwise, none of the mines under glebe lands throughout England would be opened. But it being urged that this was the only way the patron had to try his right, the Court granted a rule. Siderfin adds, "The same law seems of a copyholder of inheritance. *Quære bien.*" Whether this were his own conclusion, or collected from what fell from the Court, does not appear; but if any inference is to be drawn from it, it is that the copyholder may open the mine, not the lord. Levinz says nothing as to lord or copyholder; but KEEBLE says, "TWISDEN conceived the lord may open a mine in a copyhold of inheritance." FOSTER held it a trespass; and KEELING conceived he could not do it. The utmost extent therefore of this authority is, that there is the *obiter dictum* of one Judge, viz., TWISDEN, against the *obiter dicta* of two others, FOSTER and KEELING. In *The Bishop of Winchester* v. *Knight*, 1 P. Wms. 406 (p. 533, *ante*), Lord Chancellor COWPER held that if there were no custom to regulate it, neither a customary tenant without license from the lord, nor the lord without license from the tenant, could open and work new mines. In that case a customary tenant of the manor had opened a copper mine, and the lord filed a bill against him to account for the produce. It being doubtful where there was not a custom which would protect the tenant, [* 203] the * LORD CHANCELLOR directed the lord to bring an action of trover; but the custom appearing upon the trial

not to be applicable, "the Court held, that neither the tenant without the license of the lord, nor the lord without the consent of the tenant, could dig in these mines, being new mines." In *Player* v. *Roberts*, Sir W. Jones, 243, J. N. was copyholder for life; the lord granted all coal mines within his manor for ninety-nine years to Dimery, who underlet to Player; Dimery's term was afterwards surrendered to the lord, but Player's interest was not extinguished; the lord opened new pits upon the copyhold, and took away the coal, upon which Player brought trover against him. Several points were moved; and the last was this: a man grants all his coal and coal mines within a manor (and parcel was copyhold for life) to J. S.; the lessee (this should be the lessor) enters the copyhold, and digs a new pit in the copyhold land during the life of the copyholder, and takes the coals and converts them to his own use; and the lessee of the coal mine brings trover against the lessor: and, by the Court, so he may; for it is true, that neither the lessee nor the lessor can enter upon the copyholder to dig the coals; for the copyholder shall have trespass for breaking his close and digging his coals. But when the lessor or lessee or a stranger enters, and digs the coals out of the pits, they belong to the lessee; and if any other take the coals, the lessee shall have trover: and upon the whole matter judgment was given for the plaintiff. In Gilbert, Ten. 327, the LORD CHIEF BARON says, "It seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines; neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the copyhold estate." Lastly, in *Townley* v. *Gibson*, 2 T. R. 704–707 (p. 477, *ante*), it had been * urged in argument [* 204] that the lord of the manor was entitled to the mines under the copyholds, unless there were some custom to exclude him: and BULLER, J., in delivering his opinion, said, "I do not agree with the defendant's counsel that the lord may, unless restrained by custom, dig for mines on the copyholder's lands; but it is not necessary to consider that question here." These authorities are in point; and though they are *dicta* only, not decisions, they are the *dicta* of great men, and they correspond with the usage on the subject. Valuable as the supposed right is, there is not a single instance shown in which any lord has ventured to act upon it. The injury to the tenant would naturally have produced resistance on his part: the *dicta* above mentioned would have encouraged

that resistance: a suit would have been the consequence, and the result of such suit must have been known in Westminster Hall; and as none such is known, it may fairly be presumed that a litigation of that kind has not taken place.

The second question, whether the replications ought to have traversed the liberty of working the mines, as stated in the 3d and subsequent justifications, depends upon the construction to be put upon those justifications. If they mean only that the liberty is so annexed to the seisin in fee, as that, until the right of actual possession has accrued in virtue of the seisin, the liberty cannot be exercised; the replications have sufficiently confessed and avoided it by showing that there is an outstanding copyhold estate, which suspends the right of actual possession. But if the pleas are to be considered as claiming the liberty presently, *i. e.*, during the continuance of the copyhold estate, that liberty is not confessed and avoided by the replications, and there ought to have been a traverse. The latter seems to be the true meaning [* 205] of these pleas: and indeed the pleas * would be bad if it were not; for they admit that the closes in which, &c., were copyhold tenements at the time of the trespasses, and insist upon the right to enter upon the copyholds. The defendant says, all the mines under the copyholds are the Duke's, and the Duke has a right to work them: the closes in question were subsisting copyholds at the time of the trespass, and therefore I entered under the Duke's right. The defendant therefore must have meant that the Duke's right was such as entitled him to work during the copyholder's estate. The word "liberty," too, implies the same thing. It imports, *ex vi termini*, that it is a privilege to be exercised over another man's estate. A man's right of dominion over his own estate is never called a liberty. Now during the continuance of the copyhold, if the mine is to be worked, the lord must exercise a privilege over the copyholder's estate; but as soon as the copyhold is at an end, the surface will be the lord's as well as the coal, and he will have to work upon nothing but his own property. It requires, then, no reasoning to prove, that if the pleas claim the liberty during the continuance of the copyholder's estate, a replication that the copyholds have always been demised, without any exception or reservation of the mines or seams of coal, is not a confession of the liberty and an avoidance of it, but a mere argumentative denial of its existence; and as this is assigned

specially as a cause of demurrer, it should seem that the replications are bad on this ground, and that the plaintiff ought to have leave to amend, or that there should be judgment for the defendant.

The plaintiff's counsel then prayed leave to amend his replication, which was granted.

ENGLISH NOTES.

The question as to the right of the lord to minerals under lands held according to the custom of the manor came again before the Court in *The Duke of Portland* v. *Hill* (1866), L. R. 2 Eq. 765, 35 L. J. Ch. 439, 12 Jur. (N. S.) 286, 15 W. R. 38. It was held that the freehold was in the lord, and that in the absence of a proved custom, the tenant had no right to work the minerals. Sir W. PAGE WOOD, V. C., in giving his decision, refers to the case of *The Bishop of Winchester* v. *Knight* as plainly and clearly deciding the question against the view which appears to have been favoured in *Gale* v. *Noble* (1696), Carth. 432. "From that time downwards," the learned Vice-Chancellor continued (L. R. 2 Eq. 776), "it does not seem to me that there has been any serious doubt on the matter, though the question has been discussed again and again, particularly in *Roe d. Conolly* v. *Vernon* (5 East, 51); but as far as authority goes, there has never been a decision which has affected to reverse or cast doubt upon *The Bishop of Winchester* v. *Knight*. In the recent case of *The Marquis of Salisbury* v. *Gladstone* (No. 14, *post*, 9 H. L. Cas. 692), it is referred to as being a case of good and sound law, and no doubt that I know of has ever been cast upon it."

What sort of statement and evidence of a custom will justify an entry by the lord upon the surface of the copyhold is not made clear by decided cases; but according to the decision in *Wilkes* v. *Broadbent*, in the Exchequer Chamber, 1744 (error from *Broadbent* v. *Wilkes*, Carthew, 360), 1 Wils. 63, it seems that any such custom must be clearly defined and proved. In that case the custom set forth in the pleadings and affirmed by the verdict of the jury was, "that the lord of the manor for the time being, and his tenants in the collieries for time out of mind, have used to sink pits within the freehold lands for working the same to get coals, and to throw, place, &c., with shovels and spades, &c., earth, stones, coal, &c., coming out of the said collieries, together in heaps upon the land there near to such pits, there to remain and continue, and to place, lay, and continue wood there for the necessary use and making of the said pits, and to take and carry away from thence with waggons, carts, &c., part of the coals laid there, and to burn and make into cinders other part of the coal laid there during and at the

will and pleasure of the said lord or his tenants." It was decided by the judgment of the whole Court delivered by LEE, Ch. J., that the custom so alleged and found was unreasonable and void: "1st. Because it is so very uncertain, for the word *near* is of great latitude, and too loose to support a custom, such as this is pleaded to be; 2ndly. Because it was very unreasonable, for it laid such a great burden upon the tenants' land, without any consideration or advantage to him, as tended to destroy his estate, and defeat him of the whole profits of his land, and savours much of arbitrary power, being pleaded to be at the will and pleasure of the lord, and to do it as often and when he pleases: and if a custom be unreasonable, no length of time can make it good." As to the argument made at the bar that the custom might have a reasonable commencement, and that the lord might grant his lands to the copyholders charged as he thought fit, and that a copyholder, in the eye of the law, was but a mere tenant at will of his lord — the answer was "that he had more than an estate at will, for he has an inheritance *ad voluntatem domini secundum consuetudinem manerie; et consuetudo est altera lex* (4 Co. Rep. 21). And to support this custom would be to take away the whole benefit of the land granted originally to the copyholder by the lord; and it is a void custom and contrary to law, that the lessor shall have common *encounter son demise quia est part del chose demise* (Palm. 212); but this custom being pleaded to be at the will and pleasure of the lord, tends to make him judge in his own cause, which the law will not endure (Lit. sec. 212)."

The judgment of the MASTER OF THE ROLLS in *Eardley* v. *Earl Granville* (No. 6, *ante*) may also be read as explaining the ordinary rights, as between the lord and the copyholder, in regard to mines.

In the case of *The Ballacorkish Mining Co.* v. *Harrison and others* (1873), L. R. 5 P. C. 49, referred to on another point by the MASTER OF THE ROLLS in his judgment in *Eardley* v. *Earl Granville* (No. 6, at p. 467, *ante*), it appeared on the evidence that by the custom of the island the lords in whom the minerals were vested had the right, for the purpose of mining, to break the surface and deposit spoil, making compensation to the customary tenants of the land. This right was held by the Court below to be established, and was held to be good on the ordinary principles applying between a lord and a customary tenant; and it was not disputed on the appeal. The other point — as to the right of the mine owner to draw off the water by percolation — was given in favour of the mine owner upon the express reservation of "mines" by the Act of Tynwald (an Act of Parliament of the Isle of Man in 1703); the result being that the mine owner had the right to draw off water by percolation, like the owner of any other separate tenement, on the principle of *Chasemore* v. *Richards* (1 R. C. 729).

No. 12. — GOODTITLE d. CHESTER *v.* ALKER AND ELMES.

(1757.)

RULE.

THE property in mines under a public highway is, *primâ facie*, in the freeholder of the surface over which the highway passes.

Goodtitle d. Chester v. Alker and Elmes.

1 Burr. 133–146.

Mines under Public Highway.

Ejectment will lie by the owner of the soil, for land which is part of [133] the King's highway, or of an acre of land, described only by the name of land, though there was a wall, and porch, and part of a house built upon it.

This case was first argued on Tuesday, the 4th of February, 1755, when there were only three Judges; Mr. Justice WRIGHT having (two days before) resigned, and Mr. WILMOT (who was appointed to succeed him) not being then called a sergeant: and it was again argued, and determined on this day (when Mr. Justice WILMOT was also absent, in the Court of Chancery).

It was a special verdict in ejectment for an acre of land lying in the parish of St. Philip and Jacob in the county of Gloucester. It finds, as to one piece of land, containing 14 inches in length, and 33 feet in breadth (parcel of the premises); and as to one other piece of land, containing 3 feet 6 inches in length, and 7 feet in breadth (other parcel of the premises); and as to one other piece of land, containing 2 feet in depth and 14 feet in length (other parcel of the premises contained in the declaration); that Thomas Chester, Esq., was in 1648 seised in his demesne as of fee, of and in the manor of Barton Regis, in the county of Gloucester, with the appurtenances. That the said T. C., Esq., being so seised, certain articles of agreement were, on 24th June, 1648, * made [* 134] between the said Thomas Chester and one John Gotley, otherwise Dowle, reciting a presentment by the homage, at a Court leet of the said manor, holden 10th of April, 1648, "That the said John Gotley, *alias* Dowle, in the new building of a house at

Lafford's Gate, had encroached upon the waste of the said Thomas Chester, then and yet lord of the said manor, 14 inches in length and 33 feet in breadth, without his house; together with a porch without the wall adjoining to the said house, of 3 feet and a half; for the which encroachment the said John Gotley, *alias* Dowle, was by the said jury amerced; as by the presentment aforesaid, in the rolls of the said Court, appeared." The said Thomas Chester and John Gotley thereby agreed, not only concerning the said amerciament (whereof the said Thomas Chester thereby acquitted and discharged the said John Gotley); but also the said Thomas Chester, for the consideration thereafter mentioned, agreed to permit and suffer the said John Gotley, his executors and administrators, to continue the peaceable enjoyment of the said ground and waste encroached, without his disturbance; and also to have liberty to set and place a post in the street, &c., and three other posts, &c., without any disturbance or trouble by him, the said Thomas Chester, &c., for the term of one hundred years from the day of the date of the said articles. In consideration whereof, the said J. G., *alias* D., for him, his heirs, executors, &c., covenanted and agreed to pay to the said T. C., his heirs or assigns, the sum of 6*s.* 8*d.* per annum yearly, &c., during the said term; in consideration whereof the said T. C. granted and agreed to let the said encroachment or encroachments to stand, for and during the said term, without any disturbance, &c.; so as the said yearly rent or sum of 6*s.* 8*d.* be duly paid, &c. And it was further found, that the two first pieces of land particularly mentioned and described in the verdict are the two several pieces of land mentioned in the said articles to be encroached on by the said John Gotley, otherwise Dowle; and parcel of the waste, and part of the tenement in the declaration mentioned; and were so encroached and taken in by the said J. G., otherwise D., in the building or erecting the messuage or house mentioned in the said articles, some small time before the date of the said articles; and then were lying in and part of the said manor, and were part of a public street and King's highway, called West Street, in the parish of St. Philip and Jacob in the said county of Gloucester, and leading from the city of London to the city of Bristol.

The jury likewise find that the said yearly sum of 6*s.* 8*d.* was duly and constantly paid, in pursuance of the said articles, by the defendants and those whose estate they have, to the said Thomas

Chester and the successive lords of the said manor (his descendants), during all the said term of one hundred years; and from the end thereof till Lady-day, 1750.

* Then they find that the defendants, Alker and Elmes, [* 135] some time in the year of our Lord, 1748, erected certain palisadoes before the front of the said house, and thereby took in and enclosed the third piece of land, above particularly mentioned and described, then lying in and being part of the said manor, and being then other part of the said public street and highway; and have kept the same so enclosed, ever since, to this time: and that that part of the said street where the said encroachments were so made, at the several times of the said encroachments, contained in breadth (including the said encroachments) 60 feet and no more.

The jury find Thomas Chester, Esq., the lessor of the plaintiff, to be heir-at-law to that Thomas Chester, Esq., deceased, who executed the articles; and as such, to be seised of the said manor, with the appurtenances, as the law requires; and that being so seised, he made the demise to the plaintiff: by virtue of which demise he entered, &c.; and was ejected, &c. But whether upon the whole matter aforesaid, in form aforesaid, by the said jurors found, the said G. A. and L. E. are guilty of the said trespass and ejectment, as to the said three pieces or parcels of land, parcel, &c., by them supposed to be done, or not, the said jurors are wholly ignorant, &c., and so the verdict concludes in the ordinary form.

The counsel for the plaintiff made two questions, viz.: —

1st question. Whether an ejectment will lie for these premises as described in the declaration?

2d question. Whether the defendants are at liberty to controvert the title of the plaintiff, or are estopped from so doing?

[Upon the first question the defendants argued (*inter alia*) as follows: —]

* It being the King's public highway, the plaintiff can [* 140] never have possession delivered of it. The owner cannot levy a fine of it; nor can he distrain in it, as may be seen in 2 Inst. 13.

In cases of encroachments or purprestures on it, these encroachments are upon the King; and so is 2 Inst. 272, expressly: "Dicitur purprestura, quando aliquid super dominum regem injustè occupatur, ut, &c.; vel in viis publicis obstructis." And the

remedy is by presentment or indictment. 9 Co. Rep. 113; 5 Co. Rep. 73 a; 27 Hen. VIII. 27 a. But an action lies only where a man receives a special injury.

How can the plaintiff have *plenam seisinam* of this? In 1735, 8 Geo. II., there was a case of well advised, *ex dimiss. Sir Bourchier Wray et al.* v. *Foss et al.*, in ejectment, at the Summer Assizes at Exeter. The declaration described a piece of land, containing 40 feet in length and 4 feet in width, part of the manor of J. But the plaintiff was nonsuited. For the land was part of the waste; and upon evidence, it appeared to be part of the highway, on which the defendant had built. Lord HARDWICKE held "that no possession could be delivered of the soil of the highway; and therefore no ejectment would lie of it; and if it was a nuisance the defendant might be indicted."

In the present case, all these three pieces of land are part of the King's highway and are encroached upon; and the two former have subsisting nuisances upon them.

[*143] *Lord MANSFIELD asked whether they had any note or report of that Circuit case which was said to have been determined by Lord HARDWICKE, and by whom it was taken; but there was no note or report of it; and it seemed to have been mentioned at the Assizes, from some imperfect recollection. He therefore proceeded to give his opinion immediately, putting this case of *Sir Bourchier Wray* out of the way entirely, as being so loosely remembered and imperfectly reported, as to deserve no regard, nor be at all clear and intelligible. He said it was impossible to suppose that Lord HARDWICKE had any note or memory of such a point arising at the Assizes: otherwise, he would wait till he could know the true state of it from his Lordship, from the deference he paid to so great an authority. But from the manner in which it is quoted, there is no ground to say what the state of that case or determination really was.

As to the question "Whether an ejectment will lie, by the owner of the soil, for land which is subject to passage over it as the King's highway?"

1 Ro. Abr. 392, letter B, pl. 1, 2, is express, "That the King has nothing but the passage for himself and his people; but the freehold and all profits belong to the owner of the soil." So do all the trees upon it, and mines under it (which may be extremely valuable). The owner may carry water in pipes under it. The

owner may get his soil discharged of this servitude or easement of a way over it, by a writ of *ad quod damnum.*

It is like the property in a market or fair.

There is no reason why he should not have a right to all remedies for the freehold; subject still, indeed, to the servitude or easement. An assize would lie, if he should be disseised of it: an action of trespass would lie for an injury done to it.

I find by the case of *Selman* v. *Courtney*, Tr. 13, 14 Geo. II., that a point which had been before the Court of Exchequer in the case of the *Duchess of Marlborough* v. *Gray*, M. 2 Geo. II., is now settled; viz., "That its being a highway cannot be given in evidence by the defendant, upon the general issue:" which proves that the ownership of the soil is not in the King. I see no ground why the owner of the soil may not bring ejectment, as well as trespass. It would be very inconvenient to say that in this case he should have no specific legal remedy; and that his only relief should be repeated actions of damages, for trees and mines, salt springs, and other profits under ground. 'T is true, indeed, that he must recover the land, subject to the way; but surely he ought * to have a specific remedy to recover the [* 144] land itself, notwithstanding its being subject to an easement upon it.

. . . . . .

I am of opinion that the plaintiff ought to recover upon this special verdict.

Mr. Justice DENISON concurred.

* The difficulty at the Assizes arose (as the Judge who [* 145] tried the cause has declared) merely upon an apprehension that there had been a determination at the Assizes formerly by Lord HARDWICKE, "that an ejectment would not lie for a property in soil, over which there was a highway; because the sheriff could not deliver possession of the highway."

But the reality of this authority has not been at all proved, to any kind of satisfaction.

Trespass would undoubtedly lie: why then should not an ejectment?

It is said "that the sheriff cannot deliver full possession."

But why not? Indeed, it must be subject to the easement; but there is no other difficulty in the matter.

Therefore I take it for granted that there was something more

in that cited case of *Sir Bourchier Wray's* than we are now apprised of.

. . . . . .

[146] Mr. Justice FOSTER had no doubt of the present case, when it was before him at the Assizes, but from the then apprehended authority of the cited case, said to be determined by Lord HARDWICKE.

The owner of the soil has right to all above and under ground, except only the right of passage, for the King and his people.

And the case in 1 Ro. Abr. 392, letter B, proves this.

Therefore he entirely concurred with his, Lordship and his Brother DENISON (for Mr. Justice WILMOT was not present in Court at either of the two arguments of this case), that there should be *Judgment for the plaintiff.*

ENGLISH NOTES.

The proposition that the ownership of mines under a highway is *primâ facie* vested in the adjoining proprietors is assumed in the judgments in the case of *Chamber Colliery Co.* v. *Rochdale Canal Co.* 1895, A. C. 564, 64 L. J. Q. B. 645, 73 L. T. 258, where it is held that the presumption does not apply to the mines under a canal where the land for making the canal has been conveyed (excepting the mines) to the canal proprietors, and a conveyance is afterwards made to another of the land adjoining the canal. See, as to the analogous right of the proprietor of the adjoining land in the bed of the channel of a non-navigable river, *Bickett* v. *Morris* (H. L. Sc. 1866), L. R. 1 H. L. Sc. 47, 2 Paterson Sc. App. 1416.

It does not follow from the circumstance that the public highway is a right merely in the nature of an easement, that it is not accompanied by a right of support. Thus where commissioners under the powers of a local Act for the enclosure of waste land, set out public highways over the land, and directed that it should be lawful to all persons to use them; and reserved to the lord of the manor in the widest terms the mines, &c., under the land (formerly the waste), with power to do every act necessary for working the minerals as effectually as he could have done in case the Act had not been made, without making any satisfaction; and the defendants, assignees of the land, worked the mines so that the road subsided: it was held that the Act which set out a public road could not have been intended to authorise a public nuisance by injuring the road; and that the defendants were therefore liable. *Benfieldside Local Board* v. *Consett Iron Co.* (1877), 3 Ex. D. 54, 47 L. J. Ex. 491,

38 L. T. 530, 26 W. R. 114. And so in other cases where a statutory right was conferred upon persons to make and maintain works not necessarily accompanied by proprietory right in the soil, the undertakers of the works have been held entitled to support for them from the subjacent or adjacent soil. See *In re Dudley Corporation* (C. A. 1881), 8 Q. B. D. 86, 51 L. J. Q. B. 121, 45 L. T. 733; *Normanton Gas Co.* v. *Pope* (C. A. 1883), 52 L. J. Q. B. 629, 32 W. R. 134; *London & North Western Railway Co.* v. *Evans* (C. A.), 1893, 1 Ch. 16, 62 L. J. Ch. 1, 67 L. T. 630, 41 W. R. 149.

AMERICAN NOTES.

This case is cited in Washburn on Easements and Elliott on Roads and Streets.

No. 13. — ATTORNEY-GENERAL *v.* CHAMBERS.

(1854, 1859.)

RULE.

Primâ facie the property of the Crown in the seashore and mines underneath is limited by the line of medium high tides; and, if the land has advanced by imperceptible alluvion, the line of medium high tides is still the boundary.

Attorney-General v. Chambers.[1]

4 De G. M. & G. 206–218 (s. c. 23 L. J. Ch. 662; 11 Jur. 779).

Foreshore. — Crown Rights. — Line of Medium High Tides.

In the absence of all evidence of particular usage, the extent of the right [206] of the Crown to the seashore landwards is *primâ facie* limited by the line of the medium high tide between the springs and the neaps.

And where the line of the medium high tide has advanced or receded in the course of years, the question is whether the variation has been slow, gradual, and imperceptible or otherwise.

If the variation has taken place owing to works of the landowner, not intended to cause such variation, this landowner is entitled to gradual accretion in the same way as if the accretion had been owing to natural causes.

An information was filed by the Attorney-General against the owners and lessees of a district abutting on and extending along

[1] Before Lord Cranworth, L. C., assisted by Mr. Baron Alderson and Mr. Justice Maule.

the seashore of the parish of Llanelly, in the county of Carmarthen. The information alleged that by the royal prerogative the seashore, and the soil of all arms and creeks of the sea, and of all public ports and havens round this kingdom as far as the sea flows and reflows, between high and low water mark, and the soil of the navigable rivers of this kingdom, and all mines and minerals lying under the sea, seashore, arms and creeks of the sea, and all profits arising from the shore and soil belonged to Her Majesty, and have at all times belonged to her and her royal predecessors, Kings and Queens of this realm. The information stated that there were very valuable and extensive veins, seams, or strata of coal and culm lying under that part of the parish of Llanelly which was contiguous to the seashore, and particularly under the land belonging to the defendant, David Lewis, called or known by the name of Old Castle Farm, and that such veins, seams, or strata of coal and culm continued and extended also under the contiguous seashore below the line of high-water mark and under the sea.

The information charged that the seashore, which was vested in Her Majesty by virtue of her prerogative, extended landwards as far as high-water mark at ordinary monthly spring tides, or, at all events, far beyond high-water mark at neap tides, and up to the medium line of high-water mark between neap and [* 207] spring tides. The * information charged that encroachments had been made by the defendants on the shore by means of embankments; and that valuable coal mines were worked under that part of the shore that lay to the seaward of high-water mark at ordinary neap tides before the sea was excluded by the embankment.

The information prayed that the right of Her Majesty to the seashore of the parish of Llanelly below high-water mark might be established; that the leases or licenses to embank, or build, or dig, or raise coal from the said seashore might be declared null, void, and delivered up to be cancelled, and that the boundary or mark to which the sea flowed at high ordinary tides upon the shore of the parish of Llanelly, adjoining the lands in the occupation or possession of the defendant, D. Lewis, before the embankments were erected, and also those portions of the works or mines from which coal or culm were gotten, which lay under land belonging to Her Majesty, might be ascertained and distinguished,

and that the nuisances arising from the erection of the works might be abated.

Answers were put in by the several defendants, controverting the right asserted by the Crown, and submitting that at the utmost the Crown's right did not extend landwards beyond the line of high-water mark of ordinary neap tides, and did not embrace any alluvium of gradual formation.

The cause originally came on to be heard before the MASTER OF THE ROLLS, and on the 21st January, 1852, his Honour directed certain issues to be tried between the Crown and Lord Cawdor and Mr. Chambers (two of the defendants and principal owners of the shore); no issue, however, was directed as between the Crown * and the defendant, D. Lewis, who was also [* 208] an owner, the Attorney-General having been of opinion that the issues between the Crown and the two principal defendants should be first disposed of. The issues came on to be tried on a trial at bar before a jury at the Queen's Bench, sitting in Banco, on the 19th February, 1854, when a verdict by agreement was entered for the Crown. The Act 15 & 16 Vict., c. 86, having in the meantime passed (by the 62nd section of which a Court of Equity is empowered to determine the legal rights of parties without directing a trial at law), and the question, so far as regarded the rights of the defendant, Lewis, being still undecided, it was arranged that the cause should be set down on further directions, to be heard by consent of the LORD CHANCELLOR, before his Lordship in the first instance, assisted by two of the Judges of the Courts of common law. His Lordship having, accordingly, invited the attendance of Mr. Baron ALDERSON and Mr. Justice MAULE to assist in the determination of the question, those learned Judges now attended.

The following passages from Lord Chief Justice Hale's treatise, "De Jure Maris," [1] were much commented upon in the argument, and by the learned Judges and LORD CHANCELLOR, and are here inserted for the convenience of reference: —

"The shore is that ground that is between the ordinary high-water and low-water mark. This doth *primâ facie* and of common right belong to the King, both in the shore of the sea and the shore of the arms of the sea.

"And herein there will be these things examinable: —

[1] Hargrave's Tracts, pp. 12, 25, 26.

No. 13. — Attorney-General v. Chambers, 4 De G. M. & G. 206–210.

" 1st, What shall be said the shore or *littus maris?*

" 2nd, What shall be said an arm or creek of the sea?

[* 209] * " 3rd, What evidence there is of the King's propriety thereof.

" 1. For the first of these, it is certain that that which the sea overflows, either at high spring tides or extraordinary tides, comes not as to this purpose under the denomination of *littus maris;* and, consequently, the King's title is not of that large extent, but only to land that is usually overflowed at ordinary tides. And so I have known it ruled in the Exchequer Chamber in the case of *Vanhaesdanke,* on prosecution by information against Mr. *Whiting,* about 12 Car. I., for lands in the county of Norfolk; and, accordingly, ruled 15 Car. I., B. R., *Sir Edward Heron's Case;* and Pasch. 17 Car. II., *in Scaccario,* upon evidence between the *Lady Wansford's lessee* and *Stephens,* in an *ejectione firmæ* for the town of Cowes in the Isle of Wight. That, therefore, I call the shore that is between the common high-water and low-water mark, and no more.

. . . . . .

" There seem to be three sorts of shores, or *littora marina,* according to the various tides, viz. :—

" 1st. The high spring tides, which are the fluxes of the sea at those tides that happen at the two equinoctials; and certainly this doth not, *de jure communi,* belong to the Crown. For such spring tides many times overflow ancient meadows and salt marshes, which yet, unquestionably, belong to the subject. And this is admitted on all hands.

" 2nd. The spring tides which happen twice every month, at full and change of the moon, and the shore in question is, by some opinion, not denominated by these tides neither, but the land overflowed with these fluxes ordinarily belong to the subject *primâ facie,* unless the King hath a prescription to the

[* 210] contrary. * And the reason seems to be, because, for the most part, the lands covered with these fluxes are dry and maniorable; for at other tides the sea doth not cover them, and therefore, touching these shores, some hold that common right speaks for the subject, unless there be an usage to entitle the Crown; for this is not properly *littus maris.* And therefore it hath been held that where the King makes his title to land as *littus maris,* or *parcella littoris marini,* it is not sufficient for him to

make it appear to be overflowed at spring tides of this kind, P. 8 Car. I., *in Camerâ Scaccarii*, in the case of *Vanhaesdanke* for lands in Norfolk; and so I have heard it was held, P. 15 Car. B. R., *Sir Edward Heron's Case;* and Tr. 17 Car. II., in the case of the *Lady Wandesford*, for a town called the Cowes in the Isle of Wight, *in Scaccario.*

"3rd. Ordinary tides or neap tides which happen between the full and change of the moon; and this is that which is properly *littus maris*, sometimes called *marettum*, sometimes *warettum.* And, touching this kind of shore, namely, that which is covered by the ordinary flux of the sea, is the business of our present inquiry."

The Solicitor-General, Mr. James, and Mr. Hansen for the Crown.

By the feudal law all the real property of this country was vested in the Crown, and the seashore appertaining to the sovereign commences with that portion of the shore where the interests of the public may be said to begin; and therefore the rights of the adjacent freeholders are bounded not merely by the ordinary flux and reflux of the tide, but the Crown for the benefit of the public has a right to all the intervening space between the highest and the ordinary high-water mark; for though the soil of the sea between high and low water mark may be parcel of the manor of a subject (*Constable's* * *Case,* 5 Co. Rep. 107 a), [*211] yet, as Lord Hale, in his treatise, "De Jure Maris," says (p. 22), this "*jus privatum* that is acquired to the subject either by patent or prescription must not prejudice the *jus publicum* wherewith public rivers or arms of the sea are affected for public use." Mr. Justice BAYLEY, in the case of *Scratton* v. *Brown*, 4 B. & C. 485, 495 (28 R. R. 344), observes, "The property in such land *primâ facie* is in the Crown," and it is quite clear that if the sea encroach upon the land of a subject gradually, the land thereby covered by water belongs to the Crown; in *The Matter of the Hull and Selby Railway Co.*, 5 M. & W. 327; *Rex* v. *Lord Yarborough*, 3 B. & C. 91; s. c. 2 Bligh (N. S.), 147 (27 R. R. 292). The limit to which the Crown would be entitled by the rule of the civil law will give us more than we claim; by that law the shore is defined to be so far as the greatest winter tides do run. [ALDERSON, B., referred to the observations of HOLROYD, J., in the case of *Blundell* v. *Catterall*, 5 B. & Ald. 268, 292 (24 R. R. 353),

as to the variance between the common law and civil law in regard to maritime rights, showing that the civil law was not any guide in such matters.] With reference to the word "ordinary," that must be intended to comprehend such phenomena as are of the most constant recurrence, and the word itself is just as applicable to spring as neap tides. *Anon.*, Dyer, 326 b. They referred to *Berry* v. *Holden*, 3 Dun. & Bell, 205; *Attorney-General* v. *Burridge*, 10 Price, 350 (24 R. R. 705); and *Attorney-General* v. *Parmeter*, 10 Price, 378 (24 R. R. 723); Lord Stair's Institutes, vol. ii., p. 190. They also relied upon the observation attributed to Lord BROUGHAM in the case of *Smith* v. *The Earl of Stair*, 6 Bell, App. Cas. 847, indicating a preference for the former of the opinions which is to be found in page 12 of the treatise "De Jure Maris."

[*212] *Mr. R. Palmer, Mr. Goldsmid, and Mr. Mellish for Mr. Lewis.

We submit that the neap line best fulfils the definition of "ordinary" high-water mark, inasmuch as that line would include land covered every day in the year by the sea. Lord Hale, defining the shore to be that space usually overflowed at ordinary tides, p. 26, excludes all spring tides. On this principle PARKE, J., says, in the case of *Lowe* v. *Govett*, 3 B. & Ad. 863 (37 R. R. 560), "In the absence of proof to the contrary, the presumption as to such land (meaning land above the ordinary high-water mark) is in favour of the adjoining proprietor." The only case in which the Crown was held to be entitled is *Attorney-General* v. *Parmeter*, 10 Price, 378 (24 R. R. 723); but that was the case of a nuisance, and there the parties were claiming under the Crown, and the decision was that the grant was bad.

If the right of conservancy is attributed to the Crown to the extent asserted by the information, the consequence will be directly repugnant to the doctrine laid down by Lord Hale, in page 26 of the treatise "De Jure Maris," and would include lands which, by reason of their being uncovered for the greatest part of the year, are dry and maniorable.

Mr. Roupell and Mr. Dickinson appeared for Messrs. Sims, William, & Co., lessees under Mr. Lewis.

Mr. James in reply.

In *Lowe* v. *Govett* the Crown was not a party; and even granting the presumption in favour of the adjacent proprietors,

still this will not deprive the Crown * of the right here [* 213] asserted, nor dispense with the obligations of protecting the interests of the public for the purposes of navigation.

At the conclusion of the argument the learned Judges desired time to consider the question which had been submitted to them; and on the 8th July, 1854, Mr. Baron ALDERSON, on behalf of Mr. Justice MAULE and himself, delivered the following joint opinion: —

My LORD CHANCELLOR:

In this case, on which your Lordship has requested the assistance of my Brother MAULE and myself, I am now to deliver our joint opinion on the only question argued before us. That question, as I understand it, is this: What, in the absence of all evidence of particular usage, is the limit of the title of the Crown to the seashore? The Crown is clearly, in such a case, according to all the authorities, entitled to the *littus maris* as well as to the soil of the sea itself adjoining the coasts of England. What, then, according to the authorities in our law, is the extent of this *littus maris?*

This, in the absence of any grant, or usage from which a grant may be presumed, is, according to the civil law, defined as the part of the shore bounded by the extreme limit to which the highest natural tides extend: "*quatenus hybernus fluctus maximus excurrit;*" *i. e.*, the highest natural tide; for, according to Lord Stair's exposition, the definition does not include the highest actual tides, for these may be produced by peculiarities of wind or other temporary or accidental circumstances, concurring with the flow produced by the action of the sun and moon upon the ocean.

But this definition (even thus expounded by the * author- [* 214] ities) of the civil law is clearly not the rule of the common law of England.

Mr. Justice HOLROYD, no mean authority, in his very elaborate judgment in the case of *Blundell* v. *Catterall*, 5 B. & Ald. 268, 290 (24 R. R. 353), mentions this as one of the instances in which the common law differs from the civil law, and says that it is clear that, according to our law, it is not the limit of the highest tides of the year, but the limit reached by the highest ordinary tides of the sea, which is the limit of the shore belonging, *primâ facie*, to the Crown. What, then, are these "highest ordinary

tides?" Now we know that, in fact, the tides of each day, nay, even each of the tides of each day, differ, in some degree, as to the limit which they reach. There are the spring tides at the equinox, the highest of all. These clearly are excluded in terms by Lord Hale, both in p. 12 and in p. 26 of his treatise "De Jure Maris." For though, in one sense, these are ordinary, *i. e.*, according to the usual order of nature, and not caused by accidents of the winds and the like, yet they do not ordinarily happen, but only at two periods of the year. These, then, are not the tides contemplated by the common law, for they are not "ordinary tides," not being "of common occurrence." This may, perhaps, apply to the spring tides of each month, exclusive of the equinoctial tides; and, indeed, if the case were without distinct authority upon this point, that is the conclusion at which we might have arrived. But then we have Lord Hale's authority, p. 26, "De Jure Maris," who says, "Ordinary tides or neap tides which happen between the full and change of the moon" are the limit of "that which is properly called *littus maris;*" and he excludes the spring tides of the month, assigning as the reason, that the "lands covered with these fluxes are for the most part of the year [*215] dry and maniorable;" *i. e.*, * not reached by the tides.

And to the same effect is the case of *Lowe* v. *Govett*, 3 B. & Ad. 863 (37 R. R. 560), which excludes these monthly spring tides also.

But we think that Lord Hale's reason may guide us to the proper limit. What are then the lands which, for the most part of the year, are reached and covered by the tides? The same reason that excludes the highest tides of the month (which happen at the springs) excludes the lowest high tides (which happen at the neaps), for the highest or spring tides and the lowest high tides (those at the neaps) happen as often as each other. The medium tides, therefore, of each quarter of the tidal period afford a criterion which, we think, may be best adopted. It is true of the limit of the shore reached by these tides, that it is more frequently reached and covered by the tide than left uncovered by it. For about three days it is exceeded, and for about three days it is left short, and on one day it is reached. This point of the shore, therefore, is about four days in every week, *i. e.*, for the most part of the year, reached and covered by the tides. And as some, not indeed perfectly accurate construction, but approximate, must be given to the

words "highest ordinary tides" used by Mr. Justice HOLROYD, we think, after fully considering it, that this best fulfils the rules and the reasons for it given in our books.

We, therefore, beg to advise your Lordship that, in our opinion, the average of these medium tides in each quarter of a lunar revolution during the year gives the limit, in the absence of all usage, to the rights of the Crown on the seashore.

July 15. The LORD CHANCELLOR. — The question for decision is, What is the extent of the * right of the Crown to [* 216] the seashore? Its right to the *littus maris* is not disputed. But what is the *littus?* Is it so much as is covered by ordinary spring tides, or is it something else?

The rule of the civil law was *Est autem littus maris quatenus hybernus fluctus maximus excurrit.* This is certainly not the doctrine of our law. All the authorities concur in the conclusion that the right is confined to what is covered by "ordinary" tides, whatever be the right interpretation of that word. By *hybernus fluctus maximus* is clearly meant extraordinary high tides, though, speaking with physical accuracy, the winter tide is not in general the highest.

Land covered only by these extraordinary tides is not what is meant by the seashore; such tides may be the result of wind or other causes independent of what ordinarily regulates flux and reflux. Setting aside these accidental tides, the question is, What is the meaning of ordinary? It is evidently a word of doubtful import. In one sense the highest equinoctial spring tides are "ordinary;" *i. e.*, they occur in the natural order of things. But this is evidently not the sense in which the word "ordinary" is used, when designating the extent of the Crown's right to the shore. Treatise De Jure Maris, pp. 12, 25.

Disregarding, then, extreme tides, we next come to the ordinary spring tides, *i. e.*, the spring tides of each lunar month. No doubt, speaking scientifically, they probably all differ; but practically this may be disregarded. Lord Hale gives no absolute decided opinion, but he evidently leans very strongly against the right to the land covered only by spring tides (treatise De Jure Maris, p. 26), and refers to decisions which * support his views. Then he [* 217] describes ordinary tides as if synonymous with neap tides.

This leaves the question very much at large, and there is very little of modern authority. In *Blundell* v. *Catterall* Mr. Justice

HOLROYD says, by the common law it, *i. e.*, the shore, is confined to the flux and reflux of the sea at ordinary tides, meaning the land covered by such flux and reflux.

Still the question remains, What are ordinary tides? The nearest approach to direct authority is *Lowe* v. *Govett.* There certain recesses on the coast covered by the high water of ordinary spring tides, but not by the medium tides between spring and neap tides, were held not to pass under an Act vesting in a company an arm of the sea daily overflowed by it. Lord TENTERDEN held that these recesses were not ordinarily overflowed by the sea, which shows clearly that he did not consider the overflowing by ordinary spring tides to be what is meant by ordinarily overflowing; and both Mr. Justice LITTLEDALE and Mr. Justice (now Baron) PARKE concur in saying, that the recesses in question were above ordinary high-water mark, clearly showing their opinion to be, that what is meant by ordinary high-water mark is not so high as the limit of high water at ordinary spring tides.

There is, in truth, no further authority to guide us; for the question did not arise in either of the cases of *Attorney-General* v. *Burridge*, 10 Price, 350 (24 R. R. 705), or *Attorney-General* v. *Parmeter*, 10 Price, 378 (24 R. R. 723), as to the buildings at Portsmouth.

In this state of things, we can only look to the principle
[* 218] * of the rule which gives the shore to the Crown. That principle I take to be, that it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil. Lord Hale gives as his reason for thinking that lands only covered by the high spring tides do not belong to the Crown, that such lands are for the most part dry and maniorable; and taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is, that the Crown's right is limited to land which is, for the most part, not dry or maniorable.

The learned Judges whose assistance I had in this very obscure question, point out the limit indicating such land is the line of the medium high tide between the springs and the neaps. All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line; and I, therefore, concur with the able opinion of the Judges whose valuable assistance I had, in thinking that that medium line must be treated as bounding the right of the Crown.

Attorney-General v. Chambers.

Attorney-General v. Rees.

4 De G. & J. 55–73 (s. c. 5 Jur. (N. S.) 745).

The facts as ascertained, when these cases came on for further consideration, sufficiently appear from the following judgment. The following cases were referred to in argument: *Smart* v. *Magistrates of Dundee*, 8 Bro. P. C. (Tomlin's ed.) 119; [55] *Todd* v. *Dunlop*, 2 Robinson's App. Ca. 333; *Attorney-General to Prince of Wales* v. *St. Aubyn*, Wightwick, 167 (12 R. R. 718 *n.*); *Attorney-General* v. *Chamberlaine*, 4 K. & J. 292; *Rex* v. *Lord Yarborough*, 3 B. & C. 91 (27 R. R. 292); *Scratton* v. *Brown*, 4 B. & C. 485 (28 R. R. 344); *Lord Advocate* v. *Hamilton*, 1 Macq. 46; Hale, De Jure Maris, Hargrave's Law Tracts, pp. 14, 15, 20, 28, 35; *Re Hull and Selby Railway Co.*, 5 M. & W. 327.

April 20. The LORD CHANCELLOR (Lord CHELMSFORD). [56]

These cases come on to be heard before me on further directions, and arise upon informations filed by the Attorney-General for the purpose of asserting and establishing the rights of the Crown upon the seashore in the parishes of Llanelly and Pembrey, in the county of Carmarthen. The informations originally included several defendants, but their cases have all been disposed of, and the defendants David Lewis and John Hughes Rees are the only parties who are now resisting the claims of the Crown.

The defendant Lewis is a party to both the informations, as the owner of lands in both the parishes of Llanelly and Pembrey. The defendant Rees is a party only to the information which relates to the parish of Pembrey. The prayer of each information is the same *mutatis mutandis*, — "That the right of her Majesty to the seashore, below high-water mark, may be established and declared, and that any leases or licenses to embank or build upon, or to dig or raise coal or culm from the seashore, may be declared null and void; that the boundary or mark to which the sea flowed at high water, at ordinary high tides, upon the shore before certain embankments and buildings were erected thereon, and also *those portions of the works or [*57] mines from which coal or culm is gotten, which lie under the land of her Majesty, may be ascertained and distinguished;

and that, if necessary, a commission may issue for the purpose of ascertaining and distinguishing the same."

Of the defendants, to whom I have generally referred, Lord Cawdor opposed the claim of the Crown on the ground that he was lord of the manor of Kidwelly, and as such that he, and not the Crown, was the owner of the seashore within the manor.

Another defendant, Mr. Chambers, claimed to have become the owner of the seashore adjoining his lands, by the exercise of long-continued acts of ownership.

The defences, therefore, of Lord Cawdor and of Mr. Chambers met the whole case of the Crown, and, if they could have been established, would have terminated the dispute so far as the Crown was concerned. Accordingly, on the cause coming on to be heard before the MASTER OF THE ROLLS, his Honour, on the 21st of January, 1852, directed certain issues to be tried between the Crown and Lord Cawdor and between the Crown and Mr. Chambers, to determine the questions which had been raised between them respectively. Before the issues with Mr. Chambers came on to be tried he abandoned his opposition and consented to take a lease of the seashore from the Crown.

The order of the MASTER OF THE ROLLS was thereupon amended, and the issues directed were confined to those between the Crown and Lord Cawdor. Upon these issues coming on to be tried, Lord Cawdor submitted, upon certain conditions, to a verdict being entered for the Crown. Thus, as to these defend-
[* 58] ants, the right of the Crown to * the seashore, within the parishes of Llanelly and Pembrey, was established.

The question then arose, what was the true boundary of the seashore; the defendants Lewis and Rees contending that the utmost limit of the Crown's right was the line of high-water mark of ordinary neap tides.

For the purpose of determining this question it was arranged, as to the defendant Lewis, that the cause should be set down on further directions, and, by consent of the LORD CHANCELLOR, should be heard by him, in the first instance, assisted by two common-law Judges.

The question was accordingly argued before the LORD CHANCELLOR (Lord CRANWORTH), Baron ALDERSON, and Mr. Justice MAULE, and on the 15th of July, 1854, they pronounced their judgment: "That the landward boundary of the seashore or *littus maris*

around England and Wales is the medium line of the high water of all tides occurring in the ordinary course of nature throughout the year" (p. 555, *ante*).

Having thus obtained a definition of the boundary of the rights of the Crown on the seashore, the next thing to be done was to ascertain and lay down the line so defined in such parts of the seashore as were adjacent to the lands of the defendants Lewis and Rees, and by consent it was, by order of the 22nd of January, 1855, referred to the late Mr. Rendel, an engineer of eminence, to make a plan "of so much and such parts of the shores of the rivers Bury and Lougher, in the information mentioned, as is or are adjacent to the several lands in the possession of the defendants David Lewis and John * Hughes Rees, or their [* 59] respective lessees in the information mentioned, and to ascertain and lay down upon such plans the present medium line of high water, as hereinbefore defined; and the said James Meadows Rendel is to be at liberty, if he should think fit, but not otherwise, to report the grounds on which he has proceeded, or to report any matters specially to this Court; and it is ordered that such plans, when signed by the said James Meadows Rendel, be deposited with the clerk of the records and writs in whose division these causes are, with liberty for all parties to inspect the same as they shall be advised, at all reasonable times, giving reasonable notice thereof; and it is ordered that such plans, when so signed and deposited as aforesaid, be, subject to any order of the Court, binding and conclusive upon the Crown and upon the defendants now appearing as to the present medium of high water; but the said reference and plans are to be without prejudice to such right and claim, if any, of the Crown to such land, if any, as was formerly below but is now above the medium line of high water of all tides throughout the year, and without prejudice to any other question in the cause."

This order was afterwards varied, so far as the defendant Lewis was concerned, by limiting it to such parts of the shore as are adjacent to certain specified lands belonging to him in the parish of Llanelly.

Mr. Rendel died in November, 1856, without having completed or reported upon the matters referred to him, whereupon, on petition of the Attorney-General, by an order of the LORD CHANCELLOR of the 1st of May, 1857, Mr. George Parker Bidder, the

civil engineer, was appointed to act, in the place of Mr. Rendel, in making the plans and ascertaining and laying down the medium line of high water directed to be made and ascertained and
[* 60] * laid down, Mr. Bidder being at liberty to adopt any plans already made by Mr. Rendel.

Mr. Bidder made his report, 3rd of July, 1858, in which he states as follows: "I have ascertained and laid down upon the plan, hereto annexed, so much of the shores of the river Bury and Lougher, in the pleadings in these causes mentioned, as is or are adjacent to the land in the pleadings in these causes mentioned of the defendant David Lewis or his lessees, in the parish of Llanelly, in the county of Carmarthen (that is to say)." Then he mentions the different farms, and says, "I have ascertained and laid down upon the same plan the present medium line of high water upon those parts of those shores of all tides occurring in the ordinary course of nature throughout the year." Then he makes a special report, and he says, "I report specially to the Court that, in my judgment, the natural line of high water between the points marked K. and Z. on the said plan has been more or less varied by the direct or indirect operation of artificial causes; and I particularly call attention to the fact that the present medium line of high water, as laid down upon the said plan hereto annexed, does not, in my judgment, represent, at the points marked on the said plan with the letter A., the medium line as existing previous to the construction of the South Wales Railway; and further, that at the bank of sand, marked C. on the said plan, the natural medium line of high water has heretofore been and still continues affected by the gradual accretion of that sand-bank by the indirect operation of artificial causes; and further, that the medium line of high water has been varied and still is continually affected by the direct operation of artificial causes at the points in the harbour of Llanelly marked with the letter B. on the said plan."

Upon this report of Mr. Bidder the Crown now claims
[* 61] * to have the line of medium high tide ascertained and laid down as it ought to have existed, and as it would have existed at the time of filing the information, but for the artificial causes to which he refers. This proposed limitation of the inquiry to the period of the filing of the information will exclude the consideration of the effects produced by the South Wales Railway

mentioned in Mr. Bidder's report, which was not in existence at the time when the information was filed.

The claim now made, on the part of the Crown, involves a question of novelty and of some difficulty, which may be stated, in general terms, to be, whether the well-known rule of law as to the right of land gained from the sea is applicable to a case where the alluvium or dereliction has not been the result of merely natural causes?

This question seems to me raised with sufficient certainty by the informations and the answers. I will take the allegations in the information which relates to Mr. Lewis's lands in Llanelly.

It states thus: "Certain pieces of land" (which are mentioned) "abut on the seashore of the Bury River, and about thirty years ago there were erected, without any license or consent of her Majesty's predecessors, partly upon that piece of land which is called Penrose Taur Farm, and partly on the seashore in front thereof, lying within the harbour of Llanelly, extensive buildings and works, in and at which there has been and is now carried on the business of copper-smelting by the former and present members of a copartnership, in whose occupation the buildings and works now are, who carry on the business under the name of Sims & Co., which said firm or copartnership consists of the following members" (it mentions their names), "all of whom are defendants." "Subsequently to the erection of the copper-works, the * firm of Sims & Co., without the license [* 62] and consent of her Majesty or of her Majesty's predecessors, raised, or caused to be raised, on the seashore in front of the said pieces of land called respectively Penrose Vach Farm, Penros Faur Farm, the Morvadhu and Bryn Farm, very extensive embankments, formed principally with the slag and rubbish produced by their copper-works; and upon the said embankment the said Messrs. Sims & Co. have constructed a wharf, coal-yards, a large chimney-stack, store-houses and other buildings connected with their copper-works; and also a considerable extent of railway adjoining and leading to the dock formed in and by the said embankment of slag and rubbish, that the said embankment of slag and rubbish, by reason of its being carried out a considerable way into the harbour of Llanelly and its impeding the former line and scour of the tides, has caused a considerable silting up the parts of the harbour which lie adjacent to it on either side; and

portions of the shore of the said Bury River adjoining the land, which was formerly covered by the sea at ordinary high tides, have, in consequence thereof, become either permanently dry land or only covered at extraordinary high tides." It then charges "that the embankment formed by Sims & Co., by throwing out slag and rubbish, are encroachments upon, and nuisances in, the port of Llanelly; and that, owing to the said slag embankment projecting far into the port, and the other encroachments on the seashore, by and under the pretended title or authority of the defendants respectively, the sea has been prevented flowing and reflowing over many parts of the shore over which it had, antecedently to such encroachments, flowed and reflowed from time immemorial, and should have continued to flow and reflow if such encroachments had not been made." Then it charges that such portions of alluvial land, so formed by or gained from the [* 63] sea, have not been added to the * adjoining main land by the gradual and imperceptible projection of soil or silt upon the shore, arising from the operation of natural causes, but that the same had been produced by the works and artificial embankments raised by, and by leave and license of, the defendants respectively; and charges that all such additions to the main land as have been produced by or caused by illegal erections of embankments or other purprestures upon the seashore belonging to her Majesty do not belong to the owner of the adjacent lands, but belong to her Majesty.

The defendant Lewis, by his answer, submits that the right of the Crown does not extend beyond high-water mark of ordinary neap tides, "and does not extend to or embrace any alluvium, the same being of gradual formation, whether the same shall have been produced by natural or unknown causes, or by cuttings or embankments lawfully made, or other lawful artificial means." Then he says, that he denies that such portions of the land so formed on the seashore, as in the information is mentioned, if any such land there be, have not been added to the adjoining main land by natural alluvion. And he says that he denies that the same, if any such there be, had been produced by the works and artificial embankments raised by, and by license from, the defendant or other defendants respectively, or any of them; but whether the same lands, if any such there be, have or have not been produced by such works and artificial embankments, yet inasmuch as such works and embankments were lawfully made, and, as to all

or some of them, under the authority of an Act of Parliament, defendant submits that the same do not belong to her Majesty, but to the owners of the adjoining land. Then he further says that he cannot answer as to his belief or otherwise whether the other defendants do or do not allege, that said pieces of land, as formed upon the said seashore, as * in the said [* 64] amended information mentioned, if any such there be, have been added to the adjoining land by a gradual or imperceptible projection or subsidence of soil or silt, and that the same were produced by natural causes; and that although such pieces of land have been produced by the operation of artificial causes, or by embankments, or by cutting channels, yet the same belong to the defendants, the owners of the adjoining lands, and that such portions of alluvial land so formed by, or gained from, the sea, have been added to the adjoining main land by the gradual and imperceptible projection of soil or silt upon the seashore arising from the operation of natural causes, and that the same have not been produced by the works and artificial embankments by, or by leave or license of, the defendants.

I think, therefore, that the information and the answer, taken together, raise the issue as to the right of the Crown to alluvium produced by artificial causes.

The fact of the line of high water having materially varied upon parts of the shore adjoining to some part of the defendants' lands is, I think, clearly proved by several witnesses, and may be assumed, upon the report of Mr. Bidder, to have been the result of the operation of artificial causes. These causes appear to have been partly the copper-works of Sims & Co., which were erected in 1804 and 1805, and the buildings which were subsequently added, but principally the embankment formed by throwing slag and rubbish on the seashore by Messrs. Sims & Co., by which the main land (as it is stated) has been raised or has silted up, and considerable portions of what was formerly seashore have been added to the main land.

This embankment appears to have extended as far as * some of the lands of the defendant Lewis, viz., to Pen- * [65] rose Farm, as stated by the witnesses Dankin and Garrett, and to Bryn Farm, as shown by David Griffith, and to have indirectly affected the line of high water upon the shore adjoining other lands belonging to him.

The embankment I collect from the evidence to have been the ordinary spoil bank always produced by the regular and accustomed operations of copper-works.

It will be necessary, before I consider the rights of the Crown upon the facts just stated, to clear the case of all that relates to Stanley Marsh. The defendant Lewis claims the seashore in front of this part of his property upon the ground of uninterrupted enjoyment for sixty years.

During the course of the argument I intimated a strong opinion that the acts of ownership upon which the defendant relies were quite insufficient to prove actual possession. They consisted merely of turning out upon the marsh the cattle of the defendant, which crossed the invisible line of boundary separating the marsh from the seashore, and the cattle being allowed thus to stray without interruption. But the effect of acts of ownership must depend partly upon the acts themselves and partly upon the nature of the property upon which they are exercised. If cattle are turned upon enclosed pasture ground and placed there to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it, there, mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by the party interested [* 66] in resisting it, or by perseverance in the * assertion and exercise of the right claimed in the face of opposition.

The defendant's rights in the seashore, opposite Stanley Marsh, will not, therefore, be different from those which he is entitled to in respect of his other lands, and the claim of the Crown to all accretions produced by artificial causes may be considered with reference to all the defendant's lands without distinction. There is very little authority to guide us upon the question, which, as far as I can discover, is now raised for the first time. None of the cases cited in the course of the argument throw much light upon it. Indeed, with the exception of the cases of *Rex* v. *Lord Yarborough*, of *the Hull and Selby Railway Company*, and, perhaps, of *Scratton* v. *Brown*, there is not one which bears at all upon the point of slow and insensible accretions on the seashore, whether naturally or artificially produced.

In *Smart* v. *The Magistrates and Town Council of Dundee*, 8 Bro.

P. C. 119, which was the case of a grant of premises on the sea-shore, described as bounded on the south by the sea-flood, it was held that the grantee had no right to follow the sea, or to have the land acquired from it or left by it where it had receded; but the claim of the grantee was not to follow the sea, which had receded slowly and insensibly, but he insisted that his property, being described as bounded on the south by the sea-flood, he was entitled, both by the special terms of the grant and by the common law, to take in ground from the sea, by embankments and other operations of the same kind, opposite to his property.

The case of *Todd* v. *Dunlop*, 2 Robinson's Appeal Cases, 333, which was decided * upon the authority of *Smart* v. *Magistrates of Dundee*, was, as far as can be collected from [* 67] the short statement of the facts, not a case of gradual and imperceptible accretion, but of sudden acquisition of additional land by the operations of the trustees of the river Clyde. It therefore differed from the case of *Scratton* v. *Brown*, 4 B. & C. 485 (28 R. R. 344), where the advance of the sea had been gradual and imperceptible, and the high and low water mark had varied in the same degree, and where it was held that the freehold of the grantee of the shores and sea-grounds shifted as the sea receded or encroached.

There is nothing, however, in any of the cases, or in the few text-writers upon the subject, which hints at the distinction now sought by the Crown to be established between effects produced by natural and by artificial causes. In order to determine whether there is any ground for this distinction, it is essential to discover, if possible, the principle upon which the right to *maritima crementa* depends.

The law is stated very succinctly by Blackstone, vol. ii. p. 262, in these words: "As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma*, or by dereliction, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex;* and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss; but if the alluvion or dereliction be sud-

[* 68] den and considerable * in this case it belongs to the King, for as the King is lord of the sea, and as owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry."

I am not quite satisfied that the principle *de minimis non curat lex* is the correct explanation of the rule on this subject; because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron ALDERSON, in the case of *The Hull and Selby Railway Company*, 5 M. & W. 327, viz., "That which cannot be perceived in its progress is taken to be as if it never had existed at all." And as Lord ABINGER said in the same case, "The principle" as to gradual accretion "is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property." It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the seashore. If this be the true ground of the rule, it seems difficult to understand why similar effects, produced by a party's lawful use of his own land, should be subject to a different law, and still more so if these effects are the result of operations upon neighbouring lands of another proprietor. Whatever may be the nature and character of these [* 69] operations, they ought not to affect a rule which * applies to a result and not to the manner of its production.

Of course an exception must always be made of cases where the operations upon the party's own land are not only calculated, but can be shown to have been intended, to produce this gradual acquisition of the seashore, however difficult such proof of intention may be.

If, then, it had been clearly proved or admitted in this case that the additions to the seashore in the parishes of Llanelly and Pembrey were of gradual and imperceptible progress, so as to compel me to express an opinion upon the distinction taken by the Crown between accretions produced by nature and by artificial

causes, I should have been prepared to repudiate the distinction, and to refuse any further inquiry to ascertain the original medium line of high water, as I consider this proceeding as closely analogous to a bill to ascertain boundaries in which it is necessary for the plaintiff to establish, by the admission of the defendant or by evidence, a clear legal title to some land in the possession of the defendant. *Godfrey* v. *Littel*, 2 Russ. & Myl. 633. But in this case, although the allegation in the information, "that the alluvial land has not been added to the adjoining main land by the gradual and imperceptible projection of soil and silt upon the seashore arising from the operation of natural causes," is ambiguous, and may either amount to a denial of the gradual and imperceptible nature of the accretions or of the cause by which they were produced, yet the witnesses for the Crown say that the alluvial land has not been added to the main land gradually and imperceptibly, but rapidly.

Now if by the word "rapidly" the witnesses mean "perceptibly," then the Crown, and not the defendant, *would [*70] be entitled to these accretions. But if the witnesses merely mean, that at the expiration of some period of time they could perceive the changes which had taken place, although they could not discern them in their progress, then, I think, another important question may arise, and may call for determination, as to whether circumstances may not exist in which, though the changes were gradual, yet the original limits of the Crown's right, and of that of the owner of the adjoining land, are now capable of being distinctly ascertained.

If there is no clear line of demarcation between the main land and the seashore by the gradual encroachment or recession of the tide, all trace of the distinction between them will be completely obliterated, and there will be full scope for the rule of alluvion to operate. But suppose that the separation between the main land and the seashore is distinct; as suppose the landowner puts up a wall to prevent the encroachment of the sea upon him, and the effect of the wall is to produce a gradual and insensible accretion, which cannot be perceived from day to day, but at the end of some long period is distinctly to be seen, ought this to become the property of the landowner?

Lord TENTERDEN, in *Rex* v. *Lord Yarborough*, 3 B. & C. 91, 106 (27 R. R. 292), seems to think that it ought, for he says: "An

accretion extremely minute, so minute as to be imperceptible even by known antecedent marks or limits at the end of four or five years, may become, by gradual increase, perceptible by such marks or limits at the end of a century, or even of forty or fifty years. For it is to be remembered, that if the limit on one side be land or something growing or placed thereon, as a tree, a house, or a bank, the limit on the other side will be the sea, which [* 71] rises to a height varying * almost at every tide, and of which the variations do not depend merely upon the ordinary course of nature at fixed and ascertained periods, but in part also upon the strength and direction of the winds, which are different almost from day to day. And (he adds) considering the word 'imperceptible' in this issue as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time."

This, however, is not in accordance with the great authority upon this subject, Lord Hale (Hargrave's Law Tracts, p. 28). He says, "This *jus alluvionis* is *de jure communi*, by the law of England, the King's, viz., if by any marks or measures it can be known what is so gained; for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, *idem est non esse et non apparere*." Lord Hale here calmly limits the law of gradual accretions to the cases where the boundaries of the seashore and adjoining land are so undistinguishable that it is impossible to discover the slow and gradual changes which are from time to time accruing, and when at the end of a long period it is evident that there has been a considerable gain from the shore, yet the exact amount of it, from the want of some mark of the original boundary line, cannot be determined. But where the limits are clear and defined, and the exact space between these limits and the new high-water line can be clearly shown, although from day to day or even from week to week the progress of the accretion is not discernible, why should a rule be applied which is grounded upon a reason which has no existence in the particular case.

[* 72] * In the present state of the evidence it is impossible for me to direct an inquiry to ascertain and lay down the former line of medium high tide, because it could lead to no practical result.

I want information upon a variety of points which is not supplied by the evidence. With respect to the slag embankment, to which the accretions are principally attributed, I cannot discover satisfactory proof whether it is formed on the present seashore, or upon that which was formerly seashore, or upon the land occupied by Sims & Co.; whether it extends before the defendant's lands or merely produces effects upon the line of high water opposite to them, there being some discrepancy in the evidence on this last point; whether there were originally any bounds or marks by which the seashore could be clearly distinguished from the adjoining lands; and whether the accretions which have taken place were imperceptible in their progress or could be perceived from time to time as they were going on, upon all of which subjects the evidence is, at present, extremely defective and unsatisfactory.

I think it will be absolutely necessary for me to direct issues to be tried for the purpose of ascertaining the following facts:—

1st. Whether by the direct or indirect operation of the acts of the defendant, or of any other person or persons, and by what acts, the natural line of high water before the defendant's lands, in the parishes of Llanelly and Pembrey, has been varied, and if so, to what extent?

2nd. Whether the variation, if any, in the natural line of high water has been slow, gradual, and imperceptible, or otherwise.

* 3rd. Whether there are or were any marks or bounds [* 73] by which the natural line of high water can now be ascertained and laid down.

With respect to Mr. Rees there must be similar issues. But, in addition to these, there must be one with reference to the workings of the Pool Colliery Company. The information against him charges that the Pool Colliery Company have sunk a pit and worked a mine under the seashore, making certain payments to the defendant in respect of it. The evidence of the working, however, is, that the Pool Colliery Company have worked the mine for about one hundred and twenty yards to the south beyond the high-water mark of the spring tides, but that the workings have not extended beyond the high-water mark at neap tides. Now the rights of the Crown neither extend to the spring tides nor are confined to the neap tides, but their limits are the ordinary or medium tides. Although there is proof, therefore, of the Pool

Colliery Company working below the spring tides, there is none at all of their having worked below ordinary tides.

There ought to be an issue to inquire whether the Pool Colliery Company have worked the mine below the present or former line of high water at ordinary tides.

Until these facts are determined it is not in my power to dispose of the important questions which these informations involve; although I have thought it right not to withhold my opinion upon some of the questions which were raised in the course of the argument.

ENGLISH NOTES.

The *primâ facie* presumption was held to be rebutted in *Attorney-General* v. *Hanmer* (1858), 27 L. J. Ch. 837, 4 Jur. (N. S.) 751, where a grant was made by letters patent of the Crown as lord of the manor of E., of "all those coal mines found, or to be found, within the commons, waste grounds, or marshes within the said lordship of E., &c.," with a proviso that the grant should be construed strictly against the Crown, and most strictly and beneficially for the grantees. This grant was held by WATSON, B., and STUART, V.-C., to pass the coal lying under the estuary of the River Dee, between high and low water marks, and forming part of the manor of E.

It is the duty of the Crown, whether the foreshore has been granted to a subject or not, to protect the realm against inundations by the sea, and to maintain all natural barriers against such inundation. And where a subject removes or threatens to remove the shingle to such an extent as to expose the land within to inroads of the sea, an action lies by the Attorney-General at the relation of the owner of the land within to restrain the removal of the shingle, although the subject removing or threatening to remove the shingle may have obtained a grant of the foreshore. *Attorney-General* v. *Tomline* (C. A. 1880), 15 Ch. D. 150, 49 L. J. Ch. 377.

The question what is the "bed of the river" under the Thames Conservancy Acts has been considered in several cases, and ultimately decided by the Court of Appeal, in *Thames Conservators* v. *Smeed* (C. A.), 1897, 2 Q. B. 334, 66 L. J. Q. B. 716, upon a principle similar to that applied to the Crown's property in the foreshore; so that the "bed of the river" is held to mean the soil between the ordinary high-water mark on the one side and the ordinary high-water mark on the other side. For this construction A. L. SMITH, L. J., cited the American case of *State of Alabama* v. *State of Georgia* (1859), 64 U. S. 515.

AMERICAN NOTES.

This case is cited generally in Washburn on Easements, p. 324, and in Goud on Waters, but its general applicability will be considered hereafter (see SEA, &c., *post*).

SECTION II. — *Possession and Powers.*

No. 14. — THE MARQUIS OF SALISBURY *v.* GLADSTONE.

(H. L. 1861.)

RULE.

A CUSTOM for the copyholders of a manor to break the surface of their tenements and dig and get coal or clay without stint out of the tenements may be good in law.

The Marquis of Salisbury v. Gladstone.

34 L. J. C. P. 222–224 (s. c. 9 H. L. Cas. 692; 8 Jur. (N. S.) 625; 4 L. T. 849; 9 W. R. 930).

Copyhold. — Custom. [222]

A custom in a manor that copyholders of inheritance may break the surface and dig and get clay, without stint, out of their copyhold tenements, for the purpose of making bricks, to be sold off the manor, is good in law (*dubitante* Lord WENSLEYDALE).

Error was brought in this case by the plaintiff on a bill of exceptions to the ruling of BYLES, J., before whom the case was tried, and under whose direction a verdict was found for the defendant.

The action was ejectment for a forfeiture of certain lands in the manor of West Derby, in the county of Lancaster. The defendant was a copyholder of inheritance of the manor of West Derby, of which the plaintiff was lord.

The defendant had broken the surface and dug clay on his own tenement, for the purpose of making bricks for sale, which he made, and afterwards sold, and contended that he was justified in so doing by an immemorial usage in the manor, for copyholders of inheritance without license of the lord, to dig and get clay in

their own tenements for the purpose of making bricks for sale. Evidence was given of this custom.

The learned Judge held that the custom, if proved, was good in law, and so directed the jury. Exceptions were tendered to this direction. The jury thought that the evidence did prove the custom in fact, and so, under this direction, the verdict was found for the defendant.

On error to the Exchequer Chamber the judgment was affirmed. This proceeding in error was then taken.

Sir H. Cairns and Mr. Manisty (Mr. T. Jones was with them), for the appellant. — The custom here set up is a custom to commit waste, and waste of the very soil of the manor. Such a custom cannot be supported. *The Tanistry Case,* Sir J. Dav. Rep. 32; Legal Maxims, by Broom, 824 to 829; *Broadbent* v. *Wilks,* Willes, 360; *Hilton* v. *Lord Granville,* 5 Q. B. 701; *Tyson* v. *Smith,* 9 Ad. & E. 406; Coke's Copyholder, s. 33; Blackstone's Commentaries, Book ii., c. 6; Bracton, 26 a; *Rockey* v. *Huggins,* Cro. Car. 220; *Badger* v. *Ford,* 3 B. & Ald. 153 (22 R. R. 331); *Wilson* v. *Willes,* 7 East, 121 (8 R. R. 604); *Clayton* v. *Corby,* 5 Q. B. 415; *Attorney-General* v. *Matthias,* 4 Kay & J. 579; *Ely* v. *Warren,* 2 Atk. 189; *Bishop of Winchester* v. *Knight,* 1 P. Wms. 406 (p. 533, *ante*); Gilbert's Tenures, p. 328; Scriven on Copyholds, 4th edit. 427; *Bourne* v. *Taylor,* 10 East, 189 (p. 535, *ante*); *Rowe* v. *Brenton,* 8 B. & C. 737 (32 R. R. 524); *Bateson* v. *Green,* 5 T. R. 411; *Arlett* v. *Ellis,* 7 B. & C. 346 (31 R. R. 214); *Paddock* v. *Forrester,* 3 Scott N. R. 715.

Mr. Rolt, and Mr. Edward James (Mr. Mellish and Mr. Baylis were with them), for the respondent. — In copyholds of inheritance such a custom as this is good; it does not destroy the lord's estate. *Rutland* v. *Gie,* 1 Sid. 152; *Stephenson* v. *Hill,* 3 Burr. 1273; *Glasscock's Case,* 4 Leo. 236; *Fawcett* v. *Lowther,* 2 Ves. 300; *Cage* v. *Dod,* Styles, 233; *Denn* v. *Johnson,* 10 East, 266; *Curtis* v. *Daniel,* 10 East, 273 (10 R. R. 291).

Sir H. Cairns, in reply.

Lord CRANWORTH moved the judgment of the House. —

[*223] It was argued, on behalf of * the plaintiff that no such custom as that now set up could exist; for that a custom to be valid must be reasonable, and that the custom here was not reasonable, since the exercise of it tended to the annihilation of the lands themselves. It was not easy to define the meaning of

the word "reasonable," when applied to a custom relating to a lord and his copyholders. The relation between them must have had its origin in remote times, by agreement, when he was the absolute owner of the soil, and they were its occupants as his tenants at will. Whatever restrictions he imposed, or whatever rights they demanded, were within the competency of the lord to grant, or the tenants to stipulate for. And if evidence could be given of what was then agreed on between them, and it was shown that what was so agreed on had always been acted upon since, it was difficult to see how it could be declared void on the ground of its being unreasonable. Looking to the present case, it was impossible to say that such a custom as that here alleged might not have resulted from an agreement between the lord and the tenants before the time of legal memory. The only persons affected by it were the lord and the particular tenant. In *Broadbent* v. *Wilks* it affected other copyholders; and so again, in *Wilson* v. *Willes*, where the custom claimed was to take an unlimited quantity of turf from the common for the improvement of the tenements of those who took it, without reference to the other copyholders whose rights in the common might be thereby wholly destroyed. This was not a custom like that claimed in the case of *Hilton* v. *Lord Granville*, by which the houses of the tenants might all be undermined and destroyed without notice of what was to be done, or compensation for doing it. The custom here affected only the lord and the particular tenant, and there was no reason for saying that it might not have been the result of arrangement between these two parties. Such a custom relating to the sale of copper ore had been held good in *The Bishop of Winchester* v. *Knight*, where the tenant was not strictly a copyholder, but was a customary tenant, Lord COWPER directing an issue to try whether there was such a custom in fact, which he could not have done if he had thought that a custom of that kind would be void as unreasonable. That case could not be distinguished from the present, for clay was not the only part of the soil adapted for profitable culture, even if a custom would be bad which would lead to making the land useless for agricultural purposes. This was only a custom insisted on for this particular manor, and so limited. It might be good and reasonable; for it might have been thought that the clay here was present in such excessive quantity that its removal would tend to benefit and not to impoverish the soil. The alleged custom would

not warrant the removal of soil consisting of mixed portions of clay, chalk, gravel, and vegetable mould; and it might be that the lord considered that the removal of pure clay would increase the value of the soil which would remain. The direction of the learned Judge at the trial was therefore right, and the exceptions were properly disallowed; and the judgment must be for the defendant in error. —His Lordship added, that Lord BROUGHAM, who had heard the argument, concurred in the judgment.

Lord WENSLEYDALE confessed to not having a very decided opinion on the case, but he should not do more than express his doubts, and should not oppose the motion of his noble and learned friend. There was no doubt whatever but that the lord, being the original owner of the soil, could have given by grant such a power or even a larger one to his tenants; but when there was no express grant the rule of law applied that a custom to be good must not be unreasonable, otherwise the use might be referred to the ignorance or carelessness of those whose property it affected, and not to their grant. For that reason the custom set up in *Wilson* v. *Willes* was held bad. And so in *Arlett* v. *Ellis*, it was held that it could not be a good custom for the lord to inclose without leaving a sufficiency of common. Yet in both these cases it might have been argued that the lord might originally have made a grant to that effect. So he might, no doubt, make a grant to take away the clay, however deep and extensive the stratum of that clay might be, and however much injury it might cause to the tenement, even though there was no countervailing benefit.

But there the grant must be shown. Here it was claimed [* 224] as a custom. Such claim would be void if * it was unreasonable. Then was it an unreasonable thing for a copyhold tenant to have a right to destroy the natural surface of the soil, and remove it altogether, leaving only a substratum, sand or stone, or whatever it might be, which might be incapable of cultivation, exposed below? This custom differed much from the right to cut trees, for that might be highly beneficial to agriculture, and in particular soils they might be replaced by others: it also differed from the right to get minerals which might be done without injury to the surface. Under these circumstances he still entertained much doubt upon the question, but as all his noble and learned friends differed from him, and had formed a very decided opinion upon the validity of the custom proved, he

did not mean to offer any advice to their Lordships, that the judgment of the Exchequer Chamber should be reversed.

Lord CHELMSFORD said that the existence of immemorial usage had been in this case fully established by the evidence. It was insisted, however, for the appellant, that the custom must be bad, because it could not be presumed that there was a convention between the lord and the tenant to permit the latter to destroy the copyhold, by taking away the soil itself. It was admitted that there might be a valid custom for a copyholder of inheritance to work mines, to dig and take clay, or to cut down and carry away trees; but it was said that it was the extent of this custom which made it unreasonable, and a distinction was drawn between trees which were perishable and renewable, and the clay which was the soil itself. The trees, however, were not properly described as "renewable," though they might be replaced by others. It was difficult to conceive in what way a custom to take the whole of a particular soil from a tenement could be called a destruction of the tenement itself. The tenement would remain though this particular portion of the soil was removed. There seemed nothing unreasonable in supposing that the lord might originally have licensed his tenants to use their copyhold tenements in the way in which alone, perhaps, any great benefit could be derived from them. There was little, if any, distinction between a custom to work mines and a custom to dig clay for the profit of the tenant. In *The Bishop of Winchester* v. *Knight*, the freehold was in the lord, and the only difference between that and a copyhold case was that the tenants did not hold *ad voluntatem domini*. Lord COWPER recognised the legal validity of such a custom, or he would not have sent a case to try whether in fact it existed. There was little resemblance between this case and those where the clause was of a profit *à prendre in alieno solo*. In a copyhold tenement, though the soil was in the lord, he could not, any more than the tenant, work mines or cut down trees without a custom authorising him to do so. The rights of the lord were those which had been reserved, those of the tenant those which had been granted. But in one as in the other the rights of one party must not be inconsistent with those which existed in the other. That was the principle which governed *Bateson* v. *Green* and *Broadbent* v. *Wilks*, in the former in favour of the lord, in the latter adverse to him, because of its utter inconsistency

with the grant to the tenant. In *Wilson* v. *Willes* a custom for all the tenants of a manor, having gardens, to take pasturable turf at all times and in unlimited quantity, from a waste within the manor, for making and repairing grass plots in their gardens, and for making and repairing the banks and mounds fencing their customary estates, was held bad as being indefinite, uncertain, and destructive of the common. These cases indicated the principle on which the unreasonableness of any custom might be ascertained. There could be no doubt that the lord on the original grant of the copyhold tenements in question might have reserved to himself the right to dig and carry away the brick-earth found upon them, and if a custom of that kind existed upon the manor it would be valid. But if the lord might have reserved such a right to himself, why might he not confer it on the tenants? And if it was not unreasonable to suppose that such a right might have been originally conferred, then the custom, which had been proved by the immemorial exercise of the right, was good in law, and the judgment in favour of the defendant in error ought to be affirmed.

Judgment for the defendant in error.

ENGLISH NOTES.

In the case of *Lingwood* v. *Gyde* (1866), L. R. 2 C. P. 72, 36 L. J. C. P. 10, 16 L. T. 229, 15 W. R. 311, — a case stated by an assistant copyhold commissioner in certain enfranchisement proceedings, — the following questions (*inter alia*) had been referred to the Commissioners. 1. Whether in that manor the lord was entitled to claim any consideration in respect of timber; 3. Whether in that manor the lord was entitled to enter for a forfeiture if the tenant dug clay or brick earth; and 4. Whether in that manor the lord was entitled to enter for a forfeiture for any other kind of waste committed by the tenants. All these questions were decided by the Assistant Commissioner in the negative. The judgment of the Court (Erle, Ch. J., Willes, J., Byles, J., and Keating, J.), delivered by Willes, J., was (so far as relates to these questions) as follows: "We agree with the Assistant Commissioner as to all the questions (1, 3, and 4) respecting waste. The evidence was abundant to prove a customary right to waste both commissive and permissive; and such right was established to be good in law by the House of Lords in the case of *Salisbury* v. *Gladstone*."

The freehold of a customary tenement is in the lord, and the tenant has not, in the absence of a custom to that effect, any right to work the

minerals. *Duke of Portland* v. *Hill* (1866), L. R. 2 Eq. 765, 35 L. J. Ch. 439, 12 Jur. (N. S.) 286, 15 W. R. 38.

The principal case has also been cited in several judgments as an illustration of the high nature of the rights which may be claimed by custom. See per Lord HATHERLEY, L. C., in *Warwick* v. *Queen's College, Oxford* (1871), L. R. 6 Ch. 716, 722, 40 L. J. Ch. 780, 25 L. T. 254, 19 W. R. 1098; per HALL, V. C., in *Hall* v. *Byron* (1876), 4 Ch. D. 667, 678, 46 L. J. Ch. 297, 36 L. T. 367, 25 W. R. 317. And it is cited in support of the rights claimed by customary tenants in the Isle of Man, in the judgment of the Judicial Committee in *Attorney-General (Isle of Man)* v. *Mylchreest* (1879), 4 App. Cas. 294, 305, 48 L. J. P. C. 36, 40 L. T. 764.

AMERICAN NOTES.

This case is cited in Washburn on Easements, p. 146, as exceptional, and so in Lawson on Customs, p. 31, 65.

No. 15. — SEAMAN *v.* VAWDREY.

(1810.)

No. 16. — THEW *v.* WINGATE.

(1862.)

RULE.

No presumption of a grant of a right to mines reserved by an old conveyance, or of a release of a right of entry for the purpose of working them, arises from the mere non-exercise of the rights reserved.

But the actual possession of a mine by the owner of the surface for the period of limitation will operate as a bar under the statute (3 & 4 Will. IV., c. 27) to the claim of another.

Seaman v. Vawdrey.

16 Vesey, 390–393 (10 R. R. 207).

Mines. — Reservation. — Non-user no Ground for Presumption of Lost Grant.

Reservation of salt works, mines, &c., in 1704, with a right of entry, [390] though no instance of any claim, and the title had been transferred in

No. 15. — Seaman v. Vawdrey, 16 Vesey, 390, 391.

1761, without such reservation, upon the usual covenants, held an objection, giving a right to compensation; the purchaser not insisting upon it further. The inference of abandonment of a right from non-user not applicable to the case of mines.

The bill prayed the specific performance of a contract by the defendant to purchase estates in the County of Chester. An objection was taken to the title upon the ground, that by indentures of lease and release, dated the 26th and 27th of September, 1704, Cicely Croxton conveyed to Peter Yate, his heirs and assigns, the manor and estate of Ravenscroft, subject to the following reservation: except and always reserved to the said Cicely Croxton and her heirs the Wych houses, salt works, and brine pits, in Ravenscroft, and a piece of land, adjoining thereto, parcel of the meadow, wherein the same salt works stood (describing it); and also all springs, veins, and mines, of brine, salt, or salt rock in another small parcel of the said meadow; with full liberty, without paying anything, for Cicely Croxton and her heirs, &c., without the let, &c., of Yate, his heirs or assigns, to sink and make any new brine pits, salt pits, &c.; and to have free ingress, &c., to take, and carry away, and do all things necessary.

By the conveyance of 1761 to John Seaman, under whose devise the plaintiff was entitled, no notice was taken of the reservation in the deed of 1704.

The Answer insisted, that under the said reservation there was in the heirs of Cicely Croxton a right to all the springs, mines, &c., in the land devised; and a right of entry, &c., in respect of which the plaintiff is entitled to compensation. That question was therefore brought on, by consent, without an exception: the defendant not making it an objection to the title.

*[391] *Mr. Richards and Mr. Roupell, for the plaintiff, relied on the case of *Lyddall* v. *Weston*, 2 Atk. 19; contending, that the salt works, existing upon this estate in the year 1704, having been levelled, and from that time no act by or under the title of Mrs. Croxton appearing, a strong presumption arose, that she had released, or in some way abandoned, her right under the reservation in that conveyance: especially as the title was taken in 1761 by a purchaser, with the usual covenants, without the exception: showing a clear conviction at that time, that there was no right under that reservation.

Sir Samuel Romilly and Mr. Wetherell, for the defendant.

The non-user of this right proves nothing: the object of such a reservation being, that the party may have the power of exercising the right, when his circumstances may enable him to meet the expense attending such an undertaking. What time can bar such a private right? It is not like a right of way. The ground of presumption in all cases is, that the person seeking to establish the right has done some act inconsistent with it: but the possession in this instance was not inconsistent with the right claimed as in the case of a right of way.

The MASTER OF THE ROLLS (Sir W. GRANT).

The deed of 1704 contains an express and unequivocal reservation of all mines and veins of salt that might be contained in the estate of Ravenscroft. It was for the purchaser to consider, how far it was prudent to take an estate, subject to such a lien; but in fact by the terms of the agreement Mrs. Croxton became as much the * owner of the mines, as Mr. Yate [*392] became owner of the soil. The question is, how those who may now represent her have lost this property, or their right to enter upon the enjoyment of it. Not by any actual grant or release; for none is alleged: but it is said, at this distance of time a release is to be presumed. I do not clearly see any circumstances from which that presumption is to arise. No adverse possession is alleged. The owner of the soil has had the enjoyment to which he was entitled by the contract, and which is perfectly consistent with the right of the owner of the mines. If it could be shown, that he had wrought any mines himself, or had interrupted the other parties, claiming as representing Mrs. Croxton, under the reservation of the mines, in working them, that would lay a ground, upon which the presumption could stand: but nothing is alleged, except the mere absence of any evidence of the exercise of this reserved right; for I do not see, how the circumstance, that in the conveyance of 1761 no notice is taken of this reservation, can weigh against the persons who represent Mrs. Croxton, if they should think proper to assert her right. There are many cases, where from non-user of a right the inference of abandonment may fairly be made: but that does not apply to such a case as this. It is not so generally true, that the owner of mines does work every mine which he has a right to work; and therefore the relinquishment of the right cannot be presumed from the non-exercise of it. It is well known, that

mines remain unwrought for generations; that they are frequently purchased, or reserved, not only without any view to immediate working, but for the express purpose of keeping them unwrought, until other mines shall be exhausted; which may not be for a long period of time. It is impossible therefore to infer, that this right is extinguished; though there is no evidence of the exercise of it since the year 1704.

[* 393] * The case of *Lyddall* v. *Weston*, 2 Atk. 19, instead of being an authority for the defendant, appears to me to afford an argument by implication against him. The grounds upon which Lord HARDWICKE'S judgment goes, are two: first, that upon examination the probability was great, that there were no such mines; secondly, that the Crown, having merely reserved the mines, without any right of entry, could not grant a licence to enter upon another man's estate for the purpose of working them. That position is liable to considerable doubt: as being inconsistent with the resolutions of the Judges in the *Case of Mines* in Plowden, Plowd. 310; see 336 (p. 399, *ante*). Lord HARDWICKE however thought it necessary to assume it, before he could determine against the validity of the purchaser's objection. Here, first, it is not alleged, that there is no probability of mines upon this estate: it is rather admitted, that there were; secondly, here is the reservation of a right of entry; upon the want of which Lord HARDWICKE laid stress in that case. The defendant chooses to consider this, not as an objection to the title, but as a ground for compensation; and I think he is entitled to such compensation.

Thew v. Wingate.

10 Best & Smith, 714–722.

Statute of Limitations. — Gravel Pit. — Mine. — Adverse Possession.

[714] An Inclosure Act, 31 Geo. III., c. lxi., directed the commissioners to set out land for getting stone, &c., for repairing the parish roads, which should be vested in the surveyors of highways and their successors, and enacted that all the grass and herbage growing, arising, and renewing on the roads and on the land to be set out and appointed for getting stone, &c., should belong to and be the property of the persons to whom the commissioners should allot the same, exclusive of all other persons whomsoever, or should be applied to some parochial or other use or purpose. The commissioners, in pursuance of the Act, awarded, set out, allotted, and appointed to the surveyors of highways and their successors an allotment No. 158, containing one acre, save and except

the grass and herbage thereof, upon trust and for the purpose of getting stone, &c., for repairing the roads, and they awarded, set out, allowed, and assigned to P. and his heirs contiguous allotments, No. 157 and No. 159, together with the grass and herbage of No. 158; they also ordered and directed that the grass and herbage growing, arising, and renewing on the public roads and ways should be let from year to year, and the moneys arising thereby be applied to the repair of the highways, &c. The surveyors obtained gravel for the highways from No. 158 down to the year 1813, when they discontinued to do so, and purchased gravel from pits in the neighbouring parishes; and thenceforth until 1858 they never entered upon or exercised in No. 158 any right under the award. In 1813, P. built a cottage and barn, and other buildings, on part of No. 158, and enclosed part of it with a fence; he also cut off a corner of it, which had ever since formed part of the adjoining arable field, and cleared out the old pit, and converted it into a pond. *Held:* —

1. Per COCKBURN, Ch. J., and *semble* per BLACKBURN, J., that the award of the commissioners did not vest in P. any right to the soil, but only the right of taking the grass upon its surface.

2. That the surveyors of highways were within Stat. 3 & 4 Will. IV., c. 27, by reason of the interpretation clause, sect. 1.

3. That there had been a discontinuance of possession by the surveyors, and an actual possession by P. for twenty years, and therefore their right was barred by Stat. 3 & 4 Will. IV., c. 27, ss. 2, 3.

4. Per BLACKBURN, J. If P. had the exclusive right to the surface, the acts which he did were acts of ownership in the subsoil, and evidence from which it might be concluded that he took possession of the whole acre.

Special case stated under The Common Law Procedure Act, 1852 (15 & 16 Vict., c. 76).

By a private Act, 31 Geo. III., clxi., intituled "An Act for dividing and enclosing the open common fields, meadows, pastures, and other commonable lands, and waste grounds in the lordship of Ludford, in the county of Lincoln, comprising the parishes of Ludford Magna and Ludford Parva," commissioners were appointed, and it was enacted that it should be lawful for the commissioners, and they were thereby *authorised and re- [*715] quired before any other allotment was made in pursuance of the Act, to set out and appoint two or more pieces or parcels of land, not exceeding four acres in the whole, from and out of the lands thereby directed to be enclosed in such convenient places within the respective parishes of Ludford Magna and Ludford Parva as they should think proper, for getting stone, gravel, or other materials for repairing the roads and ways within the respective parishes, and such parcels of land should be vested in the respective surveyor or surveyors of the highways of the respec-

tive parishes of Ludford Magna and Ludford Parva for the time being and their successors, upon trust for the purposes in the Act mentioned. And it was further enacted, that after setting out the roads and ways within the lordship of Ludford, and making the allotments of lands for the repairs thereof, all the grass and herbage growing, arising, and renewing on the roads and ways within the lordship, as also upon the pieces or parcels of land to be set out and appointed for getting stone, gravel, and other materials for repairing thereof, should belong to and be the property of the person and persons to whom the commissioners should allot the same, exclusive of all other persons whomsoever, or should otherwise be applied to and for some general parochial or other use or purpose, and should be occupied and enjoyed in such manner and form as the commissioners should in and by their award order, direct, and appoint.

The commissioners by their award dated the 7th February, 1795, awarded, set out, allotted, and appointed, among others, all that plot, piece, or parcel of land, being No. 158 in the plan to the award, annexed, situate, &c., containing one acre, bounded by lands therein awarded to John Parkinson, No. 157, on or towards the east, west, and south, by the Six Hills Road on or towards the north (save and except the grass and herbage thereof, which was therein allotted to John Parkinson and his heirs), unto the surveyor or surveyors of the highways of the lordship of Ludford, and his and their successor and successors, in the office of surveyor for the time being, forever, upon trust and for the purpose of getting stone, gravel, or other materials for repairing the roads and ways within the lordship; and they awarded, set out, allotted, and assigned unto John Parkinson and his heirs all that plot, piece, or parcel of land or ground in the parish of Ludford Parva, No. 159, containing 13 a. and 33 p., &c., also all that other plot, piece, or parcel of land or ground in the parish of Ludford Parva, No. 157, containing 48 a. 2 r. 31 p., &c., together with the grass or herbage of the allotment No. 158, and declared the same subject and liable as aforesaid, to be vested in him pursuant to the directions in the Act of Parliament contained in lieu of and in full bar and satisfaction for the pieces or parcels of land or ground which he held before the passing of the Act or before the allotments were made, and which were dispersed in the fields, lands, and grounds by the Act

[* 716] * directed to be divided and enclosed, and also in full bar

of and satisfaction for all rights of common and other rights whatsoever to which he was entitled immediately before the allotments were made in, over, or upon the same fields, lands, and ground. The commissioners also ordered and directed that all the grass and herbage growing, arising, and renewing on the public roads and ways only within the lordship of Ludford should from time to time be publicly let to the best bidder or bidders by the surveyor or surveyors of the highways within the lordship for the time being from year to year only, and the moneys which should from time to time arise thereby should be applied in the first place in the necessary repairs of the roads and highways, bridges, and tunnels within the lordship of Ludford, and the fences and gates to be made and put up at the ends of the roads or highways next any of the adjoining townships, hamlets, parishes, or places, &c.

Upon the making of the award Parkinson entered upon and became seised of the allotments 157 and 159, and of the grass and herbage of the allotment 158. At that time the allotments 157 and 158 consisted entirely of arable land lying open together and undivided, but, soon after, they were fenced off, in accordance with the directions in the award, from the Six Hills Road on the west and another road on the south, being the roads set out in the award, on which they respectively abutted, and a gate was placed in the western boundary of allotment 158, forming an entrance to both allotments from the Six Hills Road.

The surveyors of the highways from time to time obtained gravel and other materials for the highways from the allotment 158 down to the year 1813, such gravel having been taken from the site marked "Old Pit" in the plan accompanying the case.

In 1813 Parkinson built a farm-house on part of allotment 157. About the same time he built a cottage and barn of brick with brick foundations on part of allotment 158, and opposite to them stables, a cow-house, and other buildings, standing partly on allotment 158 and partly on allotment 157, and so far as they extended covering the boundary between the two allotments. The space between the cottage and barn and the stables and other buildings was enclosed by a fence, and the area thus enclosed, being part of allotment 158, has ever since been used as a crew-yard. About ten years ago the fence on the north side of the crew-yard was removed, and in its place sheds were erected, partly

of brick and partly of wood, extending over the northern boundary of allotment 158, and standing partly on each of the allotments. Part of allotment 158, adjoining the cottage and barn, has from the time these were built, been used by Parkinson and the plaintiff as a stack-yard. Parkinson also put a fence across allotment 157, which intersected the northern boundary of allotment 158 [* 717] and cut off a small angle or corner * of the allotment, and this small piece or corner has ever since formed part of the adjoining arable field and been cultivated by Parkinson and the plaintiff therewith. At the same time he planted a narrow belt of trees, extending across the small corner of allotment 158, and along and over the western side of the same allotment. A year or two after 1813 Parkinson cleaned out the "Old Pit," from which the surveyors had theretofore taken gravel, and converted the same into a pond, placing posts and slabs round the sides thereof, and it has so continued ever since.

The surveyors of the highways never after the year 1813, until the year 1858, entered upon the allotment 158, or exercised therein any right under the award or otherwise. During this period they purchased the gravel required for the repairs of the parish highways from pits situated in the neighbouring parishes. The "Old Pit," in allotment 158, had in 1813, or shortly afterwards, become very wet, and the soil adjoining was of a wet and spongy nature, and the surveyors of the highways considered that it was as cheap and advantageous to the parish to obtain gravel for the roads from the pits in the neighbouring parishes as to make use of the "Old Pit," in allotment 158.

In 1858 the then surveyors of the highways entered the allotment 158, and began to dig for gravel, whereupon the plaintiff, who was devisee of Parkinson, entitled to all the rights of Parkinson in respect of No. 158 as well as of Nos. 157 and 159, sent to them notice that if they persisted he should take legal proceedings. Notwithstanding that notice the surveyors shortly afterwards again entered and took gravel from No. 158. In August, 1860, the defendants, being then surveyors, repeated those Acts.

The Inclosure Act and the award were to be referred to by either party on the argument.

The question was, whether the defendants or other surveyors of the highways for Ludford Magna and Ludford Parva for the time being were entitled to enter No. 158 and take therefrom stone,

gravel, and other materials for the repair of roads and ways within the lordship of Ludford, notwithstanding that entry thereon had not been made nor materials taken between the years 1813 and 1858, the possession and use of the grass and herbage thereon having been during the whole of that time in the plaintiff or those under whom he claimed.

Mellish, for the plaintiff. — First. The award made by the commissioners under Stat. 31 Geo. III., c. lxi., vested the soil of No. 158 in the surveyors of highways; the allotment of it to them amounted to a conveyance of the land in fee simple in trust for the repair of the highways in the parish. The award of the grass and herbage to Parkinson gave him only a right in the nature of an easement. Co. Litt. 4 b.

* Secondly. There was a sufficient taking possession of [*718] the land by the plaintiff to bar the right of the surveyors within Stat. 3 & 4 Will. IV., c. 27, ss. 2, 3. The test is, whether the plaintiff, in doing the acts which had no reference to his right of pasturage committed a trespass. [CROMPTON, J. May not the effect of the private Act and award be to vest this allotment in every succeeding surveyor?]

Thirdly. Surveyors of highways are within Stat. 3 & 4 Will. IV., c. 27. By the interpretation clause, sect. 1, "the word 'person' shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual." *The President, &c. of the College of St. Mary Magdalen, Oxford*, appt., *The Attorney-General*, respt., 6 H. L. C. 189; *Doe d. Lansdell* v. *Gower*, 17 Q. B. 589, 21 L. J. Q. B. 57, in which it was held that the statute runs against churchwardens and overseers; Grant on Corporations, p. 565.

Lush, for the defendants. — First. The award gave to Parkinson the grass and herbage to be occupied and enjoyed by him exclusively. The "grantee of herbage may enclose, and may have action of *quare clausum fregit*." Tomlin's Law Dictionary, "Herbage," citing Dyer, 285 b, and 2 Roll. Rep. 356 (*Zouch* v. *Moore*). An exclusive right to growing crops gives a right to bring an action of trespass. *Wilson* v. *Mackreth*, 3 Burr. 1824; *Crosby* v. *Wadsworth*, 6 East, 602 (8 R. R. 566). [CROMPTON, J. Why might not Parkinson have the same right to the grass as every commoner has?]

Secondly. The surveyors were never dispossessed of their estate

in the whole of the allotment 158. *M'Donnell* v. *M'Kinty*, 10 Irish L. R. 514, 525, 526; *Smith* v. *Lloyd*, 9 Ex. 562.

Thirdly. The surveyors are not within the terms of Stat. 3 & 4 Will. IV., c. 27. Succeeding surveyors do not claim under their predecessors in office, and Stat. 31 Geo. III., c. lxi., did not enable them to hold the allotment 158 in a corporate capacity for and on behalf of the parish which was the power given by Stat. 59 Geo. III., c. 12, s. 17, to churchwardens and overseers as regards buildings, lands, and hereditaments belonging to a parish.

Mellish in reply.

COCKBURN, Ch. J. — I am of opinion that our judgment must be for the plaintiff. The effect of the award made by the commissioners under the Act of Parliament was to vest the soil of this acre of land in the surveyors of the highways of the parish [*719] for the time being and their * successors, and all that Parkinson, whom the plaintiff represents, and in whose place he stands, had vested in him, was the right of taking the grass upon the surface of the soil. There may be cases in which, from the terms employed and the intention of the parties to be collected from them, a grant of herbage would pass the surface of the soil; but in the present case there is this remarkable circumstance, that by the Inclosure Act the grass and herbage upon the land to be set out for getting stone for the repair of the roads is declared to be the property of the person to whom the commissioners should allot it in like manner as the grass and herbage growing upon the roads. And in the latter case, it could not be intended that any interest in the soil should pass, but the mere right to take the grass either by cutting it or by the mouths of cattle or sheep, or other like modes of enjoyment. Mr. Lush contended that the acts of ownership or of possession which Parkinson exercised were referable to the interest in the soil which he took under the award. But that argument fails so soon as we arrive at the conclusion that Parkinson took nothing in the soil but the mere right to the grass on the surface.

The next question is, whether there is sufficient evidence of acts of ownership by Parkinson to lead to the conclusion that the surveyors, the original grantees under the award, were dispossessed of their estate. *M'Donnell* v. *M'Kinty*, 10 Irish L. R. 514, and *Smith* v. *Lloyd*, 9 Ex. 562, establish that mere abandonment by the owners of land will not suffice. There must be possession

by some other person in order that the Statute of Limitations may commence to run, and therefore, although the surveyors from the year 1813 may have abandoned possession they would not have been dispossessed so as to satisfy the terms of the statute within these authorities, unless Parkinson had possession adversely to them during that time. Then we come to the question of fact, which we, as a jury, are to decide upon the evidence. [His Lordship stated the facts.] These are strong acts to show that Parkinson had taken possession of this acre as absolute owner, making no distinction between it and the land of which he had the fee simple by the award. Coupling these circumstances with the lapse of time, there is sufficient to establish that there has been a discontinuance of the possession of the surveyors and a possession adverse to them by Parkinson and the plaintiff for a sufficient period to make the Statute of Limitations a bar to their claim.

As to the surveyors being in the nature of a corporation against whom Stat. 3 & 4 Will. IV., c. 27, does not run, sect. 1, which defines the word "person," is in as large terms as possible. It would indeed be practically very inconvenient if persons holding property in connection with an official position, or in trust for a parish, after discontinuing *their possession and [*720] allowing some other person to obtain possession, could at the end of forty, or it may be four hundred years turn round on those who had possession and say "we are not persons against whom the Statute of Limitations can operate." Independently of the authorities this is not the true construction of the statute.

WIGHTMAN, J. — During a portion of the argument I entertained doubt on the second question, it having been considered by the Court of Exchequer in *Smith* v. *Lloyd*, 9 Ex. 562, in accordance with *M'Donnell* v. *M'Kinty*, 10 Irish L. R. 514, that a mere discontinuance will not bring a case within the operation of Stat. 3 & 4 Will. IV., c. 27, unless it is followed by a dispossession by some other person. The doubt I entertained was, whether the taking possession by Parkinson of part of the allotment in such a manner as was inconsistent with the possession by the surveyors of that part was such evidence of dispossession of the surveyors as would warrant the conclusion that they were dispossessed of the whole. In *M'Donnell* v. *M'Kinty* it was considered by the Court of Queen's Bench in Ireland that a dispossession of part of the minerals would not justify the legal presumption of a possession of the whole, so

as to take away the right of the party to insist on proof of the operation of the statute as to the other part. The case of minerals is not indeed exactly analogous to the present, for there is no doubt that Parkinson might exercise certain rights on the surface; the defendants had only a right to take the gravel. The question is, Were they dispossessed of the close by the acts of Parkinson? The acts which the plaintiff did seem to be wholly inconsistent with their right. He took possession at different times (more than twenty years ago) of such portions of the allotment as he thought proper, and erected buildings thereon, without leave or permission from the surveyors, or remonstrance or hindrance by them. His right was not such as entitled him to do these acts which were adverse to the rights of the surveyors. That is evidence of a general dispossession of the surveyors of the fee they had in the corpus of the close. Upon these grounds I agree in the judgment my Lord has pronounced in accordance with the opinion of my Brother CROMPTON, who has left the Court.

BLACKBURN, J. — I agree with the decision in *M'Donnell* v. *M'Kinty*, 10 Irish L. R. 514, which has been followed by *Smith* v. *Lloyd*, 9 Ex. 562, and I adopt the words used in the latter case (p. 572): "there must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the [* 721] * statute," 3 & 4 Will. IV., c. 27. In the present case, although the fact that the persons claiming the gravel pit went out of possession in this sense, that they ceased to use it, is not by itself evidence to show that the statute would begin to run, it greatly corroborates the other evidence that Parkinson had taken possession. In my view Mr. Mellish was correct in his argument that the question of fact is, Did Parkinson, under whom the plaintiff claims, twenty years before the acts for which this action was brought, take such actual possession of the ground below the surface of this acre that he and the plaintiff after him would have been able to maintain trespass against any person who bored a hole or meddled with the subsoil? If there was evidence of actual possession sufficient to maintain an action against a wrongdoer, their was evidence of their having such actual possession of the whole as would cause the Statute of Limitations to begin to run against the rightful owner, who had not only ceased to hold possession, but against whom a possession to be protected

under the statute had been taken within *M'Donnell* v. *M'Kinty* and *Smith* v. *Lloyd*. It was said by Mr. Lush, that, Parkinson having a right to deal with the surface as he liked, what he did on it was consistent with the rights of the surveyors. On the peculiar wording of this Inclosure Act I doubt whether the award is equivalent to a grant of the *vestura terræ* or the *herbagium* to Parkinson, with all the rights which might be conveyed by such a grant. It is coupled in the Act with the grass and herbage growing on the roads, so that it may well be contended that Parkinson's right was no more than to eat the grass by the mouths of his cattle, or to cut and convert it into hay, and that he had no right to the soil of the surface. But even if he had the exclusive right to the surface, the acts which he did in 1813, viz., excluding other persons, digging the foundations for and building a house, clearing out the gravel pit and turning it into a pond, are acts of interference with and ownership of the subsoil below the *vestura terræ*. And from such acts in part of a single and undivided property it may be concluded that the person who did them took possession of the whole. I agree with *M'Donnell* v. *M'Kinty*, that the mere fact of the grantee of the land entering and taking possession of some portion of the mines was not conclusive evidence that he had taken possession of the whole, but it was evidence to be left to a jury. In the present case, coupling the acts of interference with the subsoil with the acts of ownership on the surface, it is a fair inference that Parkinson in the year 1813 took possession of the whole of this acre of land absolutely. Then every additional year during which the surveyors did not interfere and exercise any right over * it strengthens the [* 722] inference, and, after forty-five years, we are justified in drawing it.

With regard to the point whether Stat. 3 & 4 Will. IV., c. 27, runs against the surveyors of highways, it is plain that they are as much within the statute as churchwardens and overseers, who are made a *quasi* corporation by Stat. 59 Geo. III., c. 12, s. 17, and that the cases which decide that churchwardens and overseers are within the statute decide that the surveyors also are within it.

Judgment for the plaintiff.

ENGLISH NOTES.

In the case of *Adair* v. *Shafto* mentioned by Lord ELDON (Lord Chancellor) in the course of the argument in *Norway* v. *Rowe* (1812), 19 Ves. 144, 156, 12 R. R. 157, 159, the rule as to the presumption (apart from the Statute of Limitations) was carried to a great length. The LORD CHANCELLOR described the case as follows: "An estate had been sold two centuries ago with a reservation of coal mines, reserved, as no one would give anything for them. The application of machinery at length brought them forward; the person in possession of the surface, having forgot the reservation, brought the coals to bank at an enormous expense; and then the other party came forward. Upon the trial of the issue Mr. Justice BULLER laboured with the jury to the utmost upon this ground; that, the proprietor having stood by during the whole of the expenditure, the jury ought from that alone to infer some grant though it could not be produced: but, admitting that he stated many circumstances very material upon such a subject with reference to mining concerns, with which he was well acquainted, I finally established that his direction was wrong."

In the case of *Norway* v. *Rowe* itself the plaintiff not having the legal title claimed, under an equitable title, a right to share profits with the person who held a legal lease, under which considerable expenditure in working had been incurred. Upon a motion for a receiver, the LORD CHANCELLOR cited, from his recollection, a case of *Senhouse* v. *Christian* [1 T. R. 560, 1 R. R. 300], where "Lord ROSSLYN advanced a doctrine with regard to mining concerns, upon which at least the Court would not refuse to act without great consideration; holding that, if the plaintiff, not having the legal interest, stands by, suffering the defendant to incur great expense and risk, that is a case not to be admitted in a Court of equity. Consider the nature of such a concern. It frequently remains for years in the most hopeless state; and may at last be rendered profitable by an adventurous speculator, embarking property of his own and others in the pursuit. The speculation is very hazardous: perhaps when you have a golden prospect, the whole may fail. I have known a copper mine producing £20,000 a year, and the next week worth nothing; and that is as true of coal mines. There are persons who will stand by; see the expenditure incurred; if it turns out profitable, set up their claim; if otherwise, have nothing to do with it. It deserves great consideration, whether the Court would interpose even by decrees, much less on motion." The motion for a receiver was accordingly refused.

The former branch of the rule is further supported by the cases of *M'Donnell* v. *M'Kinty* (1847), 10 Ir. L. R. 514; *Smith* v. *Lloyd* (1854),

9 Ex. 562, 23 L. J. Ex. 194, 2 W. R. 271, 22 L. T. 289; *Low Moor Co.* v. *Stanley Coal Co.* (1875), 33 L. T. 436, 34 L. T. 186.

AMERICAN NOTES.

Non-user of mines raises no presumption against an owner holding written evidence of title, there being no adverse or conflicting possession, but the rule seems to be otherwise when the right is founded on use alone. *Arnold* v. *Stevens*, 24 Pickering (Mass.), 106; 35 Am. Dec. 305.

No. 17. — DURHAM AND SUNDERLAND RAILWAY COMPANY *v.* WALKER.

(EX. CH. FROM Q. B. 1842.)

RULE.

WHERE the owner of land conveys the land, excepting the mines and minerals with certain liberties, the liberties are *primâ facie* construed as restricted to the purpose of getting the minerals; and a wayleave so reserved over the surface does not entitle the mine owner to a wayleave for different or larger purposes.

Durham and Sunderland Railway Company v. Walker.

2 Q. B. 940–969 (s. c. 2 Gale & Dav. 326).

Grant. — Exception of Mines. — Reserved Powers. — Wayleave. — Limited Construction.

The following facts appeared on bill of exceptions. [940]

The Dean and Chapter of Durham, being seised in fee of lands in that county, demised them, in 1832, to W., by indenture between them and him, containing this clause: —

"Except and always reserved out of this present lease, indenture, or grant, the woods, underwoods, and trees now growing, or hereafter to grow, upon the said demised premises, and the mines, quarries, and seams of clay within and under the same, with full and free authority and power to cut down, take, and carry away the said wood and trees, and to dig, win, work, get, and carry away the said mines, quarries, and seams of clay, with free ingress, egress, and regress, wayleave and passage, to and from the same, or to or from any other mines, quarries, seams of clay, lands and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever for the purposes aforesaid, and particularly of laying, making, and granting waggonway or waggon-

No. 17. — Durham and Sunderland Railway Co. v. Walker, 2 Q. B. 940, 941.

ways in and over the said premises, or any part thereof, paying reasonable damages for spoil of ground to be thereby done, upon the adjudication of two indifferent persons to be chosen by the parties, always excepted and reserved to the said dean and chapter, their successors, grantees, or assigns."

A railway company, under a grant obtained from the Crown, had made a railway proper for carrying coals, but capable also of carrying passengers. In an action by a person claiming under the demise of 1832, who had made a sub-demise to a tenant, against the railway company, for damage to his reversion under the sub-demise, it was held by the Exchequer Chamber, —

1. That the right reserved to the dean and chapter was only that of making and using ways and granting wayleaves for the purpose of getting the excepted wood and minerals, not for general purposes; nor for carrying coals and minerals, from whatever mines gotten; nor for carrying coals and minerals of their own, gotten elsewhere than on the demised lands.

2. But that, if the road, when made, was such as the reservation authorised, the intention to use it for a purpose not authorised was no ground for an action by the reversioner, though, if the intent were carried into effect, the tenant might be entitled to bring trespass.

3. That the proper questions for the jury were, whether, when the road was formed, it had become necessary or expedient for the railway company to make a road for the purpose of getting the excepted minerals; and, if so, whether the road made was a proper road for that purpose, assuming that it would be used for no other; and that, if either question were answered in the negative, plaintiff might recover damages for any injury caused by the railway, of sufficient permanence to affect the reversion.

Held, also, that the right retained by the dean and chapter under the indenture of 1832, was not properly a subject of exception or reservation, but an easement newly created by way of grant from the lessee.

Case, by reversioner (plaintiff below), for entering his lands in the possession of certain tenants of him the plaintiff, and making excavations and laying bricks, &c.

[*941] *Pleas: 1. Not guilty. 2. That the lands were not, at the time of the committing, &c., in the possession of certain tenants thereof to plaintiff, nor did the reversion thereof belong to plaintiff in manner and form, &c. 3. That by means of the premises in the declaration mentioned plaintiff was not injured in his reversionary estate, &c., in manner and form, &c. Issues to the country were tendered and joined on these pleas. 4. Leave and license: verification. Replication, *de injuriâ*. Issue thereon.

Plea 5. That, before the supposed reversion belonged to plaintiff, and before and at the time of making the indenture after mentioned, the Lord Bishop of St. David's, Dean, and the Chapter of Durham, were, and from thence hitherto have been, and still

are, seised of the lands in the declaration mentioned in their demesne as of fee: and, being so seised, heretofore, and before the reversion belonged to plaintiff, and before any of the times when, &c., to wit on 28th September, 1832, by indenture, then made, between the dean and chapter of the one part, and plaintiff of the other part, sealed with the chapter seal of the said dean and chapter, the said dean and chapter, for them and their successors, did demise, grant, and to farm let * unto the said [* 942] William Walker (the plaintiff below), his executors, administrators, and assigns, amongst other things, the said lands in the said declaration mentioned, excepting [1] and reserving the woods, underwoods, and trees then growing or thereafter to grow upon the said demised premises, and the mines, quarries, and seams of clay within and under the same, with full and free authority and power to cut down, take, and carry away the said wood and trees, and to dig, win, work, get, and carry away the said mines, quarries, and seams of clay, with free ingress, egress, and regress, wayleave and passage, to and from the same, or to or from any other mines, quarries, seams of clay, lands and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever for the purposes aforesaid, and particularly of laying, making, and granting waggonway or waggonways in and over the last mentioned premises or any part thereof, paying reasonable damages for spoil of ground to be thereby done, upon the adjudication of two indifferent persons to be chosen by the parties, always excepted and reserved to the said dean and chapter, their successors, grantees, or assigns: *Habendum* (except as in the indenture was excepted) to the said W. Walker, his executors, &c., from 2nd September then instant for twenty-one years: yielding and paying, &c.: That plaintiff entered by virtue of the demise, and was possessed, &c.; and that he, from the commencement of the term hitherto, and during all the time that the said supposed reversion belonged to him, was entitled to * the [* 943] said lands in the declaration mentioned under and by virtue of the said indenture, and had no other right or title to, or estate or interest in, the same: And that, after the making of the indenture and during the term, &c., to wit on the days in the declaration mentioned when, &c., "defendants, as the servants, and by the

[1] The clause is stated verbatim in the judgment, pp. 614, 615, *post.*

command, of the said dean and chapter, entered into and upon the said lands in the said declaration mentioned and in which, &c., for the purpose of forming and making, and then formed and made in, upon and over the same lands, a certain road or way, being, and which was, such a road or way as was within the intent and meaning, and could and might be made by virtue and in pursuance of the said exceptions and reservations in that behalf contained in the said indenture." The plea then averred that from the time of the making of the road the dean and chapter were ready, and that after the making of the road, and the committing, &c., and before action brought, they tendered and offered to plaintiff to pay him reasonable damages for spoil of the ground on adjudication of two indifferent persons according to the indenture, which persons they requested plaintiff, together with the dean and chapter, to appoint, but that plaintiff wholly refused, &c. And that, for the purpose of and in forming and making the said road or way so formed and made as aforesaid, defendants, as the servants, and by the command, &c., necessarily and unavoidably, &c., doing no unnecessary damage, &c., and as it was lawful, &c.: and that by means of the premises, and not otherwise, plaintiff was injured in his reversionary estate, &c.; which are the same, &c. Verification.

[* 944] Replication to plea 5. That, though true it is that * the said dean and chapter were seised in fee of the said land in the declaration mentioned, as in the fifth plea is stated, and that the said indenture was made as therein is stated, and that plaintiff had not, and hath not, any right or title to the lands in the declaration mentioned, except under and by virtue of the said indenture, as in the fifth plea is alleged; for replication, nevertheless, plaintiff says, that defendants, &c.: *de injuriâ, absque residuo causæ.* Issue thereon.

The cause was tried before COLTMAN, J., at the assizes for the county of Durham, July 1837, and a verdict found for the plaintiff below on all the issues, the defendants' counsel tendering a bill of exceptions. The material parts of the evidence stated in the bill of exceptions were as follows.

The counsel for the plaintiff below put in the lease granted to him by the dean and chapter, and an agreement, dated October 18th, 1834, by which he let the land in question to a tenant for nine years. And they proved that the Durham and Sunderland Railway Company, and the other defendants, their engineers, had

made certain cuttings and embankments in the land so let, for the purpose of carrying the railway across it. John Turner, a witness for the plaintiff, stated that the railway "was finished from the Marquis of Londonderry's railway all the way to Sunderland; that the company began the railway at Broomside colliery, about half a mile nearer to Durham than the said W. Walker's land is; and that, at the other end of the railway, it was finished down to Sunderland: that a coach conveying passengers travelled daily all along that part of the said railway; viz., from a hut about 300 yards on the Sunderland side of the said W. Walker's land down * to Sunderland; but that the railway over the said [* 945] W. Walker's land was not completed, and had not been used. And, further, that the said company had built an engine-house on the said W. Walker's land for the purpose of the said railway."

The defendants below put in the Act 4 & 5 Will. IV., c. xcvi. (local and personal, public), incorporating the company, and enabling them to contract with any ecclesiastical corporation for granting leases to them for any term not exceeding ninety-nine years, of any tenements within (among other places) the parish of Pittington, where the lands in question were situate. Also an indenture of lease dated March 21st, 1835, by which the dean and chapter, and the dean of Durham respectively granted and demised, and granted, demised, and confirmed to the company, liberty, power, and authority, to enter into certain lands in the parish of St. Giles, in the county of Durham, and also into the several lands and grounds then of and belonging to the said dean and chapter, "not being garden or pleasure ground," &c., "and respectively situate and being in the several townships of Pittington, West Rainton," &c., "and in the several parishes of Pittington, Hallgarth," &c., all in the said county of Durham; "and to form, and make and maintain in the line or direction specified in the plans thereof, marked," &c., "in the last skin of these presents, through or upon and over the same several lands and grounds, or any of them, excepting as last aforesaid, upon such level, and with such inclined plane or planes, and in such manner, in all respects, as they the said lessees shall think proper or deem expedient, one double main road or way not exceeding in breadth or width, including the gutters, fourteen yards," &c; "commencing," &c. The line (towards Sunderland) was then * pointed out, and was to pass "in, [* 946]

through, over, and along the several lands and grounds" of the dean and chapter in the township of Pittington, &c., of which W. Walker (the plaintiff below), among others, was lessee. The indenture also gave the company power, under certain restrictions, to alter the main line, or abandon it and make a new line over the said lands; also, under certain restrictions, to make, and alter, &c., branch roads over the said lands. And it gave them "full power and authority to use, and to grant and authorise the use of, the roads or ways and premises hereby demised, for the conveyance of passengers, coals, goods, wares, merchandises, and other commodities, by any mode of conveyance whatsoever, whether of present use or future invention: and also to make, have, use, and enjoy such erections, engines, machines, inclined planes, and other conveniences, and to do such acts in or upon or with respect to the aforesaid several lands or grounds, or any of them, or any part thereof, excepting as firstly before mentioned, comprised within the aforesaid breadth or width of fourteen yards (except as aforesaid), as shall be necessary or expedient for the forming and making, and maintaining and altering or diverting, of any such roads or ways and other the premises as aforesaid, or for the conveyance of passengers or any such goods as aforesaid:" except and always reserved to the lessors power, &c., to work mines &c., or pits of coal, and grant to other persons wayleave with power to make roads, &c., under certain restrictions. *Habendum* (except as before excepted) for ninety-nine years from the 28th September then last past, yielding and paying, &c. And the lessees convenanted to pay to the tenants of the before-mentioned lands, as compensa-
[* 947] tion for so much of the said lands as should be taken * and occupied or used by the lessees under or by virtue of that indenture, an annual rent equal to twice the annual value of the same land if used for any common agricultural purpose; disputes as to amount of compensation to be settled by the adjudication of two indifferent persons, &c.

The defendants further proved that the lands mentioned in the declaration were parcel of those referred to as W. Walker's in this indenture. They also called witnesses who gave evidence as follows. John Robson stated: That the company's railway then in progress over plaintiff's land was well calculated for carrying on a traffic in coals from certain collieries (which he named) to the westward in the said county of Durham; that there were in

that part of the county extensive coal fields; and that the railway was well adapted for conveying coals from those districts to the sea, and was properly formed for that purpose, being a double line; that a double line was absolutely necessary for the conveyance of coals from that district; that the same line which would carry coal waggons would also convey passengers or waggons with goods; that the conveyance of coals produces greater wear and tear in a railway than lighter articles would do; that, if the railway were completed, and passengers were also carried upon it, it would increase the wear and tear of the rails, but that would be the only difference that would be caused; and that the width of the railway in Walker's land was not more than the width of the parliamentary line. George Thorman deposed that the railway was calculated to carry 800 chaldrons of coals in twelve hours; and that the coal fields in the districts of the railway, and for carriage of coals from which the said railway would be available, were likely to produce that quantity of coal: that the *engine-house erected as aforesaid was not too large [*948] for the coal traffic likely to arise on the said railway; and that if it were wanted to carry passengers along the railway it would not require a large engine. And William Langstaff deposed that it would make no difference to the owners of the lands through which the railway runs, if passengers were carried on the railway in addition to coals.

The bill of exceptions then stated that the defendants' counsel thereupon insisted that the matters proved on their part were sufficient evidence that the railway made by them on plaintiff's land "was such a road as could and might be made by virtue and in pursuance of the exceptions and reservations contained in the said indenture in the said last plea mentioned, notwithstanding it might be intended to use the said railway for other purposes than, and in addition to, the carriage and conveyance of coals and minerals:" and that the evidence adduced by the defendants entitled them to a verdict on the last issue. But the plaintiff's counsel insisted "that the evidence showed that the said railroad so made as aforesaid was a railway for other purposes as well as the carriage of coals and minerals, and was such a railway as could not nor might be made on the said land by virtue and in pursuance of the said exceptions and reservations contained in the said indenture; and that the defendants had failed to prove the

said last issue, as they had not proved any tender or offer of compensation as alleged in that plea;"[1] and that the evidence for the defendants was not sufficient to entitle them to a verdict on the last issue, or to bar plaintiff of his action.

[*949] *"And the said Justice left the question to the jury, whether or not the said railway was made and constructed over the land of the plaintiff for other purposes than the conveyance of coals and other minerals; and did then and there declare and deliver his opinion to the jury on the said trial that, if they found that the said railroad so made on the said land of the said plaintiff was made for other purposes as well as for the carriage of coals or other minerals, it was not such a road as could or might be made by virtue and in pursuance of the said exceptions and reservations contained in the said indenture, notwithstanding the form and structure of the railway was fit and proper for the carriage of coals and minerals: and thereupon the said Justice then and there directed the said jury to find their verdict for the plaintiff on the said last issue, if, upon the evidence adduced on the said trial, they thought that the said railroad was so made for the purpose of carrying passengers and goods as well as for the carriage of coals and minerals." Whereupon the defendants' counsel excepted to the said opinion and direction, and tendered a bill of exceptions, &c. And the jury thereupon, under the said direction of the Judge, found their verdict for the plaintiff on the last as well as on the other issues.

Judgment being signed, the defendants sued out their writ of error to the Exchequer Chamber, with the bill of exceptions annexed, and assigned as error that the learned Judge left the last issue to the jury with the above direction; whereas "the said Justice on the said trial ought to have declared his opinion to the jury that, if the form and construction of the said railroad so made on the said land of the said W. Walker were fit and proper for the carriage of coals and other minerals, it was such a

[*950] railroad as could and might be made by *virtue and in pursuance of the said exceptions and reservations contained in the said indenture; and ought to have directed the jury aforesaid that, if on the evidence adduced on the said trial they found that the form and construction of the said railway were

[1] This point was noticed on the argument, but not discussed, the Court being of opinion that the record did not properly bring it before them.

fit and proper for the carriage of coal and other minerals, and that the said railroad was made for the purpose of carrying coals or other minerals, it was such a railway as could and might be made by virtue and in pursuance of the said exceptions and reservations contained in the said indenture; and with that declaration of his opinion, and direction, the said Justice ought to have left the said issue to the said jury." Also that the Judge at the trial declared his opinion that the evidence for the plaintiff was sufficient, and was admissible and ought to be allowed, to entitle him to a verdict on the said issue, and with that direction left the said issue to the jury; whereas the same was not sufficient, &c. And error was assigned in the common form.

The plaintiff joined in error. The writ of error was argued in Michaelmas vacation, 1841.[1]

Joseph Addison for the plaintiffs in error, defendants below. The principal question turns on the construction of the clause, set out in the fifth plea, in the lease from the dean and chapter to the plaintiff. That clause reserves to the dean and chapter the right of granting wayleaves over the demised premises to and from other lands, and that for all purposes. So far as it operates to reserve a right of granting ways, the clause is, in fact, a new grant by the lessee to the dean and chapter, not * an exception [*951] by them from their own grant. *Doe d. Douglas* v. *Lock*, 2 A. & E. 705, 743; Shepp. Touchst. 80, there (2 A. & E. 744) cited; and *Wickham* v. *Hawker*, 7 M. & W. 63, 76, support this distinction. And, if this be a grant, it must be taken most strongly against the grantor. Now the clause professes to except and reserve the mines, quarries, and seams of clay within and under the demised premises, with power to dig, win, and work the said mines, &c., "with free ingress, egress, and regress, wayleave and passage to and from the same, or to or from any other mines, quarries, seams of clay, lands and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever for the purposes aforesaid, and particularly of laying, making, and granting waggonway or waggonways in and over the last-mentioned premises or any part thereof." The "purposes aforesaid" are, among others, those of "wayleave and

[1] November 29th. Before TINDAL, Ch. J., Lord ABINGER, Ch. B., COLTMAN and MAULE, JJ., and PARKE and ROLFE, BB.

passage" to and from the mines, &c., on the demised lands or to or from any other mines, &c., lands and grounds. The words "of laying," &c., must be connected with "privileges and powers:" and the instrument, so construed, grants the privilege and power of laying, making, and granting waggonways over the demised premises for the purposes of wayleave and passage to and from the mines, &c., on the demised lands, or to or from any other mines, &c., lands and grounds. To grant a wayleave over the demised lands only would have been but a small benefit. It is, however, contended that the wayleave and passage are for the sole purpose of carrying coals and minerals: but they are granted, not [* 952] * only to and from the mines under the demised premises, or any other mines, but also to and from "any other" "lands and grounds," which seems inconsistent with such a limitation. But, assuming that limitation to be imposed, still, on an issue raising the question whether the road over the plaintiff's land was or was not a road within the intent and meaning, and such as might be made by virtue and in pursuance, of the exceptions and reservations in the indenture, the mere intention to use the road for conveying passengers could not be conclusive as showing that the road was, *ab initio*, wrongfully made. If the defendants have made their road in execution of an undisputed power, which they have not exceeded, though they have also contemplated the exercise of an irregular one, the case is like those in which a party has claimed to act under an illegal authority, but at the same time had a legal one sufficient to justify what he had actually done. *Governors of Bristol Poor* v. *Wait*, 1 A. & E. 264; *Blessley* v. *Sloman*, 3 M. & W. 40. Further, if the plaintiff relied upon more having been done than was necessary for the carriage of coals, he should have new assigned. The consequence of omitting to do so is pointed out in note (3) to *Mellor* v. *Walker*, 2 Wms. Saund. 5 e. Here the replication both acknowledges the title under which the defendants justify, and admits the trespasses justified to be the same with those complained of in the declaration. PARKE, J., says, in *Lucas* v. *Nockells*, 10 Bing. 157, 176 (affirming *Lucas* v. *Nockells*, in Ex. Ch. 4 Bing. 729): "It is quite clear, that all acts done, which make the party unjustifiable under the authority of the law, [* 953] and a trespasser *ab* * *initio*, cannot be given in evidence under the general traverse, but must be specially replied."

W. H. Watson, *contra.* — The plaintiff cannot be said to have made any grant by the indenture of September 28th, 1832, for it does not appear that he sealed it. The clause in question can operate only as an exception or reservation; and it may be construed as saving to the dean and chapter rights of way and of granting wayleaves to and from and over the demised lands: 1, for the purpose of getting and carrying the minerals under them; or, 2, for the purpose of getting and carrying both the minerals under those lands and the minerals under other lands of the dean and chapter; or, 3, for the purpose of getting and carrying the minerals from all mines, generally; or, 4, for all purposes whatsoever. The first is the true construction. The woods, underwoods, and mines upon and under the demised premises are clearly excepted in the outset; the clause then adds, "with full and free authority and power to cut down, take, and carry away the said wood and trees, and to dig," &c., "get, and carry away the said mines, quarries," &c., "with free ingress, egress and regress, wayleave and passage, to and from the same," &c., and "all necessary and convenient ways, passages, conveniences, privileges," &c., "for the purposes aforesaid:" that means such purposes as may regard the previously excepted woods, underwoods, and mines. [Lord ABINGER, C. B. — The words "purposes aforesaid" must include every purpose before mentioned in the clause.] An exception "is always taken most in favour of the feoffee, lessee, &c., and against the feoffor," &c. Shepp. * Touchst. 100, ch. 5; Com. Dig. Fait (E 8), [* 954] citing *Lofield's Case*, 10 Co. Rep. 106 a, 106 b (*arguendo*); *The Earl of Cardigan* v. *Armitage*, 2 B. & C. 197, 207 (26 R. R. 313); *Bullen* v. *Denning*, 5 B. & C. 842, 847 (29 R. R. 431). [PARKE, B. — The timber trees there were properly matter of exception. The question is, what is properly an exception, and what is a grant by the lessee.] This, not being under his seal, is not his grant. [COLTMAN, J. — Covenant may lie upon a deed against a person who never executed, if he takes an estate under it.] That form of action may be right in such a case; but there cannot be a grant by a person who never executed the deed. It is very doubtful whether the words "with free ingress, egress," &c., "and also all necessary and convenient," &c., are so connected as to form an exception of the ways and right of granting wayleaves, here claimed. In *Dand* v. *Kingscote*, 6 M. & W. 174, a question arose as to the right to make railways under a grant like the

present; but a decision upon it became unnecessary. It cannot, at any rate, be contended that the wayleaves which were to be created by virtue of this deed were wayleaves in gross: if they were so, they were a privilege which, as was before observed, the plaintiff ought to have granted by deed. *Wickham* v. *Hawker*, 7 M. & W. 63 (see pp. 76, 77); *Hewlins* v. *Shippam*, 5 B. & C. 221 (31 R. R. 757). See *Bird* v. *Higginson*, 2 A. & E. 696 (affirmed on error in Exch. Ch., *Bird* v. *Higginson*, 6 A. & E. 824). And, supposing that objection to be surmounted, the questions, to whom such alleged grant could extend, whether to the dean and chapter only, or to their servants or grantees, or whether they might confer on others the privilege of granting wayleaves, would raise [* 955] difficulties not easily to * be solved. [Lord ABINGER, C. B. The right could not be in gross: it must have passed with the reversion if the lessors had assigned.] The right, if not in gross, must have been annexed to the demised lands, or at all events to some land of those who claim the privilege. Yearb. Hil. 21 Ed. III. f. 2, A, B, pl. 5 (see 4 Vin. Ab. 519, tit. Chimin Private (G), pl. 3); Fitz. Nat. Br. 183 N and note (*a*), ibid.; Bro. Abr. 136 b, tit. Chimyne (see pl. 3, 5, 7); *Godley* v. *Frith*, Yelv. 159; *Alban* v. *Brounsall*, Yelv. 163. In Burton on Real Property, 432, c. 6, s. 3, 5th ed., it is said that "a private right of way," "if in gross, seems to be not properly a tenement; but it may be annexed to a house or land, and made to follow it through all circumstances of ownership." So, here, the rights of way over the lands now in question would pass to the lessees of other lands under the dean and chapter; the power reserved of granting wayleaves over the premises here demised must be taken to mean wayleaves to such lessees. But if the reservation in this deed can be deemed to include ways to other lands than those of the company, they must at least be lands from which coals and other minerals are to be brought. And accordingly, in *Farrow* v. *Vansittart*, 1 Rail. Cas. 602, which turned upon a clause in one of the dean and chapter's leases exactly like that now in question, the VICE-CHANCELLOR (Sir L. SHADWELL), after commenting on the grammatical construction, said (1 Rail. Cas. 609): "It is obvious to me that the dean and chapter did not intend to reserve to themselves the unlimited right of making roads and ways of any description, and [* 956] in any direction, for all * purposes whatever, but that the power of making ways, which is reserved, is a power with

reference to what precedes it; namely, that of going to and from their own mines, including the case of mines of other persons, as to which it might be advantageous to them to give a passage for the coals and minerals of those persons over their own lands. That such was the meaning of the reservation clause, I can well understand; but it is clearly not, as it appears to me, a power reserved of making ways generally." Lord COTTENHAM, C., on appeal (1 Rail. Cas. 614), inclined to the same opinion. The fourth construction suggested, which would give to the dean and chapter rights of way and power of granting wayleaves for all purposes, would enable them to destroy the subject-matter of the grant. Such a claim of right would be against legal principles. *Badger* v. *Ford*, 3 B. & Ald. 153 (22 R. R. 331); *Arlett* v. *Ellis*, 7 B. & C. 346 (31 R. R. 214). The making of a railway like that in question was held, in *Doe dem. Wawn* v. *Horn*, 3 M. & W. 333, 5 M. & W. 564. (where the Durham and Sunderland Railway Company were defendants), to be an actual ouster of the lessor of the plaintiff, whose land was occupied by the line. The right construction, therefore, of this clause must be one of the three first mentioned; and, if any one of those be correct, the learned Judge's direction is supported.

Then, further, it is not shown on this record that the road in question, when made, was (according to the terms of the reservation) "necessary and convenient" for the purpose of getting coals from the mines of the dean and chapter, or from any others. A mere intention to get them at some time was not sufficient. The objection * successfully made with reference to the [*957] third plea in *Dand* v. *Kingscote*, 6 M. & W. 174, applies here. The road was adapted to the limited purpose of carrying coals, and likewise to other purposes; and it was not proved, nor does the plea allege, that the road was required for the limited purpose: that ought to have been shown, and also that it was so required at the time when it was made. [TINDAL, Ch. J. — You do not contend that the coal must be actually raised before the road can be made?] The owners must be going to raise it. [Lord ABINGER, C. B. — The road must have been intended for conveying coal. The real question is, whether an intention to use it for another purpose also makes the formation of it unlawful.] The defendants below ought to have shown that it was actually convenient and necessary for the former purpose. The necessity and

convenience should be immediate; and the plea ought to state that. [PARKE, B. — Whether that was necessary or not, is one question; and another is, whether the plea, as it stands, would have been good on general demurrer. Lord ABINGER, C. B. — Can you say that this plea is bad after verdict? PARKE, B. — That is the real point.] The clause under which the defendants below justify reserves a right of way to and from "mines, quarries, seams of clay, lands and grounds" (the "lands and grounds" meaning such as are *ejusdem generis* with the mines, &c.); the substantial objection is, that the defendants below could not, in the supposed exercise of that right, make a railway to receive other railways from all parts of the country, but not, itself, leading to any mine, quarry, or seam of clay.

[* 958] * The plaintiff below was not under the necessity of new assigning. The defendants justify, in general terms, under a clause of reservation. The plaintiff contends that the clause reserves a way for the carriage of minerals, not of passengers, but that the defendants have made a way for both purposes, and that their plea of a qualified right does not cover their exercise of a general one. This, if supported by the facts, is a good answer to the plea. *Jackson* v. *Stacey*, Holt N. P. 455 (17 R. R. 663); *Cowling* v. *Higginson*, 4 M. & W. 245. See *Allan* v. *Gomme*, 11 A. & E. 759. If the defendants had pleaded, in express terms, a right of way for both purposes, and the plaintiff had traversed it, he would have been entitled to the verdict, if his construction of the clause is correct. *Drewell* v. *Towler*, 3 B. & Ad. 735; *The Marquis of Stafford* v. *Coyney*, 7 B. & C. 257 (31 R. R. 186). See *Brunton* v. *Hall*, 1 Q. B. 792.

Joseph Addison, in reply. — As to the grant not being under the plaintiff's seal; the plea states a deed *inter partes;* an allegation that each party sealed is unnecessary. The making of an indenture implies a sealing by both parties. And, if the sealing did not appear, still, if the clause could not operate as a reservation, it must take effect as a grant. At all events this objection comes too late after verdict. *Vivian* v. *Champion*, 2 Ld. Ray. 1125. See *Partridge* v. *Ball*, 1 Ld. Ray. 136. [TINDAL, Ch. J. — In that case there was a general finding for the plaintiff. PARKE, B. — The decision was only that the omission of "*sigillatam*" could not be taken advantage of.] That a party to an indenture, agreeing to the deed, and taking an estate under it, is bound though he do

not seal, * appears by Com. Dig. Fait (C 2).[1] As to the [* 959] grant of a way in gross, the facts stated in Yearb. Hil. 21 Ed. III. f. 2, A, B, pl. 5, are not applicable here; and the question discussed regards merely the proceeding by assize of nuisance, and it is not denied that for a way in gross there would be some remedy. The important question in *Dand* v. *Kingscote*, 6 M. & W. 174, was, whether under a particular reservation of wayleave, coals gotten in township A. could be carried over township B.; no such point arises in this case. The VICE-CHANCELLOR'S judgment in *Farrow* v. *Vansittart*, 1 Rail. Cas. 602, can scarcely be considered as a final decision on the reservation clause; and, in connecting the words "all privileges and powers whatsoever" with the words "of laying, making," &c., his construction agrees with that suggested by the defendants in this case. He does not, however, notice the words "lands and grounds" which follow the words "to or from any other mines, quarries," and "seams of clay." The LORD CHANCELLOR, on appeal, decided nothing as to the construction of this clause. Reservations of general rights of way like that here contended for are very usually introduced into leases of property in the north of England; and, reference being had to the practice, there can be no real doubt of the intention with which the present clause was named. It is objected that the road does not appear by the plea, or by evidence, to have been convenient and necessary at the time when it was made. The objection in point of pleading, if valid at all, would have been matter only of special demurrer; in point of fact, it is fully met * by the evidence. The point, that the [* 960] railway in question is not shown to communicate directly with any mine, was not raised at the trial. As to the new assignment, in *Jackson* v. *Stacey*, Holt N. P. 455 (17 R. R. 663), the defendant expressly claimed the way, and had used it, for a purpose to which his right did not extend; the same observation applies to *Cowling* v. *Higginson*, 4 M. & W. 245. Here the defendants set forth a clause of reservation (which is proved as pleaded), and allege that they entered for the purpose of making, and made, a road or way, being "such a road or way as was within" the reservation, and might be made by virtue of it. If the plaintiff meant to reply that the defendants entered for a different purpose,

[1] Referring to Fait (A 2). See Co. Litt. 231 a, there cited; *Burnett* v. *Lynch*, 5 B. & C. 589 (29 R. R. 343).

and made a road to be used otherwise than according to the reservation (though even this would not have made them trespassers *ab initio*), he should have new assigned. *Cur. adv. vult.*

TINDAL, Ch. J., now delivered the judgment of the Court.

This was a bill of exceptions, which was argued before the Court of Error at the sittings after last Michaelmas Term. It was an action on the case brought by William Walker (the defendant in error) against the Durham and Sunderland Railway Company, and two of their servants, wherein he complained of an injury to his reversionary interest in certain lands at Pittington, in the county of Durham, in the possession of his tenants, by reason of the company having cut and formed a railway through those lands.

The defendants below pleaded, by way of justification, [* 961] that the dean and * chapter of Durham, being seised in fee of the lands in question, by an indenture of lease, dated the 28th day of September, 1832, demised the same to the plaintiff below for a term of twenty-one years from the 2nd day of September then instant, subject to certain yearly rents thereby reserved, and with an exception and reservation of the mines and minerals, and of certain rights of way, and of granting wayleave; which, on the part of the plaintiffs in error it was contended, enabled the dean and chapter to authorise them to make the railway in question. The plea then avers that the plaintiff has no title to the land except under that demise, and goes on to state that the defendants, the Forsters, as the servants of the dean and chapter, and by their authority, entered upon the lands and formed the railway across the same, such railway being a way which, under the exception and reservation contained in the deed, the dean and chapter had power to make. To this plea the plaintiff, admitting the seisin in fee of the dean and chapter, and the demise to the plaintiff, and admitting that he had no title except as lessee under that demise, replied, *De injuriâ absque residuo causæ.* The cause was tried before Mr. Justice COLTMAN, at the Durham Summer Assizes, 1837. On the trial the plaintiff gave in evidence, amongst other things, the lease set out in the plea; and the exception and reservation, on which the company relied, appeared to be in the following words: —

"Except and always reserved, out of this present lease, indenture, or grant, the woods, underwoods, and trees now growing or hereafter

to grow upon the said demised premises, and the mines, quarries, and seams of clay within and under the same, with full and free *authority and power to cut down, take, and [*962] carry away the said wood and trees, and to dig, win, work, get, and carry away the said mines, quarries, and seams of clay, with free ingress, egress and regress, wayleave and passage, to and from the same, or to or from any other mines, quarries, seams of clay, lands, and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever for the purposes aforesaid, and particularly of laying, making, and granting waggonway or waggonways in and over the said premises or any part thereof, paying reasonable damages for spoil of ground to be thereby done, upon the adjudication of two indifferent persons to be chosen by the parties, always excepted and reserved to the said dean and chapter, their successors, grantees, or assigns."

The defendants then gave in evidence a deed under the seal of the dean and chapter, authorising them to make a double line of railway across the lands in question, and to use the same for the conveyance of passengers, coals, goods, wares, and merchandise; and it was proved that, in pursuance of that authority, the company had formed a double line of railway through a very considerable line of country, including the lands in question. Evidence was given, on the part of the plaintiff, to show that the railway was constructed for the purpose of being used for the conveyance of goods and passengers as well as of coals and minerals, and, on the part of the defendants to show that the railway was not more than was necessary for the carriage of the coals and minerals likely to be sent along it from the western part of the county, with which it communicated.

*Upon this evidence the learned Judge declared his [*963] opinion to the jury that, if the railway was made for other purposes as well as for the carriage of coals and minerals, it was not such a road as could be made in pursuance of the exceptions and reservations contained in the indenture of demise. And he directed them that, if they thought the railway was so made for such other purposes as well as for the carriage of coals and minerals, then they ought to find a verdict for the plaintiff. To this direction the counsel for the defendants excepted; and the

question for our decision is, whether that direction of the learned Judge was right. And we think it was not.

The injury of which the plaintiff complains is not a trespass affecting his possession of the land in question, for he is not in possession at all; but it is the injury to the inheritance, occasioned by the defendants having, as he alleges, wrongfully made across the lands of his tenants a railway which they, the defendants, were not warranted in making, thereby lessening the value of his reversion. Now, if the railway is such a railway as the defendants, at the time when it was formed, might lawfully make for the purposes for which when made they might lawfully use it, the plaintiff can have no ground of complaint by reason of the intention of the defendants also to use it for other purposes for which they have no right to use it. Such an unwarranted use of the railway, if afterwards put in execution, may entitle the tenants in possession to maintain an action of trespass; but the mere intention to commit such a trespass is no injury to the reversioner; and we therefore think that the direction of the learned Judge was incorrect. The [* 964] proper question for the jury, as it appears to us, was, * not whether the railway was made for other purposes as well as for the carriage of coals and minerals, but whether it was such a railway as, at the time when it was made, it was reasonable and proper to make for the purposes for which it was lawful to make it, and for those purposes only. This being so, it follows of necessity that a *venire de novo* must be awarded.

But it would be a very unsatisfactory decision of this case if we were simply to award a *venire de novo*, without at the same time declaring our construction of the deed, as to the purposes for which the dean and chapter or those who claim under them are thereby authorised to make a railway. That is a question of law to be decided by the Court, after the decision of which there can be no difficulty in putting the case properly before the jury. Now in the argument of this case four different constructions of the clause in question were suggested. First, it was said that the meaning was to reserve to the dean and chapter an unlimited power of granting wayleaves over all or any part of the lands demised, without any restriction whatever as to the uses to which the ways should be applied. Secondly, if that were considered too wide a construction, then it was contended that the clause authorised the granting of wayleaves for the purpose of carrying coals and min-

erals, from whatever mines they might have been raised and gotten. Thirdly, it was argued that at all events the dean and chapter had, under the reservation, the power of granting wayleaves for the transport of their own mines and minerals, whether raised from under the lands demised or from under any other lands. And, fourthly, it was contended that the deed in fact gives no power to the dean and chapter, except that * of making ways [* 965] and granting wayleaves for the purpose of getting the coal and minerals excepted in the demise. The important question for our decision is, which of these constructions ought to be adopted. And we are all of opinion that the fourth, which is the most limited construction, is the correct one, and that the only right reserved to the dean and chapter, under the clause in question, is that of making, and granting the right of making, ways over the demised lands for the purpose of getting the excepted wood, mines, and minerals. The exception is of all woods, underwoods, and trees growing or to grow on the demised premises, and of all mines, minerals, and seams of clay within and under the same, with full power to cut down and carry away the trees, and to dig, win, and carry away the mines, quarries, and seams of clay, with free ingress, egress and regress, wayleave and passage, to and from the same. If the words of the exception had stopped here, it would have been quite clear that the right of way intended was only a right of way for the purpose of getting the trees and minerals excepted. It would, in truth, have been like the words immediately preceding, viz., with power to dig, win, and carry away; nothing more than what the law would, if necessary, have given as incident to the exception, — a right of passing to and fro for the purpose of making the exception available. Sheppard's Touchstone, 100. But the language of the exception goes on further; viz., or to or from any other mines, quarries, seams of clay, lands, and grounds, on foot and on horseback, &c., and also all necessary and convenient ways, privileges and powers whatsoever " for the purposes aforesaid," and particularly of laying, making, and granting waggonways in and over the said premises, or * any part thereof, &c. These are the [* 966] words which create the doubt. Are they introduced for the purpose of securing to the dean and chapter a general right of way and of granting wayleaves over the demised lands, for purposes other than that of getting the matters excepted, or are they confined to that object alone? We have already stated that we think

they are confined to the latter object. The things excepted are the trees and minerals; and we consider all which follows as mere accessories to the exception. The word "with" must be taken to mean "and as incident thereto;" so that the passage must be read as if it was framed thus: Excepting the trees, mines, and minerals, and, as incident thereto, full power to cut down, &c., the trees, and dig, win, and carry away the mines, &c., and, as incident to such digging, &c., free ingress, wayleave, &c., to and from the lands demised, and to and from any other lands and grounds, and also all convenient ways, privileges, and powers whatsoever for the purposes aforesaid, — that is, for the purpose of getting the excepted trees, mines, and minerals, — and particularly the power of making and granting ways and wayleaves for those purposes. Neither the wayleave to and from the mines in and under the lands demised, nor the wayleave to and from other lands and grounds, purports to be excepted or reserved as a distinct matter of exception or reservation. Both the one and the other are mentioned in connection with the mines excepted, and in no other manner whatever. The right of way to other lands and grounds is connected with the right of way to the mines, &c., reserved, only by the disjunctive "or:" excepting mines, &c., with a right of way to and from them, "or" to and from any other [* 967] lands and grounds. If the intention * had been to reserve to the dean and chapter a right of way, and still more a right of granting wayleaves, independently of the right to get the excepted trees and mines, such a right would surely have been treated as a separate matter, unconnected with the previous exception, more particularly being, as it was stated to us in the argument to be, a right of the greatest value and importance. There is nothing unreasonable in supposing that the lessors meant to reserve to themselves a right of getting the excepted mines and minerals by means either of shafts and pits to be sunk on the demised premises, or, if it should be more convenient, by means of shafts or pits already sunk or to be sunk on adjoining lands; and, if such was the intention, the language of the deed is perfectly well adapted to carry it into effect.

It is to be observed that a right of way cannot, in strictness, be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter

to a reservation. A right of way reserved (using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same manner as a right of sporting or fishing, which has been lately much considered in the cases of *Doe dem. Douglas* v. *Lock*, 2 A. & E. 705, and *Wickham* v. *Hawker*, 7 M. & W. 63. It is not indeed stated in this case that the lease was executed by the lessee, which would be essential in order to establish the easement claimed by the lessors as in the nature of * a grant from the lessee; but we presume that [* 968] in fact the deed was, according to the ordinary practice, executed by both parties, lessee as well as lessors.

It was pressed in the argument, on behalf of the plaintiffs in error, that general wayleaves, or powers of granting rights of way, over lands demised, as easements reserved to grantors or lessors, are so very usual in the north of England, and often constitute so very valuable a property, that the Court will so construe the reservation as to carry out this presumable intention. But to this we cannot accede. Indeed, if we were to hazard a conjecture on this subject, we should be strongly disposed to think that the words in the present lease, and which it was suggested are the same as occur generally in leases from the dean and chapter, were probably first introduced long ago, before the great importance of wayleaves had been fully felt or understood either by grantors or grantees, and when really nothing more was thought of than the subject-matter actually excepted, and what was necessary for the purpose of making that available; and that the same words have been subsequently retained without much attention to their precise import. Be that, however, as it may, we are clearly of opinion that the ways referred to in the exception in this case are confined to ways necessary or proper for enabling the lessors to get the matters excepted, and, in like manner, that the powers mentioned in the latter part of the exception, and particularly the power of granting rights of way, are powers which can only be exercised "for the purposes aforesaid," that is, for the purpose of getting the excepted trees, mines, and minerals.

A *venire de novo* must therefore be awarded; and * the [* 969] questions for the jury will be, whether, at the time when the road was made, it had become necessary or expedient for the dean and chapter, or those claiming under them, to make a road for

the purpose of getting the excepted mines, and, if so, whether the road actually made was a proper road for that purpose, assuming that it would be used for no other object. If either of those questions is answered in the negative, then the plaintiff below will be entitled to compensation in respect of any construction of a permanent nature which would be an injury to the reversion which the jury may consider to have resulted from the making of a road at all, or the making of a road unnecessarily large, as the case may be. *Venire de novo awarded.*

ENGLISH NOTES.

In the case of *Dand* v. *Kingscote* (1840), 6 M. & W. 174, 9 L. J. Ex. 279, referred to in the argument, under conveyances by the same landowner to different parties of two several parcels, X. and Y., of land, reserving, in each case, the mines of coal under the lands, with sufficient wayleave to and from the said mines, it was held that the coal owner entitled under the reservations could not use the wayleave over X. to carry coals got in Y., although from the same mineral field. So far as relates to the construction of the way, it was held, as may be also inferred from the principal case, that the mere laying down of a rail or tramway for the purpose of carrying the coals was not in excess of the power if the rail or tramway so laid down was convenient for carrying the coals from the mines comprised in the reservation. There had been a similar decision on that point in *Senhouse* v. *Christian* (1787), 1 T. R. 560, 1 R. R. 300.

In *Bidder* v. *North Staffordshire Railway Co.* (C. A. 1878), 4 Q. B. D. 412, 48 L. J. Q. B. 248, 40 L. T. 801, 27 W. R. 540 (affirmed in H. L. *s. n. Elliott* v. *North Staffordshire Railway Co.*, W. N. 1881, p. 52), the following points were decided: 1. Where the owner of land and mines conveyed to C. the surface of part of his land, but by the deed of conveyance excepted and reserved the mines, and also a right of way along the southwest side of the land conveyed as and for a waggon or cart road of the width of eighteen feet, the Court held that this reservation did not enable the grantor to lay down a railroad or tramway for the carriage of coal raised from neighbouring collieries belonging to him. (2) By a lease of mines the lessees were authorised to take and use "full and sufficient rail and other ways to take and carry away the produce of the said (demised) mines or any other mines." It was held that under these words the lessees might lay down a railway and use it for carrying away the produce of other mines, whether worked by them or not.

It is quite a different case where the mineral owner, under a reserva-

tion of certain minerals in X., makes a tunnel through the excepted minerals under X. for carrying away the minerals from Y. See the cases of *Duke of Hamilton* v. *Graham* and *Ramsay* v. *Blair*, referred to in the notes to Nos. 5 and 6, pp. 470, 472, *ante*. There the mineral owner is merely using his own property for his own purposes. But he must not, for the purpose of carrying minerals from Y., use a tunnel through minerals under X. which are not within the exception. *Ramsay* v. *Blair*, in notes to Nos. 5 and 6, p. 472, *ante*.

The rule is similar in principle to that considered under *Wimbledon & Putney Commons Conservators* v. *Dixon*, No. 9 of "Easement," 10 R. C. 164 *et seq*.

AMERICAN NOTES.

This case is cited in Washburn on Easements, p. 298, and in *Hagerty* v. *Lee*, 54 New Jersey Law, 580, and Washburn cites also *Dand* v. *Kingscote*, 6 M. & W. 174 (p. 291).

SECTION III. — *Powers of Railway and Canal Companies.*

No. 18. — HOLLIDAY *v.* MAYOR, ETC. OF BOROUGH OF WAKEFIELD.

(H. L. 1890.)

RULE.

UNDER the modern Acts relating to railway and canal or water companies, the company is not bound to purchase mines if they elect to take the risk of the mine owner proceeding with his workings. But under the 27th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict., c. 17), the water company would, in case of such election, be subject to the risk of having to pay damages for the consequential drowning of the mine.

Holliday and others v. Mayor, &c. of Borough of Wakefield.

1891, A. C. 81–107 (s. c. 60 L. J. Q. B. 361; 64 L. T. 1; 40 W. R. 129).

[81] *Waterworks. — Reservoir. — Mines. — Compensation. — Prospective Injury to Mine. — Apprehended Injury. — Waterworks Clauses Act*, 1847 (10 & 11 *Vict.*, *c.* 17), *ss.* 6, 22, 25, 27.

A special Act incorporating the Waterworks Clauses Act, 1847, empowered the making of a reservoir in lands containing coal mines. The waterworks undertakers having given the mine owners notice to treat for part of the coal, the mine owners claimed compensation (to be settled by arbitration) not only for the value of the land to be taken (as to which no question arose), but also for injurious affection and prospective damage. The arbitrator found that the workings of the mine owners had not as yet approached the reservoir so as to cause any present risk to the mines from the existence of the reservoir; that if the mine owners were free to work their mines without risk of interruption from the undertakers' works, they could and would have got the whole of certain seams of coal under the reservoir and within forty yards of the boundary, and that if the undertakers purchased and retained *in situ* the coal which they had given notice to take and no other coal, the mine owners, by reason of the undertakers' works and of apprehension of injury therefrom to one seam, could not get more than 50 per cent of the coal under the reservoir or within twenty yards of its boundary; that a prudent lessee working without right to compensation would be compelled by reason of such apprehension of injury to abstain from working more than 50 per cent of the coal within the defined area; and that there was no reason to apprehend injury present or future from the undertakers' works to any part of the mines if 50 per cent of the coal in the defined area were retained *in situ*.

Held, affirming the decision of the Court of Appeal (20 Q. B. D. 699), that the mine owners were not entitled to claim or to recover compensation for the prospective prevention of the working of more than 50 per cent of the coal within the defined area; inasmuch as though the word "lands" in sect. 6 of the Waterworks Clauses Act, 1847, includes "mines," the mine owners were not injuriously affected within the meaning of sect. 6; neither could they at present claim or recover under the mines clauses of that Act, sects. 18 to 27.

Appeal from so much of an order of the Court of Appeal (FRY and LOPES, L. JJ., Lord ESHER, M. R., dissenting) as was [* 82] * adverse to the appellants. That order reversed in part a judgment of the Queen's Bench Division (MATHEW and CAVE, JJ.), 20 Q. B. D. 699.

The following statement of the material facts is taken from the judgment of Lord HERSCHELL: —

The respondents were authorised by the Wakefield Waterworks Act, 1880, to construct certain waterworks with a reservoir at

Ardsley. The Waterworks Clauses Act, 1847, and the Lands Clauses Act were incorporated with this Act.

By two leases, dated the 26th of August and the 8th of December, 1873, four seams of coal, known as the Cannel, the Doggy, the Little, and the Middleton, underlying certain lands, were demised to the appellants for forty years, from the 1st of August, 1872, and the 2nd of February, 1873, respectively, subject to the payment of certain minimum and other rents.

About the year 1872 the appellants sunk a shaft at East Ardsley, and have worked and still continue to work the Middleton, Little, and Doggy seams under both leases. They have not yet begun to work the Cannel seam. Before the 19th of June, 1883, the corporation had, under the said Act, acquired certain lands, including land the coal under which was demised by the leases I have referred to, and had begun to make their reservoir on the acquired land. On that day the appellants gave notice to the respondents that they were the lessees of the coal lying partly under the proposed reservoir and partly under land within forty yards of the prescribed limits of the appellants' works, and that they intended to work the same. The respondents thereupon gave the appellants a counter notice to the effect that if the reservoir was made and the appellants should by fair and regular working approach within the distance prescribed by the Waterworks Clauses Act, 1847, the respondents would expect the appellants to give the usual notice, and would then be ready to take such steps as could lawfully be required of them.

Prior to the month of November, 1883, the appellants had made preparations to bore with a view to sinking a pit at a spot where such a pit would have interfered with the proposed reservoir. Although the minerals only were demised to them, they were empowered, for the purpose of working the minerals, to sink pits and exercise other rights on the surface.

*On the 1st of November the respondents gave the ap- [*83]
pellants notice to treat for thirty-five acres of the Middleton seam, and also for their surface rights over certain lands defined by the notice. The appellants on the 19th of November gave particulars of their claim for compensation in respect of these matters, and desired that the amount should be settled by arbitration. Arbitrators and an umpire were accordingly appointed for that purpose. A further notice was afterwards given by the

appellants that they would claim in the arbitration compensation in respect of the injurious affecting of their seams of coal, and for so much of their seams not purchased by the respondents as could not be worked by reason of the making and maintaining of their works, or by reason of the apprehended injury in the working thereof. The respondents disputed the validity of the notice and their liability to make the compensation claimed. It was, however, agreed that without prejudice to the contention of the respondents the matters in the last-mentioned notice should be taken to be within the jurisdiction of the arbitrators and umpire to the same extent and in the same manner as if they had been comprised in the claim of the 19th of November. The arbitration accordingly proceeded, and the umpire made his award in the form of a special case for the opinion of the Queen's Bench Division.

He found that the workings of the appellants had not as yet approached the reservoir in such a manner as to cause any present risk to the appellants' mines or seams from the existence of the reservoir assuming it to be filled with water. That if the appellants were free to work their mines without risk of interruption from the respondents' works, they could and would have got the whole of the Middleton and Cannel coal under the reservoir and within forty yards of the boundary, within the terms of their leases, and that if the respondents purchased and retained *in situ* the thirty-five acres of the Middleton seam which they had given notice to take, and no other coal in that or any other seam, the appellants, by reason of the respondents' works and of apprehension of injury therefrom to the Cannel seam, could not work or get more than 50 per cent of the cannel and black coal under the reservoir or within twenty yards of its boundary. He also found that a prudent lessee [*84] working without right to compensation *would be compelled by reason of such apprehension of injury to abstain from working or getting more than 50 per cent of the cannel and black coal in the area above described, and that there was no reason to apprehend injury, present or future, from the respondents' works to any part of the Doggy seam or of the Little seam or to any part of the Cannel seam, if 50 per cent of the cannel and black coal in the defined area were retained *in situ*, or to any part of the Middleton seam.

The first question submitted for the opinion of the Court (which alone it is necessary to state) was as follows: —

No. 18. — Holliday v. Mayor, &c. of Borough of Wakefield, 1891, A. C. 84, 85.

Whether by virtue of the Waterworks Clauses Act or of the Lands Clauses Act, or otherwise, the claimants are entitled upon this arbitration to claim and to recover compensation for the prospective prevention of the working of more than 50 per cent of the cannel and black coal within the defined area.

The Divisional Court answered this question in the affirmative; but the Court of Appeal, by a majority, reversed this decision, and ordered that the question should be answered in the negative.[1]

1890. March 18; May 5, 6. Sir R. Webster, A. G., and Rigby, Q. C. (George Banks with them), for the appellants: —

The appellants are entitled to compensation now for the loss of 50 per cent, and can claim it in one of two ways under the Waterworks Clauses Act 1847. By sect. 3 "lands" includes hereditaments of any tenure, and therefore mines. *Smith* v. *Great Western Railway Company*, 3 App. Cas. 165, 180. Mines, therefore, are "lands" within sect. 6; and the appellants' mines are "injuriously affected by the construction and maintenance of the works" authorised by the special Act, viz., the reservoir. The being prevented from working more than 50 per cent is an injurious affection.

Part *of the appellants' lands are taken, and they come [*85] within the principle of injurious affection as laid down in the decided cases ending with *Cowper-Essex* v. *Local Board for Acton*, 14 App. Cas. 153. Compensation was intended by the Legislature to be assessed once for all. *Croft* v. *London and North-Western Railway Company*, 3 B. & S., at p. 453. If, therefore, it is not assessed now, it never can be; but if the case is not within sect. 6, it comes under sect. 25, by which the undertakers are to pay "for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the said works, or by reason of such apprehended injury from the working thereof as aforesaid." The "apprehended injury" is the not being able to work. The clause is similar to sect. 81 of the Railways Clauses Act, 1845, which has been held to include prospective injury. *Whitehouse* v. *Wolverhampton Railway Company*,

[1] 20 Q. B. D. 699. The second question submitted for the opinion of the Court was, whether by virtue of the said Acts or otherwise the claimants are entitled upon this arbitration to claim and to recover compensation for being prevented from sinking a shaft at Blue Pits. The umpire made alternative awards for different sums, according as the two questions were answered in the affirmative or negative. The second question was not contested in either Court, and both the Divisional Court and the Court of Appeal answered it in the affirmative.

L. R. 5 Ex. 6. The judgments of the Divisional Court and of Lord ESHER, M. R., state the reasons for the appellants' contention.

Sir H. James, Q. C., and Meadows White, Q. C. (R. S. Wright with them), for the respondents.

Rigby, Q. C., in reply.

The House took time for consideration.

Dec. 15, 1890. Lord HALSBURY, L. C.: —

My Lords, I will in the first instance read the judgment of my noble and learned friend, Lord BRAMWELL, who is unfortunately unable to be present to-day.

[His Lordship then read the judgment of]

Lord BRAMWELL: —

My Lords, I am of opinion that "lands" in sect. 6 includes mines. The words in the interpretation clause are the same as in the Railways Clauses and the Lands Clauses Acts. Lord CAIRNS in *Smith* v. *Great Western Railway Company*, 3 [*86] App. Cas. 180, so held. *I do not understand CAVE, J., to think differently. Unless "mines" are included, there is no power to take them. One question then in this case is, whether the appellants are entitled to judgment by virtue of sect. 6.

Before considering that, however, I think it desirable to examine the sections specially relating to mines. It is suggested that they take away any right that would exist under sect. 6, or show that none exists under it, and give no right themselves.

I do not think they take away any right, though they help to show that none exists under sect. 6. They are, with exceptions I shall notice, the same as in the Railways Clauses Act. I cannot see why compensation should be delayed in railway cases, nor in waterwork cases. If a present damage, there ought to be a present compensation. As MATHEW, J., says, waterwork undertakers might become insolvent. It seems to me that if the law was meant to be otherwise it ought to have been expressed directly in plain language, and not left to be inferred by implication. I will now proceed to examine those clauses.

They are introduced by the words, "And with respect to mines be it enacted as follows." The provisions are, as I have said, of the same character as those in the Railways Clauses Act, sects. 77 to 85, with variations.

The difference between 8 & 9 Vict., c. 20, s. 81, and the corresponding section, 10 & 11 Vict., c. 17, s. 25, is that the latter

includes not only "minerals which cannot be obtained by reason of making and maintaining the works," but also those which cannot be obtained "by reason of apprehended injury from the working thereof." There is also in the Waterworks Act sect. 27, on which I shall comment. There is no corresponding section in the Railways Clauses Act. I will only quote 10 & 11 Vict., c. 17, those in the Railways Clauses Act being the same, with the exceptions I have mentioned.

Sect. 18 enacts that the undertakers shall not be entitled to mines under lands purchased, nor shall they pass by a conveyance unless expressly mentioned. Sect. 22 says that when within the prescribed distance the mine owner shall give notice, and if the undertakers will purchase, the mine owner shall not work, and provides for compensation to him.

* Sect. 23 says if the undertakers will not purchase, the [* 87] mine owner may work so that no wilful damage be done, and the works are in the usual way. This is to some extent for the benefit of the mine owner.

Sect. 24 says if the working of the mines be prevented "by reason of apprehended injury to such works," the mine owner may make air-ways and other conveniences. This also is to some extent for the benefit of the mine owner.

Sect. 22 does not compel the undertakers to purchase, nor do sects. 23 and 24. Neither of them gives the mine owner a right to compel purchase. He may, indeed, work if his mines are not purchased, but, for aught that I can see in these sections, at the risk of letting down the reservoir and of being flooded. These sections might be adequate under the Railway Act, where it is difficult to suppose any possible damage to the mine owner analogous to flooding. They may have been thought to be so in the Act in question. It may be that sect. 27 of the Waterworks Act is the remedy. There is, as I have said, no section of the same sort in the Railways Clauses Act. That section says that "nothing in the Act shall prevent the undertakers being liable to any action to which they would have been liable for any damage done to any mines by means of the waterworks in case the same had not been constructed or maintained by virtue of the Act." I do not see why this should not mean what it says, viz., that if the mine owner works his mine and is flooded from the reservoir he may maintain his action for the damage,

and so from time to time as often as he is flooded. His mine he cannot get, but he may have right of action. This clause may be put in to guard against the arguments that prevailed in *Rex* v. *Pease*, 4 B. & Ad. 30, and *Hammersmith Railway Company* v. *Brand*, L. R. 4 H. L. 171; as but for the reasons that prevailed in those cases it would be law without an enactment (*Rylands* v. *Fletcher*, L. R. 3 H. L. 330).

So far, there is no provision in these clauses compelling the undertakers to take or pay for any mine, or pay any compensation to the mine owner, unless they stop him under sect. 22. But there remains sect. 25 to be considered. That says that the

[* 88] * undertakers shall from time to time pay to the owner, &c. of mines extending so as to lie on both sides of any reservoirs, buildings, pipes, conduits, or other works, all additional expenses and losses incurred by such owner by reason of the severance of the lands over such mines, or of the continuous working thereof being interrupted, or by reason of the same being worked under the restrictions of this or the special Act, and for any mines not purchased by the undertakers which cannot be obtained by reason of making and maintaining such works, or by reason of such apprehended injury from the working thereof as aforesaid. I agree with FRY, L. J., that this is apprehended injury to the works of the undertakers. The words are "such apprehended injury," to be settled as other cases of disputed compensation. And it means apprehended by the undertakers, and that not a mere alarm in their minds, but one on which they have acted by stopping the works under sect. 22. I do not understand this clause. It seems to me to provide for what is already provided for by sect. 22. This at least is certain, that it gives no right to the mine owner to compel the taking of, and paying for, any mine. Nor can I see it gives any right of compensation unless the mine owner is stopped. Also, it seems to me, with submission, clearly to be limited to the case of the mine or minerals being on both sides of the works or some of them. This section then gives no right to the mine owner to compel the taking of, or compensation for, mines.

It seems to me, then, that if the appellants have any right it must be under sect. 6, and whether they have depends on whether their mines are "injuriously affected by the construction or maintenance of the works, or otherwise by the execution of the powers

conferred." I cannot think they are. I agree with FRY, L. J., and his reasoning. They are not at present; nor ought they to be, nor need they be, in future. If, when they reach the prescribed distance to the respondents' works, the appellants give the notice they are bound to give, the respondents must purchase such mine as is necessary, if any; or, if they do not, they must keep their reservoir from leaking or they will be liable to an action. Of course, it is better to have money down for being prevented working than to be prevented, and not * only lose the mine [* 89] but be put to expense. But I should think that on reaching the prescribed distance, if there was real danger of the reservoir being let down, and the appellants flooded if they worked, proceedings could be taken to restrain the respondents from damaging the mines, and so they would be compelled to purchase. However that may be, they are not now injuriously affected; not within the finding of the award. The arbitrator finds that a prudent lessee working without right to compensation would be compelled by reason of the apprehension of injury to abstain from working or getting more than 50 per cent of the cannel coal. But this is just what the appellants, when they work, or want to work, the cannel coal, will not be, *i. e.*, without a right to compensation. The respondents will have to stop and compensate them, or, if not, they will have to keep the reservoir watertight or pay for all damage. It seems to me that the claim of the appellants takes away the rights of the respondents to say which they will do. I cannot say that the appellants' mines are injuriously affected by the respondents' works within sect. 6. I cannot see that *Whitehouse* v. *Wolverhampton Railway Company*, L. R. 5 Ex. 6, helps the appellants.

I am of opinion the judgment should be affirmed.

[His Lordship then read his own judgment.]

Lord HALSBURY, L. C.: —

My Lords, I think the question in this case turns upon the true construction of the Waterworks Clauses Act, 1847, and, before dealing with the particular clauses under which the question in this case arises, it is material to notice what is the problem which the Legislature had to solve in giving compulsory powers for the construction of waterworks, and the contingencies which were likely to arise in the maintenance of the works constructed.

With reference to some public works of a different character,

such as railways and the like, two principles appear to have been established as those upon which legislation should be founded: one, that the works when so established should not be [*90] *subject to be impeached in a Court of law for any damage or annoyance they might cause by reason of their ordinary use; and as a correlative of this principle, that any person whose land would be injuriously affected by the construction of the works should, in lieu of his right of action, be entitled to compensation, — a compensation which must, except where otherwise specially provided, be assessed once and for ever, and not subject to increase or diminution after that one assessment.

The Legislature, having before its mind the peculiarity of waterworks, departed, in the statute under construction, from both these principles. Compensation in the form of damages might still be claimed against a waterworks company, notwithstanding that they were constructed and maintained by virtue of an Act of Parliament, and compensation, as such, might be made from time to time and not be assessed once and for all.

It is not difficult to see what was in the mind of the Legislature when dealing with such a subject-matter as the establishment of large reservoirs of water in relation to underground workings by persons, other than the undertakers of the waterworks, in winning mines and minerals which *primâ facie* were not to belong to the undertakers of the waterworks. The undertakers and the mine owner have a common interest in the security of the reservoir — the one to preserve the water which the reservoir was intended to retain, the other to keep the power of working out the minerals which the leaking of the reservoir would prevent them from winning by the drowning of the mine.

But, except so far as it should be necessary to preserve both these rights for those respectively interested in them, the Legislature appears to have thought that it was expedient that both mine owner and waterworks undertaker should be left free to pursue their respective industries without interference. It is the interest of the mine owner to be allowed to retain his mine; it is the interest of the waterworks undertaker not to be called upon to pay more for land than was necessary for the purpose of his undertaking.

Accordingly, while the 6th section of the Waterworks Clauses Act, which in terms refers to the construction of the works,

*enables the undertakers, if they please to pay for it, to [*91] take all land including mines for the construction of their works (and I cannot doubt that in that section the word "lands" does include mines and minerals), yet by the 18th section of the Act and the sections which follow it, the relations between the owners of the waterworks and the mines are, I think, intended to be exhaustively regulated, and I agree with the MASTER OF THE ROLLS, if not altogether for the same reason, that compensation, if it can be given at all, must be sought for under the code specially relating to mines in the statute.

Now it is provided that the mine-owner shall not get his minerals within the prescribed distance of the waterworks without giving due notice to the undertakers, obviously to afford the undertakers the opportunity to purchase if they will, and so prevent any working beyond the prescribed distance. The Act itself prescribes a distance if no distance is prescribed by the special Act; but it contemplates the possibility of the undertakers being familiar with the works they are about to execute, and procuring a different prescribed distance from that which the Act itself enacts in the absence of any special prescribed distance.

Now this being so far the scheme of legislation, let us see what are the facts on which the question in debate arises. This depends on the 13th paragraph of the finding of the arbitrator, which is as follows: "(13) The workings of the claimants have not as yet approached the reservoir in such a manner as to cause any present risk to the claimants' mines or seams from the existence of the reservoir, assuming it to be filled with water. If the claimants were free to work their mines or seams without risk of interruption from the works of the corporation, they could and would have got the whole of the Middleton and Cannel coal under the reservoir and within forty yards of its boundary within the respective terms of their leases. Assuming the corporation to purchase and retain *in situ* the 35A. 3R. and 24P. of the Middleton seam for which they have given notice, and no other coal in that or any other seam, the claimants, by reason of the corporation works and of apprehension of injury therefrom to the Cannel seam, could not work or get more than *50 per cent of the cannel [*92] and black coal under the reservoir or within twenty yards of its boundary (being the area edged orange on the annexed plan), and I find that a prudent lessee working without right to compen-

sation would be compelled by reason of such apprehension of injury to abstain from working or getting more than 50 per cent of the cannel and black coal in their such last-named area."

Now I think that, in order to bring the mine owner in this case within sect. 25 of the statute, the continuous working of the mines or minerals must have been "interrupted as aforesaid," that is manifestly under sect. 22; "or by reason of such apprehended injury from the working thereof as aforesaid." Sects. 23 and 26, giving power respectively to the owner to work his mines and to the undertakers to inspect the working of the mines after giving twenty-four hours' notice, show, I think, the complete scheme of the Act, supplemented perhaps by 26 & 27 Vict., c. 93, ss. 3 to 10 inclusive.

I am not certain that the Act I have just referred to does not suggest that the Legislature had thought from the experience of facts that the undertakers of water companies were not sufficiently under supervision in respect of the security which other people were entitled to, and accordingly framed an additional code by which danger to other people might be averted and such undertakers compelled to look to the safe condition of their reservoirs. But dealing with the matter as it was left under the Act of 1847, each case of difficulty and interference with their respective rights appears to have been provided for, or intended to be provided for, by the sections now under construction.

Now, with one exception, namely, the apprehended injury (which it appears to me to be impossible to contend is not the same apprehended injury throughout sects. 22, 24, and 25), the language of sect. 25 is copied almost *totidem verbis* from sect. 81 of the Railways Clauses Act, where no such reciprocal danger on the part of the mine owner could have arisen.

I cannot therefore find on the facts as set forth in the award any danger which those sections contemplated as the subject of compensation.

There is, as I have before remarked, all the difference [* 93] between * the principles upon which compensation ought in general to be assessed. These are lucidly set forth by Lord WENSLEYDALE in the *Caledonian Railway Company* v. *Lockhart*, 3 Macq. 808, 825; but as the noble and learned Lord pointed out, those principles "do not apply where, by the express terms of the special Acts, compensation for damages from time to time sustained is payable."

I have not been able to see any answer to the analysis by FRY, L. J., of the provisions of sect. 25, and with a single exception as to the apprehended injury (with which I have already dealt and which is peculiar to the Waterworks Act), the construction put upon the equivalent section in *Whitehouse* v. *Wolverhampton Railway Company*, L. R. 5 Ex. 6, seems to me to be by no means favourable to the argument for the appellants here. KELLY, C. B., in that case said: "We must take it, therefore, that the mines were, at the time of the award, actually being worked to a point where they were intercepted by the defendants' line. This, then, is a case where the railway company have stopped the mine and rendered it necessary for the plaintiffs to sink a new pit in order to work the north side, and we must conclude that the expense of sinking it was about to be incurred, and was within the words of sect. 81, as being an additional expense or loss which would be incurred by the mine owner by reason of the severance of the lands." I think the facts as they are assumed for the purpose of the judgment furnish a very good example of the interruption to the working of the mines which the statute intended to provide for.

On the whole, I am unable to concur with the MASTER OF THE ROLLS and the two learned Judges of the Queen's Bench Division in the view that any present injury now exists in respect of which the compensation claimed is due. The mine owner has not been stopped under the powers of the Act. No compensation, I think, for injuriously affecting can at any time be demanded under the 6th section, since I think all rights of compensation are exhaustively dealt with under the mining sections; and I think all sense of injustice to the mine owner is relieved when one considers that the decision is not one which finally determines the relations between the mine owners and the undertakers. * When [*94] the mine owner does work, when an interference with the mining operations is actually made, then I think he will be entitled to litigate that question and claim compensation; but until that contingency arises — and I think it has not yet arisen — he has no claim.

I think the arbitrator has very tersely and accurately stated the question. "(1) Whether by virtue of the Waterworks Clauses Act, or of the Lands Clauses Act, or otherwise, the claimants are entitled upon this arbitration to claim and to recover compensation for the prospective prevention of the working of more than 50 per

cent of the cannel and black coal within the area edged orange on the annexed plan."

It will be observed it is not present prevention from apprehension of prospective damage, but prospective prevention. This is a thing for which I think the Act makes no provision, for reasons which I have already suggested and upon which I think it unnecessary to enlarge.

Under these circumstances, I am of opinion that the judgment of the Court of Appeal ought to be affirmed and this appeal dismissed with costs.

Lord WATSON:—

My Lords, this case involves a question of some nicety, arising upon the construction of the 6th and mines clauses of the Waterworks Clauses Act of 1847.

The appellants are tenants of a mineral field containing four seams of coal, under two leases, each for a term of forty years, the one commencing from the 1st of August, 1872, and the other from the 2nd of February, 1873. They are under obligation to work out the whole of these seams during the currency of the leases, failing which, to pay rent or lordship in respect of the coal left unworked. Such portions of the surface as they may find it convenient to occupy for sinking pits, erecting miners' houses, making roads and railways, and other mining purposes, are demised to them during the respective periods of their leases.

The respondents having in the year 1880 obtained a special Act for supplying water to the borough of Wakefield, acquired [* 95] * from the owners fifty-eight acres of land within the limits of the appellants' mineral leases, for the purpose of constructing a reservoir. On the 19th of June, 1883, the appellants gave notice of their intention to commence working out all four seams of coal below and around the site of the reservoir. The respondents, at the same date, served a counter notice requiring the appellants to repeat the notice of their intention to work, when they had in course of working the seams reached the limit prescribed by sect. 22 of the Act of 1847. On the 1st of November, 1883, the respondents gave notice in terms of the Lands Clauses Act, to treat for the purchase of (1) 35A. 3R. 24P. of the Middleton Deep Main, which is the lowest of the four seams, and (2) all the appellants' right and interest, as mineral tenants, in the surface of the fifty-eight acres already acquired from the owners. The

statutory arbitration which followed devolved upon the umpire, who issued his final award in the shape of a special case for the opinion of the Court.

The award fixes the compensation due to the appellants in respect of the surface interests and minerals actually taken from them at £8287; and as to that sum no question has ever been raised. At the date of the notice to treat, the appellants were making preparations to sink a pit, on a convenient site within the fifty-eight acres, for the purpose of working the two upper seams of coal; and the arbiter has found that the increased cost of sinking a shaft in a suitable place outside that area will be £150. The respondents do not now dispute that the appellants are entitled to present payment of that sum also. The argument addressed to us was confined to the third finding, which relates to the injurious effect which the construction of the statutory works contemplated by the respondents may have upon the future working of the seams of coal which were not included in the notice, and no part of which has been acquired by the respondents.

In dealing with this last claim, the arbiter has of course assumed that the thirty-five acres of the Middleton Main Seam, which the respondents have taken, will remain *in situ*, for the purpose of giving subjacent support to the reservoir. On that assumption, he has found that the appellants will be unable to work out * more than 50 per cent of the Cannel seam, [*96] which is the seam nearest to the surface, with safety to their mines; and that a prudent lessee working without right to compensation, would not work or get more than that proportion of the coal below or within twenty yards of the reservoir. He has further found, that, if such proportion of the upper seam be left undisturbed, the working of the three lower seams will not be injuriously affected by the construction of the appellant's waterworks; and has assessed the compensation due, upon that footing, at £4777. At the date of the award, the three lower seams had been partly worked by the respondents; but they had not begun to work the Cannel seam.

The 6th section of the Waterworks Clauses Act, which incorporates the provisions of the Lands Clauses Act, empowers the undertakers to use these provisions for the purpose of taking compulsorily such interest in "lands and streams" as they are authorised to acquire by their special Act, upon the condition of

their making full compensation to owners and occupiers, and other parties interested in the lands or streams taken or used, or injuriously affected by the construction or maintenance of the authorised works. Sects. 18 to 27 inclusive apply to "mines," and, with the notable exception of sect. 27, their provisions are strictly analogous to, if not identical with, those of the corresponding clauses in the general Railways Clauses Acts of 1845.

It was argued for the appellants that, inasmuch as the respondents have taken by compulsion not only their interest in the surface, but a portion of one of their coal seams, under the powers of sect. 6, the conditions of that clause must be followed out, and all their claims for injurious affection of the seams not taken settled now. Alternatively, it was maintained that their right to compensation for prospective injury to their mineral workings, from the construction and maintenance of the reservoir, has already emerged, under the mines clauses of the statute. On the other hand, it was contended for the respondents that compensation in respect of unworked minerals, not taken under sect. 6, is exclusively regulated by the mines clauses, and that no claim arises to
[*97] the mineral tenant, under these clauses, until, *in the ordinary course of mining, his workings have approached the reservoir and have reached the prescribed limit.

In the Divisional Court, MATHEW, J., and CAVE, J., gave judgment for the appellants. They dealt with the claim as one falling under the mines clauses, and held that it was made competent by the provisions of sect. 25, being of opinion, on the authority of *Whitehouse* v. *Wolverhampton Railway Company*, L. R. 5 Ex. 6, that the damage, though prospective, was ascertainable with reasonable certainty, and might therefore be claimed now. In the Court of Appeal, Lord ESHER, M. R., agreed with these learned Judges both in their reasoning and their conclusion; but the majority of the Court, consisting of FRY and LOPES, L. JJ., reversed their order, on the ground that no claim in respect of minerals which, at some future time, it might be necessary to leave unworked, was competent before the seam was actually worked and the workings had reached the statutory limit.

In the course of the argument the question was mooted whether the word "lands," as it occurs in sect. 6 of the Waterworks Act, includes minerals. I think it is clear that the word is there used in its widest sense, and that the undertakers have the power to

acquire subjacent minerals as well as surface, when their acquisition is necessary for the support of the authorised works. The point appears to me to be placed beyond doubt by the observations of the LORD CHANCELLOR (Earl CAIRNS) in *Smith* v. *Great Western Railway Company*, 3 App. Cas. 180. Although it authorises waterworks undertakers to acquire minerals when necessary, I do not think the Legislature, by sect. 6, intended to enact that compensation in respect of other minerals, which at some future time it may be found necessary to leave unworked, should be immediately ascertained and paid. The mines clauses are, in my opinion, equivalent to an exception (even in cases where minerals are taken) from the provisions of sect. 6, with respect to compensation. These clauses are framed in general terms, and appear to me to be applicable to the case of all minerals, save those which are expressly purchased and conveyed to the undertakers. There may, however, be injury to works connected with mining operations, so directly and immediately occasioned by the taking of *the surface, or of interests in the surface, that the [*98] mine owner will be entitled to have compensation made to him, at the same time when the value of his interest in the surface is ascertained. Of that class of injuries, the claim of the appellants in this case, in respect of loss arising from their being compelled to sink a pit outside of the fifty-eight acres, affords an apt illustration. But the only claim with which we have to deal is for the value of coal forming part of a seam which the appellants have not begun to work, which the arbiter has found that they will, after they begin working, be unable to remove along with the rest of the seam without endangering not only the reservoir, but their own mines.

Whitehouse v. *Wolverhampton Railway Company*, L. R. 5 Ex. 6, relied on by the learned Judges of the Divisional Court, does not appear to me to support the inferences which they derived from it. All the claims sustained by the Court of Exchequer were of the same nature as the claim made by the appellants in consequence of their being compelled to alter the site of the pit they were about to sink. In that case the mine owner was in course of working a continuous seam of coal, when the railway company took a narrow strip of surface which intersected his mineral field. His workings had been confined to the south side of the strip, but were rapidly approaching the north side; and he was about to

sink two additional pits in order to get the coal on the north. The intended site of one of these pits was in the centre of the railway strip, and had been selected because it could be worked by the engine of an existing pit on the south; and the mine owner had already acquired the right to lay spoil on an area beside the site. In consequence of the site being taken by the railway company, he was under the necessity of sinking the pit in a position from which it could not be worked by the engine of the old pit, and of acquiring other land for the deposit of the spoil; and in these circumstances, he claimed and was allowed (1) the expense of engine and plant for the new pit; (2) the extra expense of working the engine; (3) the expense occasioned by change of site; (4) extra expense of raising pit frames and depositing spoil; [* 99] and (5) the cost of providing new land for spoil. * These were the only items in dispute, no claim being made in respect of minerals to be left unworked.

Had the present claim been preferred by the appellants against a railway company, under the provisions of the Railways Clauses Act, I see no reason to doubt that it would have been held to be premature. The difficulties which beset the case appear to me to be wholly due to the particular use which the respondents are authorised to make of the surface which they have acquired. In the case of a railway, the working of the subjacent minerals is frequently attended with certain danger to the line, but seldom, if ever, involves peril to the mine. When the overlying surface is occupied by a large reservoir of water, the results are very different. Injury to the reservoir, from the working of mineral seams below or near it, means the risk or certainty of flooding the mine; and the owners of the mine, and the undertakers interested in maintaining the reservoir, have a common interest to secure the safety of both. The mines sections of the Railways Clauses Act were apparently framed with the view of enabling railway companies to protect their lines from the destructive effects of subsidence of the surface, by giving them the opportunity of putting a stop, in whole or in part, to the working of subjacent seams of mineral, upon payment of compensation.

I come now to the mines clauses of the Act of 1847, upon the true construction of which the asserted right of the appellants to present compensation appears to me to depend. It is not necessary, and it is not my intention, to express any opinion upon the effect of

these clauses, except in so far as they bear upon the time at which a claim of compensation for minerals, which it may become necessary to leave unworked, for the protection either of the reservoir or of the mine, can be competently made. Because, after all, the question between the parties is one of time. The respondents do not dispute that they must ultimately compensate the appellants for all injuries occasioned to their mines by the construction and maintenance of the reservoir; but they object that no such injury as that for which compensation is sought has yet arisen, within the meaning of the statute.

Sects. 22 and 23, which are expressed, *mutatis mutandis*, in the same terms with sects. 78 and 79 of the English Railways
* Clauses Act, make it incumbent on the mine owner to [* 100] give thirty days' notice of his intention to work minerals below, or within forty yards' distance of, the reservoir. If the undertakers have not within that period, or at any time before the minerals are actually taken out,[1] signified their desire that the minerals, some or all of them, shall be left *in situ*, and their willingness to make due compensation, he may proceed to work them. The provisions of sect. 26, which enable the undertakers to inspect the workings for the purpose of discovering the distance which they have reached, and their probable effect upon the stability of their reservoirs or other works, indicate the intention of the Legislature that, in cases where the subjacent minerals are part of an extensive seam, the undertakers shall not be called upon to elect between retaining the minerals and permitting them to be worked until an inspection of that kind has become possible. I am, therefore, of opinion that the appellants are not in a position to prefer a claim for compensation under these clauses.

The enactments of sect. 25, so far as they bear upon the question before us, are to the effect that the undertakers shall, "from time to time," pay compensation to the owner, lessee, or occupier of the mine "for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the said works, or by reason of such apprehended injury from the working thereof as aforesaid." These enactments are, in my opinion, adverse to the argument of the appellants. They refer back to the clauses already noticed, for ascertainment of the unworked minerals in respect of which compensation is to be paid;

[1] See *Dixon* v. *Caledonian, &c. Railway Companies* (5 App. Cas. 820).

and the provision that payment shall be from time to time indicates, not that the whole claim of the mine owner is to be ascertained and paid upon an estimate formed before working has begun, but that compensation is to be made as often as, in the course of working, and after there has been an opportunity of examining the workings, the undertakers notify their desire that minerals shall be left unworked.

Sect. 27 has no parallel in the Railways Clauses Acts; and was obviously intended by the Legislature to afford the [* 101] mine * owner protection against a reservoir or other waterwork, which he does not require in the case of a railway line. It enacts that "nothing in this or in the special Act shall prevent the undertakers from being liable to any action or other legal proceeding to which they would have been liable for any damage or injury done or occasioned to any mines by means or in consequence of the waterworks, in case the same had not been constructed or maintained by virtue of this or the special Act.".

I do not think that sect. 27 was meant to supersede the other clauses of the Act, in cases where a full remedy is provided by these clauses; but I am of opinion that it was intended, and is sufficient, to cover every case of injury to mineral workings, in which the mine owner would otherwise have been deprived of a legal remedy. In such a case, the undertakers cannot set up the plea that their works were constructed under statutory authority. The case of a mine owner who, at a distance of fifty yards from a reservoir, finds that he cannot push his workings farther in its direction, without serious risk of discharging its contents into his mine, is not, in my opinion, within sects. 22 and 25, but is certainly within the provisions of sect. 27. Injury is done to the mine by the reservoir whenever, in due course of working, the minerals or part of them become either unworkable to profit, or altogether unworkable, by reason of the flooding which must accompany the working. Whenever that state of matters occurs, the mine owner may, in my opinion, bring his action for removal of the nuisance, with the alternative of pecuniary damages, if the undertakers prefer not to remove it. The Act of 1847 is an imperial one, and as the remedy would be open to a Scotch mine owner in these circumstances, I can see no reason why it should be denied to an English mine owner. But there is no present injury to the appellants' mines; and it appears to me that they have no cause of action under sect.

27, until there is actual injury, in the sense which I have suggested. It is manifest that if compensation were given under that clause to mine owners whose workings and whose damage are prospective merely, in many cases, nay, in the present case, the cause of damage might be partly or wholly removed before there was actual injury.

* For these reasons, I am of opinion that the order [* 102] appealed from ought to be affirmed.

Lord HERSCHELL (after stating the facts as given above, proceeded as follows):—

The question thus raised is, to my mind, one of very considerable difficulty; and it is not without much consideration that I have arrived at the conclusion which I am about to state to your Lordships.

I do not feel the same difficulty as was expressed by the Court below in holding that the word "lands" in sect. 6 of the Waterworks Clauses Act, 1847, includes "mines." By the definition clause (3), the former word includes "tenements, hereditaments, and heritages of any tenure;" and I think this language is large enough to cover mines. I should, therefore, but for the 18th and following sections of the Act, be prepared to yield to the contention of the appellants. It cannot, I think, be denied that these sections constitute a special code relating to mines and their working, and to interference with them, which was intended in general to regulate the respective rights of mine owners and the undertakers in relation to the construction and maintenance of waterworks. And the question, as it appears to me, is whether these enactments were not intended exclusively to regulate those rights, so far at least as the compensation to be paid by the undertakers, other than for minerals taken and damage consequent thereon, was concerned, and thus exclude claims for compensation which might perhaps otherwise have been made good under sect. 6. The sections in question are introduced by the words, "And with respect to mines, be it enacted as follows." The object of these sections appears to me to be that the undertakers should not be under the obligation of buying any minerals which were not necessary for the construction of their works, and which might never be wrought by the owners so as to interfere with them, but should be in a position, if the winning of the mines approached so near their works as to endanger them, to prohibit the removal of the minerals

whose support was requisite for the security of the works, on the terms of paying compensation to the mine owner. With [* 103] this view it is provided that the minerals * shall not be gotten within the prescribed distance of the works without due notice being given to the undertakers, so as to enable them to take advantage of the power conferred upon them to prohibit mining within the prescribed distance.

But for the fact that mining in the neighbourhood of the undertakers' works, without leaving sufficient support for them, would not only imperil the existence of those works, but might be a source of danger to the mine itself by letting in the water and flooding it, I should have no hesitation in arriving at the conclusion that the intention of the Legislature was that no compensation in respect of such restraint upon the working of the mines as might be necessary for the support of the works, should be recovered until the mining approached within the prescribed distance of those works, and in respect of such minerals as the undertakers considered must be left for the safety of their works. But the difficulty as regards this particular description of undertaking arises from the fact that, whereas in general the mine owner is sufficiently protected by being left to win his minerals as he pleases if the undertakers will not compensate him for refraining from working, in the case of waterworks he may bring disaster on his mine if he continues to work. It is true that by sect. 27 the same right of action is reserved to him for damage occasioned to his mines by the waterworks as he would have had if they had not been constructed or maintained under parliamentary authority; but it is urged with force that this can hardly be said to be an absolute protection to the mine owner.

I fully feel the weight of the arguments urged before your Lordships by the appellants; but, on the other hand, I find it impossible not to be impressed by the fact that the Legislature, in a Waterworks Act, has enacted this code relating to mines, and has added to it a reservation of rights of action, which is not to be found in the similar mining clauses contained in the Railways Clauses Acts. And I think it will be seen, when the matter is carefully considered, that there is insuperable difficulty in the way of sustaining the right to the compensation claimed, and, at the same time, giving due effect to the provisions relating to mines, at least without involving the risk of serious injustice.

[* 104] * The arbitrator here found that if the undertakers purchase and retain *in situ* the thirty-five acres of the Middleton seam, for which they gave notice, and no other coal in that or any other seam, the appellants could not safely get more than fifty per cent of the cannel and black coal under the reservoir and within twenty yards of its boundary, and he assessed compensation upon this basis. What, the respondents ask, is to happen when the mine-owner's workings come within the prescribed distance, and he gives statutory notice of his intention to work? Are they to be bound to compensate him as if he had already received nothing in respect of a limitation of his mining rights? And if they are content that he should work the fifty per cent which the arbitrator considered might be worked with safety, what means are there of compelling him to refrain from working the residue? These considerations do not, owing to the statement of facts by the arbitrator, present to my mind an insuperable difficulty in the peculiar circumstances of the present case. There is more force in the objection that the effect of the award is to withdraw from the undertakers the determination what seams should be worked and what left for the support of their works, and to transfer it to the arbitrator, whereas they, by selecting different seams, might, perhaps, have afforded the required support as effectually and more economically. And, moreover, the result is to compel payment at once on the basis that workings will be interfered with which might never be undertaken. Whether these considerations would be sufficient to conclude the case against the appellants if an award under the statute would always show on its face the basis on which the arbitrator had assessed compensation and the minerals which he had assumed must be left for the support of the surface, it is needless to inquire. The argument of the appellants appears to me to lose sight of the fact that the statute does not compel any such course. The statement was only made in the present case to raise a legal point. An arbitrator assessing compensation under sect. 6 would be under no obligation to show on the face of his award the mode in which he had arrived at the sum assessed, or the basis on which he had proceeded. And there would, I think, be no mode of compelling him to do so. All that the award would
* show would be that he had assessed a certain amount of [* 105] compensation as due to the claimants. It is necessary to bear this in mind in considering the appellants' contention, and to

see how it would work in the ordinary case. Suppose after a sum has been awarded and paid to the mine owner as compensation, he approaches with his workings the prescribed distance, and gives the undertakers the statutory notice. What means would there be of ascertaining how much of the minerals the arbitrator had contemplated must be left when assessing compensation, or of restraining the mine owner from working the minerals in respect of the necessity for leaving which he had been paid, or of securing that he was not paid a second time in respect of the same minerals? Resort, it may be said, could be had to the evidence given before the arbitrator; but this would probably have been conflicting, and the arbitrator may not be in a position, even if inquiry of him were legitimate, to afford the information. These considerations appear to me strong to show that the Legislature intended such questions of compensation as that which is in controversy in the present case, to be dealt with exclusively under the special enactments relating to mines.

And I think the real answer to the difficulty suggested by the appellants, which I admit to be a weighty one, is this, that the Legislature may have thought that the self-interest of the water-works owners would be calculated to insure their securing sufficient support for their reservoirs and other works, and that this, coupled with the provision that nothing in the Act should prevent their being liable "to any action or other legal proceeding to which they would have been liable for damage or injury occasioned by their works if these had not been constructed under the authority of Parliament," was a sufficient security for the mine owner.

I ought to add a word or two with reference to clause 25. Supposing that clause to be applicable to such a case as the present, I do not think the time has yet arrived for assessing compensation under it. The earlier words of the section certainly seem to limit somewhat narrowly the later provisions. But the clause is clumsily and inartificially drawn, and it is possible that these latter words may be capable of a broader construction than that [* 106] * which at first suggests itself. I do not think this clear enough to rest my judgment upon it, though it would to my mind get rid of all difficulty if such a construction could be adopted. All that I desire to do is to express no opinion which could preclude the contention hereafter, that if the mine would be endangered by the working of the minerals, and the respondents

refuse to make compensation under the earlier sections, it may be claimed under this one.

Upon the whole, I feel constrained to the conclusion that the judgment appealed from ought to be affirmed.

Lord MORRIS:—

My Lords, I am of opinion the word "lands" in sect. 6 of the Waterworks Clauses Act, 1847, includes "mines;" but I am also of opinion that the mines clauses of the same Act, sect. 18 and following sections, must be held to govern the rights of undertakers and mine owners in relation to waterworks undertakings. I am further of opinion that sect. 25 does not include an injury to the mines apprehended by the mine owner such as present compensation is sought for in this case by him.

The reasons for arriving at these conclusions were so clearly and fully set forth in the judgments of my noble and learned friends, Lord WATSON and Lord HERSCHELL, which I have had the advantage of reading, that I found I could not add anything. I concur that the order appealed from should be affirmed.

Order of the Court of Appeal affirmed and appeal dismissed; the question of costs (upon which the Court of Appeal had made no order, for a reason which is not applicable since the Arbitration Act, 1889: see *In re Gonty & Manchester, &c. Ry. Co.* (C. A.), 1896, 2 Q. B. 439; 65 L. J. Q. B. 625; 75 L. T. 239; 45 W. R. 83) *reserved for argument at the Bar.*

Lords' Journals, 15th December, 1890.

* The parties having afterwards agreed as to the costs, [* 107] that question was not argued; and upon a petition of the appellants (consented to by the respondents) it was ordered that each party pay their own costs in the appeal.

ENGLISH NOTES.

The statement of principles upon which compensation ought in general to be assessed, referred to in the speech of Lord HALSBURY, p. 632, *ante*, as having been made by Lord WENSLEYDALE in the *Caledonian Railway Co.* v. *Lockhart* (1860), 1 Paterson Sc. App. 942, 950, 3 Macq. 808, 825, was as follows: Referring to an objection to the award there in question that the arbiter had awarded prospective and contingent damages, which he ought not to do, Lord WENSLEYDALE

said: "The answer is, that he really has not done so. The compensation given is for the necessary damages by the construction of the railway, and for the highly probable damages which would be occasioned in the ordinary course of events by the vicinity of the river Clyde. It becomes, therefore, unnecessary to consider what would be the effect of awarding a sum for purely speculative damages, not reasonably foreseen. Generally speaking, railway and other similar companies acquire parliamentary power to purchase land and to construct their works, on condition of their paying the price of the land and the compensation to the parties who may sustain damage by exercise of the acquired power to do acts for which, if the authority of the Legislature had not been given, the landowners might have maintained an action. That price should be a full compensation, once for all, for the injury to those rights. When paid, the company have obtained a lawful right to construct their works; and if they happen to injure one in the reasonable exercise of these rights so purchased, they are irresponsible for such injury. Those rights are given for the public good; and if an extraordinary unforeseen damage occur, the suffering party must bear it, and is without remedy. But if those acquired rights are exercised unreasonably and without due care, those who have acquired them are responsible as they are for their exercise of common-law rights. *Sic utere tuo ut alienum non lædas.* The case of *Lawrence* v. *Great Northern Railway Co.* (16 Q. B. 643) may have been well decided as belonging to that class of cases in which the acquired right has been negligently executed, for which, therefore, an action would lie. I much doubt whether the company would have been responsible for damages occasioned by the due exercise of their powers, though those damages were unforeseen at the time the compensation was settled and paid. In the case in the Court of Exchequer the damage done to a distant piece of land was clearly not within the terms of the arbitration, the award on which was sought to be impeached; and the *dictum* of the Lord Chief Baron, that the claimant might proceed for further damages under the 68th section of the general Act was clearly extra-judicial, and was founded upon the authority of *Lawrence's* case. These observations, of course, do not apply to cases of which there are some (*The King* v. *Leeds and Selby Railway Co.*, 3 A. & E. 683; *Lee* v. *Milner*, 2 M. & W. 839) where, by the express terms of the special Acts, compensation for damages from time to time sustained are payable."

SECTION IV. — *Rights of Support.*

No. 19. — ROWBOTHAM *v.* WILSON.

(H. L. 1860.)

No. 20. — LOVE *v.* BELL.

(H. L. 1884.)

RULE.

WHERE land has been granted excepting the mines, or the right to the mines has been otherwise severed from the right to the surface, *primâ facie*, and unless there is express provision to the contrary in the instrument effecting the severance, the surface owner is entitled to support of his land in the state in which it is at the time of the grant or reservation.

Rowbotham and others v. Wilson.

30 L. J. Q. B. 49–54 (s. c. 8 H. L. Cas. 348; 6 Jur. (N. S.) 965).

Mines. — Subjacent Land. — Support. — Damage. — Grant. [49]

An Act of Parliament authorised commissioners to allot certain commons and commonable lands. The Act authorised the commissioners to allot the lands "amongst persons who, at the time of executing the award, should be entitled to or interested therein, either in right of the soil or of any other right or interest whatever, and with a just regard to any mines, &c., supposed to be under the same." The Act then provided for proportioning the allotments, and for securing the necessary right to work the mines. The commissioners made their award, allotting to A. land and to B. mines, specially naming mines of coal under A.'s land. The award then contained a covenant that "the mines so allotted shall be enjoyed by the persons to whom the same are assigned, and be worked and gotten accordingly without molestation, denial, or interruption of any other persons parties to these presents, and those claiming under them, owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action on account of working and getting the same by reason that the surface of the lands may be rendered less commodious by sinking in hollows or being otherwise defaced and injured, — the parties to these presents and interested in the disposal of lands and mines under the circumstances aforesaid having agreed with each other, and being willing and desirous to accept their respective allotments, subject to any inconvenience and

No. 19.—Rowbotham v. Wilson, 30 L. J. Q. B. 49, 50.

incumbrance which may arise from the cause aforesaid." A. signed the award, and thus executed the covenant it contained. B.'s assignee of the mines worked the mines. By degrees, without any imputation of negligence in the working of the mines or of working them in an unusual manner, the surface of the ground and the houses upon it became injured. A.'s assignee of the lands brought an action against B.'s assignee of the mines for compensation or damages. *Held*, that the award was valid; that the right to work mines was an incident to the grant of mines; that though the covenant could not operate as a release of the general right of a surface owner to the support of the subjacent soil, it did operate as a grant of the right to work the mines, and thereby injure the surface, provided such injury was not the result of negligence or wilfulness.

This was a proceeding in error under the Common-Law Procedure Acts of 1852 and 1854, from a judgment of the Court of Exchequer Chamber upon a special case, whereby the judgment of the Court of Queen's Bench in favour of the defendant was affirmed.

The action was brought by Daniel Rowbotham, the now plaintiff's testator, and the declaration alleged that the plaintiff was entitled to certain houses in reversion which "had been erected and standing for more than twenty years," and that the plaintiff was "rightfully entitled to have the said houses and the foundations thereof supported by the soil and land contiguous and near to the same, and also to have the foundations of the said houses, and the land whereupon the same were erected and standing, sufficiently supported by the minerals lying under the said last-mentioned land;" and alleged for breach, that "the defendant wrongfully and negligently worked certain mines under the land on which the said houses were erected, and under the land contiguous and near thereto removed the coals and minerals from the said several mines without leaving any sufficient support, so that by reason thereof the foundations of the said houses in which the plaintiff was so interested as aforesaid, became and were weakened, damaged, and undermined, and became incapable of supporting the said houses, and the said houses cracked, sank in, and became and were dilapidated and unsafe; and that the plaintiff had been injured in his reversionary interest." In the second count the plaintiff alleged that "certain land was in the possession of certain persons as tenants thereof to the plaintiff, the reversion [*50] therein then and still belonging to the *plaintiff, yet the defendant wrongfully and negligently, and without leaving any proper and sufficient support in that behalf, worked certain

coal mines under and contiguous to the said land, and got and removed the coals and minerals and earth of and in the said last-mentioned mines; that by reason thereof the soil and surface of the said land gave way and sank in, and became low, hollow, and uneven, and liable to be covered with water, and thereby the said land became unfit for cultivation as garden ground, for which purpose it had previously been cultivated, and became and was of much less value than the same had theretofore been, and the plaintiff became and was greatly injured and prejudiced in his reversionary interest therein; and the plaintiff claims £300."

After declaration there was stated by consent of the parties, for the opinion of the Court of Queen's Bench, the following

CASE.

The plaintiff was the reversioner in fee of the surface land and of the buildings mentioned in the first count of the declaration, and of the surface land mentioned in the second count, having become seised of the same premises by virtue of divers mesne conveyances from Samuel Pears, to whom the said surface land was allotted by the award hereinafter mentioned.

The buildings had been erected more than twenty years before the accruing of the causes of action, and the houses were not upon the land at the time of the execution of the award hereinafter mentioned, nor until long afterwards.

The defendant, before and at, &c., was entitled to and worked the mines of coal, being the same mines as those allotted to Henry Howlette by the award under the said premises, and the damage to the plaintiff's reversion mentioned in the first and second counts was caused by the subsequent sinking of the soil. The course and practice of mining before and at the time of the Act and award hereinafter mentioned, and since in such cases used and approved of in the county and neighbourhood in which the said mines were situate, was for the owner of the mine to get the whole of the underlying coal in the mine without leaving any pillars of the coal by way of support, the coal there worked being of so soft and perishable a nature as that any coal left by way of support would in a short space of time fall away and decay; but, instead of leaving pillars of the same coal, the course and practice of mining during the period aforesaid used and approved of in the county and neighbourhood aforesaid has been and is, to erect pillars of

the refuse coal, called lamb and slack, which form a much more durable support than pillars of the same coal would, if left. The defendants' mines have always been worked without any negligence on his part, and according to the said course and practice of mining, and he left, as is usual, pillars of lamb and slack, according to such course and practice. No natural or artificial pillars would prevent the accrual of the injuries now complained of, which have arisen from the natural subsidence of the surface soil in getting the mine, according to the use and practice of the county and neighbourhood as aforesaid.

By an Act of Parliament, 9 Geo. III., entitled "An Act for dividing and enclosing the common fields, common grounds and commonable lands, in the parish and township of Bedworth, in the county of Warwick, and for regulating certain charity estates within the said parish," certain commissioners were appointed for the purposes and with the duties, powers, and authorities in the said Act more particularly mentioned.

The Act is made part of the case. It recites that there were in the township and parish of Bedworth certain common fields and commonable lands, and that the property in the same lay intermixed and dispersed in small parcels remote from the houses of the owners thereof, which had been found to be very inconvenient and detrimental, and that the owners were desirous that the said lands should be specifically allotted amongst them in severalty, according to their several rights and interests. Commissioners were appointed for dividing, allotting, and enclosing the said commons, commonable lands, &c., and for putting the Act in execution; and it authorises and requires them to divide, as certain, and allot the same unto and amongst the persons who at [* 51] the time of executing the award should be entitled to or interested therein, either in right of soil or of any other right or interest whatsoever, in a due and fair proportion, as near as might be, according to the value of the shares and interests, and with a just regard to any mines or delphs of coal, lime, and stone supposed to lie under the same, but subject, nevertheless, to the rules, orders and directions of the Act.

The Act recited that there were lands in the parish supposed to have mines under them, and on that account the proprietors might be desirous of retaining their property therein; and it enacted, that such of the lands of the said proprietors as the

commissioners should adjudge to have any mines should be allotted and set by metes and bounds in distinct lots unto or for such of the proprietors respectively as should desire the same, or otherwise that there should be set out for such proprietors other lands under which there should be supposed to be mines of equal value; and the commissioners, in allotting the said mine lands, should make just allowances between such of them, the delphs whereof remained entire and unbroken, and such of them which had theretofore been opened and in part worked. And then the right of doing what was necessary for working the mines was provided for.

The Act empowered the commissioners to draw up an award, which should express the quantity of acres, &c., contained in the said commons, &c., and a description, &c., and proper orders for fencing, &c., and for making roads, &c., and that the award should be binding and conclusive upon all parties interested.

An appeal was given to the Quarter Sessions for anything done in pursuance of the Act.

The commissioners, on the 21st of June, 1770, made their award, and did thereby award and allot certain lands to H. Howlette. "And as to the mines on the said estate of the said H. Howlette, previous to the enclosure thereof, the same not having been required to be set out by metes and bounds, we do assign, allot, and appoint unto the said H. Howlette, in lieu thereof, all the mines of coal and limestone under the several allotments of land before made to him, and also the mines of coal under the allotment to Samuel Pears; and also all the mines of coal under the turnpike road so far," &c. The commissioners also awarded to S. Pears "all that lot or parcel of land lying in Mill Field aforesaid, containing 2A. 2P., bounded on the east by the turnpike road and by the allotment to the said Thomas Murray, on the north by the same allotment and by an allotment to the said Sir Roger Newdigate, and on the west and south by an allotment to the said H. Howlette;" and as to the mines on the estate of S. Pears, the commissioners allotted to him "all the mines of coal under that part of the turnpike road contained between a line ranging with the south side of his own home close, and a parrallel line drawn from the south end of the said Sir Roger Newdigate's tenement opposite to houses of the said S. Pears and of Daniel Jackson, all situate in Colly Croft aforesaid, for the breadth of

thirty-five links on the east side thereof adjoining to the homestead of the said S. Pears, which the said commissioners adjudged to be equal in value to the mines he was previously possessed of, without being entitled to any part of the mines under his own allotment of land, which last-mentioned mines were thereby before awarded to the said H. Howlette." The award also contained the following covenant: "And whereas, in order to preserve the convenience of situation of the allotment to the several proprietors interested in the said enclosure and division, it hath been found necessary, in some cases, to assign the mines under the whole of some particular allotments, and in other cases part of such mines to different persons than those to whom the allotments of the surface land are awarded, and the several proprietors, parties to this our award, are the only persons interested in the disposal of land and mines under such circumstances, which said proprietors parties thereto do, by their sealing and executing these presents, testify their acceptance of their respective allotments in manner as the same are allotted to them as aforesaid, and do for themselves severally and respectively, and for their several and respective heirs, executors, administrators, successors, and assigns, utterly disclaim, release, and disavow all right, title, interest, claim, and demand of, in, or to any of the mines [*52] under *their several allotments, except such, or such part thereof, only as are hereinbefore particularly mentioned and described to be allotted to each of them. And the same proprietors do hereby, for themselves, &c., covenant, &c., that the mines so allotted under the circumstances aforesaid shall or lawfully may for ever after be held and enjoyed by the respective persons to whom the same are assigned, according to the true intent and meaning of this award, and by them, and every of them, be worked and gotten accordingly, without any molestation, denial, or interruption of any other person or persons, parties to these presents, and those claiming under them respectively, who for the time being are or may be owner or owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action or actions for damage on account of working and getting the said mines, for or by reason that the surface of the lands aforesaid may be rendered less commodious to the occupier thereof by sinking in hollows, or being otherwise defaced and injured where such mines shall be worked, the said

several proprietors, parties to these presents, and interested in the disposal of lands and mines, under the circumstances aforesaid, having agreed with each other, and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience and incumbrance which may arise from the cause aforesaid, so, nevertheless, as that nothing herein contained shall extend, or be construed to extend, to authorise or enable any of the parties for the time being entitled to the said mines to sink pits into the allotments under which the same are situate, for the purpose of working the said mines, without the consent of the then owners of the surface of the same allotments previously obtained, or in any manner to dig or break up the said surface without the like consent."

Judgment was given in the Court of Queen's Bench for the defendant upon both counts. Proceedings in error were taken by the plaintiff in the Exchequer Chamber, where the judgment was affirmed.

The present proceeding in error was then brought.

Hayes, Serj., and Spinks, for the plaintiff in error, insisted that this was not a covenant running with the land; that only those who were parties to the deed were bound by it; that Howlette was not a party to the deed, for that he had never executed it; and that the general right to support could not be destroyed by what had taken place here. They cited *Humphries* v. *Brogden*, 12 Q. B. 739 (p. 407, *ante*); *Keppel* v. *Bailey*, 2 Myl. & K. 517; *Bonomi* v. *Backhouse*, El. B. & E. 642, 27 L. J. Q. B. 378, 28 L. J. Q. B. 378; *Moore* v. *Rawson*, 3 B. & C. 332 (27 R. R. 375); *Spencer's Case*, 1 Smith's Lead. Cas. 63; *Casamajor* v. *Strode*, 2 Myl. & K. 706; *The King* v. *Washbrook*, 4 B. & C. 732; Shep. Touch. 163.

M. Smith and Field contended that the award here was binding on all parties, who had, as they lawfully might, accepted the ownership of the surface, accompanied by a qualified right to support from the subjacent strata. They cited *Hilton* v. *Lord Granville*, 5 Q. B. 701; *Goodtitle* v. *Bailey*, Cowp. 597; Gale on Easements, 46; *Northam* v. *Hurley*, 1 El. & B. 665, 22 L. J. Q. B. 183; *Wickham* v. *Hawker*, 7 M. & W. 63, 10 L. J. (N. S.) Ex. 153; *Wood* v. *Leadbitter*, 13 M. & W. 838, 14 L. J. Ex. 161; *Doe d. Freeland* v. *Burt*, 1 T. R. 701 (1 R. R. 367); *Denison* v. *Holliday*, 1 H. & N. 631, 26 L. J. Ex. 227; *Rogers* v. *Taylor*,

1 H. & N. 706, 26 L. J. Ex. 203; *Smart* v. *Morton*, 5 El. & B. 30, 24 L. J. Q. B. 260.

Hayes, Serj., in reply, referred to *The Caledonian Company* v. *Sprott*, 2 Macq. Sc. App. 449 (p. 686, *post*).

M. Smith was heard to comment on this case, which had then for the first time been cited in reply.

[* 53] *Lord WENSLEYDALE (June 19) moved the judgment of the House. — In his opinion the judgment of the Court of Queen's Bench was right, and ought to be affirmed. It was unnecessary to discuss several of the questions raised at the bar: whether the title of the owner of the surface to the support of the subjacent strata was a mere easement or a legal right was immaterial to the decision of this case. *Primâ facie* the owner of the surface was entitled to the surface and all below it *ex jure naturæ;* and those who claimed any interest in the minerals below must do so by virtue of some grant or conveyance from or through him; and the right of the grantee must depend on the terms of the deed. As they were to be enjoyed, a power to get them was a necessary incident to such a grant. Shep. Touch. put that instance, declaring that by grant of mines was granted the power to dig them; and a similar presumption arose that the owner of the mines was not to injure the owner of the soil above if it could be avoided. Generally these rights were governed by deed executed between the parties; and then the only question was as to the construction of the deed. And the question in this case was one of a similar kind, namely, what were the rights of the parties upon the facts stated in this case? The origin of the right of both parties was to be found in the award of 1770, under the private enclosure Act for the common fields of Bedworth. The allottee of the surface had received a larger extent of surface as compensation for the minerals not being given to him. Each of the parties had full notice of their respective titles by the award itself; and the question was, what were the powers, and what the limitations legally annexed to their respective rights? The power of the commissioners to separate the minerals from the surface was denied. He was of opinion that they had that power; and consequently the commissioners had the power to give to Howlette the right to get the coal, and the covenant described the manner in which that power should be exercised. The award, then, was valid, and Howlette obtained the right to get the coal in a manner

which would render the surface uneven; but if that right came not from the award, but from the covenant, then the covenant operated as a grant, and Howlette in that way obtained the right to get the minerals. This was, no doubt, the proper subject of a grant, as it affected the land of the grantor: it was analogous to the grant of right to damage the surface by making a way over it. No particular words were necessary for such a grant. If the words used only amounted to a covenant, it must be admitted that such a covenant would not affect the lands in the hands of the assignee of the covenantor; but they would do so if they amounted to a grant. Therefore, if the award was valid, the plaintiff, as assignee of the surface, would be bound, either by the order of the commissioners or by the grant. He thought that the commissioners had the power to make separate allotments of the surface of the mines, because the Act did not limit them to allot both together, nor show that anything was intended inconsistent with the separate mode of allotment. Such might be, as had been properly suggested by Mr. Field in his argument, a convenient manner of arranging the interests of all parties. The private Act amounted to no more than an agreement between the parties, sanctioned by the Legislature, and in order to construe it surrounding circumstances might be looked at; and the award having been acted on for ninety years intendment was to be made in its favour. These conditions led to the opinion that the commissioners had the power, for the general convenience, and exercised it to give portions of the surface to one, and the mines under each of such portions to the other; the award therefore was valid. Most of the Judges in the courts below seemed, however, to have considered it bad; but even then the defendant was entitled to judgment. The right to the surface land might, after ninety years' enjoyment, be presumed to be in those under whom the plaintiff claimed, and a legal right to the minerals, with a right to get them, by a legal grant, in those under whom the defendant claimed. But this right could not be exercised without rendering the surface uneven, and therefore it involved the right to withdraw a certain quantity of support from the surface, and to do the damage which had been done, and which was not charged as being done by negligence. But
*it was not necessary to have recourse to this presump- [*54]
tion. If the award was bad, Pears was still bound by

the deed, which would operate as a grant; even if he had not a legal title to the land at the time he made the grant, his grant would operate from the time of his acquiring a title to the land. *Trevivan* v. *Lawrence*, 6 Mod. 258. A good legal title would therefore be obtained after twenty years' enjoyment of the right to get the coals. If the plaintiff had a right to the support of the minerals as an easement, or *ex jure naturæ*, the covenant operated, not as a release (*Bonomi* v. *Backhouse*), but as a grant of a right to disturb the surface; and it was enough to decide the case on that ground. The circumstance that the plaintiff had subsequently built houses on the ground made no difference. The defendant was entitled to judgment. — His Lordship desired to add, that Lord BROUGHAM, who was unavoidably absent, entirely concurred in the view which he had taken of the case.

Lord CHELMSFORD [after stating the pleadings and the facts, as agreed on, said:] — It was denied that the commissioners had the power to make the separation of the mines from the surface land. He had no doubt of the existence of that power under the Act. But it was immaterial whether their award was valid or not, for, upon either supposition, there was the covenant of Pears, which was sufficient to prevent the action being maintained. The covenant was much more than a covenant not to sue, for Pears expressly declared that he was "willing and desirous to accept his allotment, subject to any inconvenience or incumbrance which may arise from working and getting the mines." The word "incumbrance" here really signified obstruction or impediment to the use of the surface land. The deed was correctly construed as a grant. Pears had no right, except from the allotment of the land; that right passed with the land, but did not possess a separate existence. At first, he thought it was a right which might be released; but he was satisfied that the view taken by his noble and learned friend, Lord WENSLEYDALE, founded upon the nature of the right, as explained in the case of *Bonomi* v. *Backhouse*, was correct; and that it was not a right which could be the subject, as a right, of a grant or of a release. But though the thing itself, namely, the right to support, could not be the subject of grant, nor be extinguished by release, yet the covenant amounted to a grant of a right to do acts which would affect that thing, and being by deed it was in that form valid as to all who held the surface land from Pears. The effect of that grant was

to give a right to work the mines without molestation, even to the taking away the support, and defacing and injuring the surface of the land, which, without such a grant, could not lawfully have been done. He therefore agreed that the judgment of the Court below ought to be affirmed.

Lord KINGSDOWN quite concurred.

The LORD CHANCELLOR (Lord CAMPBELL), as he had not heard the case, gave no judgment in it. But he felt no doubt whatever as to the correctness of the judgment which had been delivered in the Court over which he formerly presided.

Judgment affirmed, with costs.

Love and another v. Bell and another.

9 App. Cas. 286–302 (s. c. 53 L. J. Q. B. 257; 51 L. T. 1; 32 W. R. 725).

Inclosure Act, Construction of. — Mines. — Manorial Rights. — Support. [286] *— Damage to Surface. — Compensation.*

An Inclosure Act enacted that allotments should be made to the persons having a right of common upon the waste of the manor, that is, to the owners of every separate ancient dwelling-house within the manor; that all right of common should be extinguished; and that the allotments should be held and enjoyed by the allotees by the same tenure and estates as the respective dwelling-houses: provided that nothing should prejudice, lessen, or defeat the title and interest of the lords of the manor to and in the royalties, but that the lords and their successors as owners of the royalties should for ever hold and enjoy all "rents, courts, perquisites, profits, mines, power of using or granting wayleave, waifs, estrays, and all other royalties and jurisdictions whatsoever" to the owners of the manor appertaining "in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." Provided further, that in case the lords or any persons claiming under them should work any mines lying under any allotment, or should lay, make, or use any way or ways over any allotment, such persons so working the mines, or laying, making, or using such way or ways, should make "satisfaction for the damages and spoil of ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil;" such satisfaction to be settled by arbitration and "not to exceed the sum of £5 yearly during the time of working such mines, or continuing or using such way or ways, for every acre of ground so damaged or spoiled."

At the time of passing the Act there were no customs which enlarged or cut down the common-law rights of the lords to work the minerals under the wastes of the manor. Under the Act an allotment was made in 1772 to a commoner in respect of an ancient freehold dwelling-house. At that time no house had been built upon the allotment. More than twenty years after a house had been built upon it, the minerals underlying it were worked by lessees of the lords of the

manor so as to cause the surface of the land to subside, whereby the house was damaged to an amount exceeding the sum recoverable under the proviso. The land would have subsided if there had been no house. An action for
[*287] damages having been brought *against the lessees by the allottee's successor in title and by his tenant in possession: —

Held, affirming the decision of the Court of Appeal, that upon the true construction of the Act, the proviso for satisfaction did not apply to damage from subsidence; that there was nothing in the Act giving the lords the right to let down the surface; that the plaintiffs were entitled to have the house and land supported by the minerals, and to recover damages for the subsidence.

Appeal from an order of the Court of Appeal.

The action was brought by the respondents against the appellants for damages caused to a house belonging to the respondent Salvin and in the occupation of the respondent Bell by the appellants' mineral working, and for an injunction to restrain the appellants. The Court of Appeal (Lord COLERIDGE, C. J., BAGGALLAY and LINDLEY, L. JJ.) gave judgment for the plaintiffs, affirming an order of the Queen's Bench Division (MANISTY and WILLIAMS, JJ.). The facts, which were stated in a special case for the opinion of the Court, are fully set out in the report of the decisions below, (10 Q. B. D. 547). All the facts material to the present report are stated in the headnote.

Feb. 28. Sir F. Herschell, S. G., and F. M. White, Q. C. (John Edge with them), for the appellants: —

The respondents are entitled to no more compensation than that provided by the Inclosure Act; the Act expressly providing that the mining rights of the lords of the manor to work the mines should be exercised as fully as before the Act. Before the Act those rights were unlimited save by the obligation to leave enough pasturage for the commoners. The respondents have not shown that the workings would have infringed on the rights of the commoners. The Act did not contemplate buildings or any use of the surface other than agricultural; but construing the Act most favourably to the respondents, there must be some limitation to the right of building; for if not the whole ground may be covered and no way left in to the minerals but through a building. The construction put by the Court of Appeal upon the compensation clause is unsound and leads to strange results; for if the
[*288] compensation be intended only for temporary and * not for permanent damage, there is no compensation or redress for sinking shafts or any "spoil of ground" which is in its nature

permanent. Who is to say what damage is "temporary" or "slight"? What is the test? This shows that the Act intended the compensation to be applicable to all damage however caused; and this is no hardship on the allottees, who are as well off as they were before the Act in their capacity as commoners. The present is substantially the same case as *Duke of Buccleuch* v. *Wakefield*, L. R. 4 H. L. 377, which the Court of Appeal did not effectually distinguish. Their judgment to some extent relies on the decision in *Blackett* v. *Bradley*, 1 B. & S. 940, 31 L. J. Q. B. 65, which was decided only on the authority of *Hilton* v. *Earl Granville*, 5 Q. B. 701, and was wrongly decided, as was held in *Gill* v. *Dickinson*, 5 Q. B. D. 159. The *primâ facie* right of the surface owner to support may be taken away by a contract or an Act. *Rowbotham* v. *Wilson*, 8 H. L. C. 348, 30 L. J. Q. B. 49 [p. 647, *ante*]. Inclosure Acts are to be regarded as contracts between parties, and so construed. In *Roberts* v. *Haines*, 6 E. & B. 643, 7 E. & B. 625, the language was very different, and was applicable to the surface. Here it is not so: the language points to what is under the surface. *Aspden* v. *Seddon*, L. R. 10 Ch. 395, 403.

[*Rylands* v. *Fletcher*, L. R. 3 H. L. 330; *Dixon* v. *White*, 8 App. Cas. 833; *Harris* v. *Ryding*, 5 M. & W. 60; and *Smart* v. *Morton*, 5 E. & B. 30, were also cited.]

C. Russell, Q. C., and E. Ridley, for the respondents, were informed that notice would be given if the House, after consideration, desired to hear them.

March 3. EARL OF SELBORNE, L. C.: —

My Lords, the authorities, which are numerous, from *Harris* v. *Ryding*, 5 M. & W. 60, and *Dugdale* v. *Robertson*, 3 Kay & J. 695, down to the recent case of *Davis* v. *Treharne*, 6 App. Cas. 460, which was decided in this House in 1881, have, I think, fully established the general law applicable to the * case [* 289] of two owners, the one of upper strata, or the surface of the ground, the other of lower strata, containing minerals which are to be worked; and perhaps the most convenient way of putting the matter will be to read a few words from the opinion given by Lord BLACKBURN in *Davis* v. *Treharne*, 6 App. Cas. 466: "I think it must be taken as perfectly settled ground that as of common right the surface land has a right to be supported by subjacent strata of minerals. Although that is common right, it may be shown — the burden lying on those who wish to show it — that

the person who has got the surface, obtained it either upon terms which would give him no right to support, he having accepted it and taken it upon those terms, or that before he got it the person from whom he claims, the owner of the surface, had parted with the right of support from below, in which case, of course, the owner of the surface could be in no better position than the person who sold it to him. In common right the person who owns the surface has a right to have it properly supported below by minerals, and if there are mineral workings under the surface, to have a proper support left for it by pillars." Whoever claims against that has the burden of proof thrown upon him.

In the same case, *Davis* v. *Treharne*, 6 App. Cas. 467, 468, two pages later, Lord BLACKBURN deals with the question which there arose, and on this principle: that when the person on whom the burden of proof lies has to satisfy it, he will not be able to do so merely by showing that there are words, however large, applicable to the right of working, and privileges connected with it, and compensation to be paid for working and for the use of those privileges, which may receive full effect consistently with the right of support. I will not refer in detail to that passage: it is in accordance with what is to be found in other authorities.

Starting with these principles we have to consider this particular case. It is, I may say, an ordinary case of inclosure of open or common lands, where the lord of the manor has certain rights: the right to the soil, and of course the right to the minerals below it, and the commoners have certain surface rights. The recital is, that by the inclosure this tract of waste ground which then [* 290] yielded little profit might become "capable of * considerable improvement." I shall have occasion to refer to that afterwards in connection with an argument which was suggested, that no improvement except by using the inclosed ground for agricultural purposes could be supposed to have been in contemplation. It goes on to allot to the lords in severalty certain plots and parcels of ground. Whether it be more or less that, upon the inclosure, is allotted to the lords can make no difference; it is equally a case of mutual considerations resulting in the apportionment of land to which the parties may be taken to have agreed, or have had determined for them by the authority which made the award. If it were needful to draw any inference from the fact that the greatest part of the land seems to have been allotted to

the commoners, and a comparatively small part (if such is the fact) to the lords, the dean and chapter, the inference would be that the rights of the commoners in this case were very substantial, and that the rights of the dean and chapter, so far as the surface was concerned, at all events, were small in comparison with them. However, that is not important. Then there follows the allotment of the residue to the commoners in respect of the houses, some freehold, some leasehold, to which the rights of common had been appurtenant or appendant, and they are to hold the allotted lands upon the same tenure on which they held those houses. The particular allotment in question being in respect of a freehold house is a freehold allotment, and we have to deal therefore with a freeholder having the ordinary rights of a freeholder to his allotment, except so far as there is anything in this Act to make them less than the ordinary rights.

The question, whether there is or is not anything of that kind in the Act, depends entirely upon the clause of reservation in favour of the lords of certain rights, and the proviso which follows that clause of reservation. The reservation, though it includes mines, is by no means confined to them; it is plainly a reservation of the pre-existing interest of the lords in the manorial rights and royalties, and rights also in the soil which previously belonged to them as lords of the manor. It says, that nothing in the Act "shall prejudice, lessen, or defeat" their "right, title, and interest" to these things; but they and their successors "shall and may at all times for ever hereafter hold and enjoy all rents, * courts, perquisites, profits, mines, power of using [* 291] or granting wayleave, waifs, estrays, and all other royalties and jurisdictions whatsoever, to the owner or owners of the said manor, barony, or borough, incident, appendant, and belonging or appertaining (other than and except such right of common as could or might be claimed by them as owners of the soil and inheritance of the said moor or common so to be enclosed as aforesaid) in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." So far, we have nothing but reservation of pre-existing rights, and that not in terms specially applied to mines and minerals although including them, — not in terms from which an intention to deal specifically with powers connected with those mines and minerals can be inferred,

— but in terms which are as much applicable to anything else mentioned as they are applicable to mines; no doubt not less applicable to mines, than to the other things which are mentioned.

What is there in that clause of reservation which can possibly be relied on as depriving the freeholder to whom an allotment has been made of the right of support to his freehold? The only words which have been insisted upon as capable of having that effect are the words, "in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same" (which means, as I understand it, held and enjoyed those rights, titles, and interests which are reserved) "if this Act had not been made." Applying that to the mines, although it is not more applicable to the mines than to any other subject, I quite agree that it at least carries so much as this, that they were, with the mines, to have all usual powers and surface privileges for working them. Supposing in the clause of reservation these words had been expressly inserted, "reserving the mines and minerals with all usual powers and surface privileges for working them," would that have given a right to let down the surface? Would that have destroyed the freeholder's right of support? I apprehend that it clearly would not. As was pointed out in the case referred to at the bar, *Duke of Buccleuch* v. *Wakefield*, L. R. 4 H. L. 377, it is impossible to understand [*292] such words as *reserving the previous rights of working exactly as they were without reference to the fact that an inclosure had been made, and as if the rights of common still continued to exist, and the rights of working were subject to the rights of common. The right given by those words must in that respect, although it is still a right to be held and enjoyed in a full, ample, and beneficial manner, nevertheless be a right to be held and enjoyed by the lord after inclosure, and against the owners of allotments, and no longer as against commoners.

But let us consider what was the nature of the enjoyment which existed before the inclosure. I apprehend that before the inclosure, as much as afterwards, the lords, in the exercise of their powers as to the minerals, were subject to the principle *sic utere tuo ut alienum non lædas*. They had not a right of working paramount to the surface rights of the commoners, they had only a right of working subject to the surface rights of the commoners, and any working which would substantially interfere with those surface

rights would have been an unlawful working, and might have been restrained at the suit of the commoners. The only ground for saying that they might lawfully from time to time have let down portions, and perhaps ultimately the whole, of the surface is this: that they might have done so without injuring the surface rights of the commoners. They would not then have infringed upon the principle *sic utere tuo ut alienum non lædas.* No *damnum*, no injury would have been suffered by the commoners, and therefore the lords might have been subject to no action, and to no restraint. But now the commoners, giving up the whole of their common rights, take in lieu of them these allotments. Why should not the lord in his altered position with his reserved rights be subject in respect of those allotments to the principle *sic utere tuo ut alienum non lædas* in its full extent, as much as he was before? I quite agree with what BAGGALLAY, L. J., in the Court of Appeal suggested on that subject (10 Q. B. D. 566); namely, that the substituted rights are not given with power to the lord to take them away, which he could not have done with regard to the original rights, and that this reservation, if it stood alone, must be construed subject to the * surface rights of the [*293] person to whom the allotments had been made.

Then we come to the words of the proviso. Now I quite agree that we should not be fettered by form if we find in substance in the proviso something tending either to enlarge, or to explain in such a way as to enlarge, the effect of the reservation; but still we must approach that proviso with due regard to the fact, that what we have already seen is a reservation only, not a grant, by Act of Parliament or otherwise, of privileges which a mere reservation would not have conferred; and that this proviso which follows has for its office to deal with the compensation to be made for the exercise of the reserved rights, so far as relates to those two particular subjects by which the surface might possibly be affected; namely, the working of the mines and the power of granting or using wayleaves, two subjects which throughout this proviso are separately kept in view.

It appears to me that here the principles already mentioned throw, at all events as strongly as before, upon the appellants the duty of showing that there are words which dispense, in their favour, with the general rule of law, and give them a right to let down the surface and deprive the surface owner of his ordinary

right of support. I can find no such words. It is contended, however, that the usual powers of working mines do involve some right of interference with the surface; and that is contemplated by this proviso. But why should more be supposed to be contemplated? What word is there which shows more than this, that it is contemplated, that in the working of mines, as well as in the use of wayleaves, there may be some interference with the surface, in respect of which compensation is to be made? That would necessarily follow from the usual powers of working; but this consequence which is now sought to be established would not follow from the usual powers of working. Why, therefore, should it be supposed to follow, because the effects on the surface which are contemplated are provided for by way of compensation? The whole proviso, in my opinion, is satisfied by ordinary surface damage, such as might arise from the exercise of usual working powers.

[*294] The more the detail is examined, the more strongly am I led * to the affirmative conclusion that this is what was meant, and all that was meant. The detail tends to repel, instead of to support, the appellant's construction. First of all, it refers to the working of the "mines lying within or under any of the allotments," and to "satisfaction for the damages and spoil of ground occasioned thereby." I pause for a moment to observe that the word "ground" occurs four times over in the passage; and it strikes me, to say the least, without dwelling too much upon it, as indicating ordinary surface damage to the surface of the ground, and not at all damage such as might happen in the case of buildings, with which we are now dealing. Therefore it confirms, as far as it goes, the view which, as I have said, I take of the clause as a whole.

But that is not all; for who is to receive this compensation? "The person or persons in possession of such ground at the time or times of such damage or spoil." It is manifest that the Legislature thought that compensation ought to be made, and to the proper person. But is it to be for a moment imagined that in the case with which we are dealing, of injury to buildings erected upon the ground, which by possibility might be entirely destroyed, justice would be done by giving the compensation not to everybody injured, nor to the person chiefly injured, who would be the owner of the freehold, but to his tenant, to the person who might happen to be in possession at the time when the damage was done?

There is then a limit, which limit is measured by the yearly value of "£5 for every acre of ground so damaged or spoiled," — a reasonable limit enough, probably, for such surface damage as might arise from the exercise of ordinary powers, which would not extend to the destruction of the surface, or of the buildings upon it, but to my apprehension, a most improper, a most unreasonable, and a most unjust limit if it had been intended to take away the ordinary right of support. It was said upon this, "Oh, but it was never contemplated that there would be any buildings at all upon that ground — it does not appear that there were any at the time, and therefore we are to infer that the sort of improvement contemplated by the Act was the conversion of this moor-land into agricultural land and nothing more." But is it not extravagant to suppose that that was the only possible *im- [*295] provement of this land, there being no restriction whatever upon the mode of improvement which the persons into whose hands it might come might think expedient? The very principle of improvement by inclosure is that the land should be improved, to the extent of its capacity, by those persons who have the altered tenure, and who would have an interest in improving it. Even if it had been let as agricultural land, we are not to assume that it was all let out to neighbouring farmers who had already sufficient farm buildings for all purposes of agricultural cultivation. Even upon that hypothesis it cannot be imagined that it was out of contemplation in this improvement that there might be a residence for a farmer, a suitable house for him to live in, with stables, yards, and proper out-buildings, the damage to which buildings would be of a very serious kind, in no degree compensated under this clause. But the truth is that there is no ground for any such contention. The neighbourhood of the mineral works might make it a convenient and profitable mode, in using the land, to erect upon it cottages for persons employed in the mines; or the owner might wish to reside near the mines, and therefore erect a house for himself. Consequently, it is clear that we must take into account damage to buildings as well as other things. For damage to buildings this mode of compensation would be quite inappropriate; but it would not be necessary if the right of support exists.

No authority whatever was cited in support of the appellants' argument except the case of *Duke of Buccleuch* v. *Wakefield*, L. R. 4 H. L. 377, 382, which appears to me to differ from the present

in every material particular. In the first place, the words to be construed there were not words occurring in an enumeration of various rights reserved of different kinds, but they were words having direct and special application to the subject of mines, minerals, and mineral working; and in connection with that it was said that the lord was to retain his former status and to exercise his powers, not simply "in the same way as if the Act had not been made" (which words occur here), but the words were very emphatic and very remarkable, namely, in the same way as "if the lands had remained open and uninclosed, [* 296] or this Act had not been passed;" * that is to say, that for the purpose of giving effect to the reservation in the lord's favour, and the rights expressly conferred upon the lord by the Inclosure Act, the hypothesis of the lands remaining in an uninclosed state was, as between him and the surface owner, established by the Act; and that was pointed out as one of the reasons for the conclusion which was arrived at by one of the noble and learned Lords who then advised the House. But, secondly, there was not in that case a mere reservation, but there were words operating by themselves to confer, by the authority of the Legislature, upon the lord, in respect of the exercise of those reserved rights, a great number of privileges expressly enumerated, and affecting the surface, which might or might not, but probably would not, have followed from a mere reservation. And Lord HATHERLEY, in advising the House as to its judgment, said that the enumeration of those rights, granted and not merely reserved by the Act of Parliament, was the reason which mainly weighed upon his mind in leading him to the conclusion to which he came, he finding in those words, not indeed in express language a power to let down the surface, but what he thought was practically equivalent to it, namely, a power totally and permanently to destroy the surface, and to take away the beneficial enjoyment of any part of it from the persons to whom the allotments had been made. And, thirdly, there was there (which was also much and justly relied upon) an absolute and unqualified clause of compensation; so that whatever might be the extent of the damage sustained, full reparation for that damage would be made to whoever might be the person who sustained it. All those things were relied upon, and all formed ingredients in that judgment, but all are absent here.

I need say no more, but I move your Lordships to affirm the judgment appealed from, and to dismiss the appeal with costs.

Lord WATSON: —

My Lords, the respondents are the owner and tenant of a parcel of a moor or waste within the manor of Elvet, allotted to the predecessor in title of the former, by statutory commissioners acting under an Inclosure Act of 1772, in respect of, or as appurtenant to his ancient freehold dwelling-house within the * manor; and the Act provides that such parcels of land * [297] shall be "held and enjoyed" by the allottees, "in the same manner" and by the same tenure as the dwelling-houses, in respect of which the allotment was made, were then holden. The appellants are mineral lessees under the Dean and Chapter of Durham, the lords of the manor of Elvet, to whom are reserved, by the express terms of the Act, all mines within the limits of the divided waste, with power to work the same.

The respondents, being thus in right of the surface, are entitled to have it supported by the subjacent strata, unless the appellants can show that, by the terms of the statutory reservation in their favour, the lords of the manor have the right to let it down, in the course of their mineral workings. The principles of law applicable to a case like the present are, in my opinion, precisely the same with those which govern the mutual rights of the respective owners of the surface and of the minerals below, when the *plenum dominium* of the land has been split into these two estates, by grants proceeding from a common author.

The Act of 1772 declares that nothing therein contained shall prejudice the title or interest of the dean and chapter in and to the "royalties" incident to the manor; but that they and their successors shall ever thereafter "hold and enjoy" (*inter alia*) all "mines," and that in as "full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." After the judgment of this House in *Duke of Buccleuch* v. *Wakefield*, L. R. 4 H. L. 377, an authority upon which the appellants rely, I think it is impossible to hold that a reservation expressed in these terms is, *per se*, sufficient to give the lords of the manor a right to work their minerals so as to let down the surface. In *Duke of Buccleuch* v. *Wakefield*, Lord CHELMSFORD said that the Duke "must establish his right to work his mines, notwithstanding the

inevitably injurious consequence to the respondents' surface, by proof either of a custom within the manor, or of an authority derived from the Act for inclosing the wastes of the manor." Here the existence of such a custom within the manor, as would sustain the right asserted by the appellants, is negatived in [* 298] the * joint case for the parties. It was no doubt decided in *Duke of Buccleuch* v. *Wakefield*, L. R. 4 H. L. 377, 406, that his Grace had the right which he claimed, under the provisions of the special Inclosure Act; but there the clause of reservation, besides expressly authorising a great variety of enumerated operations, both above and below ground, some of which involved the disturbance, if not the destruction, of the surface, concluded with a general power to the mine owner to do all further and other acts whatever for getting the said mines and minerals, and carrying on the works thereof, and disposing of and carrying away the same, in as full and ample a manner as if the lands had remained open and uninclosed, or the Act had not been passed.

The terms of the reservation to the Dean and Chapter of Durham present a marked contrast to the broad and comprehensive terms of the clause with which the House had to deal in *Duke of Buccleuch* v. *Wakefield*, a clause which, to use the words of Lord HATHERLEY, conferred the "largest imaginable power" upon the owner of the mines; yet in that case the decision of the House was given in his favour, not because the clause *per se* enabled him to work so as to cause subsidence, but in respect that its powers were made subject to the condition that those who worked the mines, should make full compensation for all injury thereby occasioned to the owners of the surface. I concur in the opinion expressed by MELLISH, L. J., in *Hext* v. *Gill*, L. R. 7 Ch. 717, that "no one can read the judgment without coming to the conclusion that, if the provision as to compensation had not been there, the House of Lords, notwithstanding the strength of the other words, would in all probability have come to another conclusion." But the contrast between the compensation clauses in that case and the present is also very marked. There every person, whose interest in the surface was injuriously affected, was to be fully indemnified. Here, under the Act of 1772, no one is to receive compensation, except the occupant of the surface for the time being; the amount of compensation payable is restricted to £5 per annum for each acre of surface damaged; and all liability

on the part of the mine owner to pay that restricted sum ceases the moment he desists from working. No compensation is provided * to the owner of the surface, who is not in [* 299] the personal occupation of it, during the time of working, though his property may be permanently injured; and, even if he does occupy himself, he is not to be compensated for any damage accruing (as, for instance, from subsidence) after the workings have ceased. A compensation clause, in these terms, so far from suggesting or supporting the inference that the mine owner was to have power to let down the surface, points to the very opposite conclusion.

I think it must always be presumed that a clause providing compensation was intended to cover the damage resulting to the landowner from the exercise of the powers previously reserved or granted to the owner of the mines. It is not the proper office, nor is it presumably the intention of such a clause, to define or extend the powers given to the mine owner; and it is frequently *ob majorem cautelam*, and in the interest of the landowner, expressed in comprehensive terms, so as to include every species of damage which may result from operations which are consistent with giving support to the surface. The clause may, nevertheless, be so expressed as to explain the character and extent of these powers, as was the case in *Aspden* v. *Seddon*, L. R. 10 Ch. 394, where the power reserved to the mine owner was to work the subjacent minerals without entering upon the surface of the lands. That power would not, of itself, have warranted letting down the surface; but it was made subject to the condition that the person working the mines should pay for all damages to erections on the surface occasioned by the exercise of the reserved power. Entry on the land being prohibited, it was a reasonable, if not a necessary, inference in that case, that the kind of underground working, contemplated and sanctioned, was such as would cause subsidence and injure buildings erected on the surface. But any such inference derived from the terms in which compensation is provided, must, in my opinion, be plain and unequivocal: otherwise general words, which were only meant to include every possible injury that could be caused by working without disturbance of the surface, might be construed as a power to let it down.

I agree with your Lordships that the judgment appealed from ought to be affirmed.

[* 300] * Lord BRAMWELL: —

My Lords, I also am of opinion that this judgment should be affirmed. Before the inclosure award the dean and chapter were owners of the soil, the surface, and all on it and under it, — subject indeed to a right of common, the existence of which, however, seems to me immaterial. By that Act and the award they ceased to be owners of the soil generally, but remained owners of the minerals. If there had been nothing more in the Act, the dean and chapter would have had no right to touch the surface to get the minerals. And if all the right the Act gave them was to use such part of the surface as was necessary to get the minerals, they would have no right in getting them to let down the surface. In other words, when the ownership of the soil generally and of the minerals is severed, the mineral owner has no rights as against the surface in getting the minerals except what the instrument of severance gives him, and if it gives the right to get the minerals without more, there is no right to let down the surface. This is well put — indeed the subject generally and the questions that arise in this case are very well treated — in MacSwinney on Mines, Quarries, and Minerals, pp. 293 to 334.

The appellants in this case say that rights are given to the dean and chapter by the Inclosure Act not only to interfere with the surface to get the minerals, but also to let it down, and they rely on the general words that the dean and chapter are to "hold and enjoy the mines in as full, ample, and beneficial manner as they could or might in case this Act had not been made." I cannot agree. For it is clear to me that that does not relate to working, but to property. The section begins that the title of the dean and chapter to the royalties incident or belonging to the manor shall not be prejudiced, lessened, or defeated by anything in the Act, "but that" they as owners of the royalties shall hold and enjoy all rents, mines, &c., to the owners of the manor incident, belonging, or appertaining. This relates to property. The power of working, so far as given, is in the next section. Supposing that the previous section would, without the subsequent, give the right claimed, it would give it without compensation. But the subsequent section being there shows
[* 301] * what is to be compensated, and consequently limits the meaning which the former section might have if it stood alone.

The appellants further say that the power is to be found, not indeed in express words, but as the result of the provisions for compensating the owner which it is said include all kinds of damage, and therefore subsidence. I do not know if the antecedent probabilities are in favour of the respondents or the appellants. If the appellants are right, inasmuch as they contend that they may let down and destroy a house, and admit that for that adequate compensation is not provided, it follows that until the minerals are exhausted and subsidence finished, the owner of the soil cannot use it to its best advantage. On the other hand, if the respondents are right the owner of the minerals can rightfully take half of them only, and might be stopped from taking anything the result of which would be subsidence of the surface. Either way there seems a loss.

We must examine the statute to see on whom it falls. And the problem we have to solve is a very common one, viz., what provision has been made for a case not contemplated? I say a very common one, for it continually happens that extensive words are used to comprehend cases not particularly contemplated. As I have said, the appellants say, not that the right they claim is given in express words, but that it is shown by the provision for compensation for damage. I am of opinion, however, that the damage contemplated is temporary only, a damage to the person in possession, not to any reversioner or remainder-man. The statute uses the present participles "working," "laying," "making," "using," and says that satisfaction shall be made for the "damage" and "spoil of ground" occasioned thereby to the person in possession at the times of such damage and spoil, and the damage is to be paid yearly during the time of working or continuing or using such ways for every acre so damaged. This, I think, clearly contemplates temporary damage during the working from which the person in possession alone suffers. It is impossible to say subsidence is included in this, for the subsidence may not take place till long after the working. Certainly, subsidence where a house or barn is let down is not contemplated. As to that, however, it may be said it is the folly of the landowner to build it. But even without any house being built the * damage by subsidence is permanent. The [* 302] level of the surface is destroyed, and if any gap or steep descent is made, the landowner would have to fence. Anyhow,

subsidence is a permanent damage, and may be long after the working. There is no provision for compensating for that.

I am not insensible to the force of the argument of the Solicitor-General. He says, if the argument for the respondents is right, inasmuch as the damage from a spoil bank or a shaft is permanent, either there is no right to sink a shaft or make a spoil bank, or the Legislature has thought that compensation to the person in possession was enough, and if so, why is not the same true of subsidence, it being always the surface which is injured? This is a strong argument. It is singular that no express power is given to sink shafts or deposit spoil. Whether this matter was not thought of, or the right was supposed to be "incident" to the manor, or it was thought that damage to the reversion from shafts and spoil was not of sufficient consequence to the reversioner to require compensation to be provided, I cannot guess. Perhaps there is no right to sink shafts and deposit spoil. I think there is. But it does not seem to me that because no provision is made for compensation to the reversioner for one permanent damage, there is therefore a right to inflict on him another one which may damage him only, and not the person in possession during the working.

In the result it seems to me that the compensation is to be for what the Legislature considered damage to the person in possession during working; that if it has authorised shafts and spoil it has considered them damages to that person or sufficiently compensated for by payment to him, or forgotten the matter; anyhow, that it has not provided compensation for subsidence, and consequently has not authorised its being caused.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 3rd March, 1884.

ENGLISH NOTES.

As to the right of support, generally see *Dalton* v. *Angus*, No. 8 of "Easement," 10 R. C. 98 *et seq.* As to the time when the cause of action arises, see notes to *Wedgewood* v. *Bailey*, No. 4 of "Action" (Right of), 1 R. C. 556 *et seq.* And see the case of *Humphries* v. *Brogden*, No. 2, p. 407, *ante*.

Harris v. *Ryding* (1839), 5 M. & W. 60 (referred to by Lord SELBORNE, p. 659, *ante*), was an action on the case for the negligent work-

ing of a mine. The land had been granted, "excepting and reserving" to the grantor, "his heirs and assigns, all and all manner of coal — seams and veins of coal" and other minerals, "with free liberty of ingress, egress . . ." to the grantor, &c., to dig, work, &c., and with a clause for compensation. It was held that the mine owner under the reservation had no right to take away all the coal, without leaving so much as to be a reasonable support to the surface. PARKE, B., observed: "The grantor can be entitled under the reservation only to so much of the mines below as is consistent with the enjoyment of the surface according to the true intent of the parties to the deed, that is, he only reserves to himself so much of the mines and minerals as could be got, leaving a reasonable support to the surface. That is the true construction of this deed, in order to make it operate according to the intention of the parties. It never could have been in their contemplation, that, by virtue of this reservation of the mines, the grantor should be entitled to take the whole of the coal and let down the surface, or injure the enjoyment of it; it is very like the case of the grant of an upper room in a house, with the reservation by the grantor of a lower room, he undertaking not to do anything which will derogate from the right to occupy the upper room; and if he were to remove the supports of the upper room, he would be liable in an action of covenant; for the grantor is not entitled to defeat his own act by taking away the underpinnings from the upper room. So in this case he would be acting in derogation of his grant if he were to take away the whole of the coal below, he having granted the use of the surface to the grantee. If that is the true construction of the reservation and power, the defendant ought to have stated in his plea that he took the coal he did take, leaving a reasonable support for the surface in the state it was at the time of the grant. It becomes unnecessary to inquire whether or not he was bound to leave support for an additional superincumbent weight upon the surface; probably he would not be; but this plea is clearly bad, because the defendants do not assign that in taking away the coal they did leave a sufficient support for the surface in its then state. . . . Then as to the compensation clause: it seems to me, upon the true construction of the covenant, that the provision applies only to the exercise of rights upon the surface."

In *Taylor* v. *Shafto* (Ex. Ch. 1867), 8 B. & S. 228, the plaintiff claimed under a conveyance of land in 1857, which reserved the coal under the estate, with power to the grantor or persons entitled thereto to work and carry away the coal, paying compensation for damage sustained thereby, and containing a covenant by the grantor against incumbrances. The action was for breach of covenant by reason of the lessees under a former lease (made in 1844) of the mines, working so as to let down the surface. Houses had been built on the land (by the

plaintiff or persons through whom he claimed) subsequently to the conveyance of 1857; but it was found by the jury that the plaintiff had not overloaded the surface by the houses built on it, and that the lessees had properly worked the mines. The effect of the lease of 1844 had been the subject of a judgment of Vice-Chancellor WOOD in an action of *Shafto* v. *Johnson;* and he had held that the lessees under that lease were not only entitled, but bound, to get all the coals which could be got with safety to the mines, although the support of the surface was thereby removed. The Judges of the Queen's Bench saw no reason to differ with the decision of Vice-Chancellor WOOD in the former case; and accordingly held that the fact of support being removed in accordance with that lease was a breach of the covenant for title in the conveyance of 1857. In the Exchequer Chamber, the Court, on an independent consideration of the lease of 1844, came to the conclusion that the lessees under it were not only authorised, but bound, so to work the mines as to obtain therefrom the largest quantity of coal that could be gotten consistently with the safety of the mines, and without regard to the safety of any dwelling-house which might be erected after the date of the lease upon any portion of the surface, not specially protected by any of its provisions. They considered that the covenant for title was broken by the prior grant of that lease, and affirmed the judgment of the Queen's Bench accordingly.

The judgment of Vice-Chancellor WOOD in the case of *Shafto* v. *Johnson*, referred to in *Taylor* v. *Shafto*, is given in a note to the report of that case (8 B. & S. 252), and contains some valuable comments upon the principles applying to the interpretation of such leases. It appears from this judgment that the lease contained a grant of the general powers of mining "subject to the restrictions in that behalf hereinafter contained;" then there was a covenant to pay the tenants or occupiers of the land £4 per acre "by way of satisfaction for the loss, damage, or spoil of so much of their lands as should be occasioned by pit room or heap room, or by the exercise or enjoyment of any of the liberties, privileges, or easements thereby granted;" then there was a covenant by the lessees that they will work and carry on the colliery "in a fair, proper, and orderly manner, and according to the best and most approved method of working collieries of a like nature on the rivers Tyne and Wear, and so as to produce with safety the greatest quantity of merchantable coals from and out of each of the workable seams thereof, and shall not nor will at any time during the said term knowingly do or suffer to be done any wilful or negligent act, matter, or thing whatsoever which may hazard or endanger the said colliery, coal mines, and seams of coal, or any of them, or which may bring any creep or thrust upon the same, or occasion any loss, damage, or detri-

ment thereto, or which may tend to hinder, stop, or obstruct any of the water courses, air courses, passages, or drifts which shall be in or belonging to the same." Then there was a covenant that the lessees "shall not nor will sink any pit or pits within two hundred yards of any dwelling-house, building, or farm-yard erected or to be erected upon any of the lands or grounds hereinbefore mentioned without the consent in writing of the lessor or his assigns;" and then there is a covenant that they "shall and will leave the coal in each and every seam which may be wrought under the mansion-house or offices at Whitworth Park, by virtue of this demise, to the extent of the line delineated upon the surface plan upon the back of these presents and therein coloured blue, which said coal shall be left for the support of the said mansion-house and offices, and shall not be reduced or passed through without such consent as aforesaid on any pretence whatsoever; and shall not nor will, without such consent, carry on any surface operations upon, nor by any means whatsoever do or occasion any injury or damage to such parts of the lands or grounds hereinbefore mentioned as are now occupied by dwelling-houses and their respective offices, or by gardens or pleasure-grounds or farm-yards, or by either of the parks belonging to the Whitworth estate." The learned Vice-Chancellor commenced his judgment with the following observations: "I have carefully considered this lease, and I cannot arrive at the conclusion that any act has been done by the lessees which is unlawful and contrary to the stipulations contained in it. These cases are not easy to be determined, and, although we are greatly assisted by the light of authority thrown upon them through the decisions in the House of Lords, there is none which represents precisely the case now before me. There are two classes of authorities. First. It is settled that whether there is a grant originally of the minerals reserving the surface, or whether there is a grant of the surface reserving the minerals, the *primâ facie* presumption of law, in whatever way the two properties became separate, is that the owner of the surface has the clear right to the support of it, notwithstanding another person may have an equal right to the minerals and to work them. But then the matter stands exactly as it was put by Lord WENSLEYDALE in *Rowbotham* v. *Wilson* (*ante*, p. 647, 8 H. L. C. 348, 30 L. J. Q. B. 49), which, however, does not materially assist the present case, because there was an express provision which indicated very clearly and definitely the intention of all the parties to the original arrangement that there should be a disturbance of the surface, and they bound themselves to acquiesce in it, as the House of Lords ultimately held, the main question being more upon technical grounds than upon any substantial equity in the case, viz., whether a clause in an award contained words which could operate by way of grant as between the

parties who were concerned in the litigation. Lord WENSLEYDALE said (*ante*, p. 654, 8 H. L. Cas. p. 360, 30 L. J. Q. B. p. 53): 'The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Primâ facie*, it must be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved, as a necessary incident. It is one of the cases put by Sheppard (Touchstone, chap. 5, p. 89) in illustration of the maxim, "Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit," that by [the] grant of mines is granted the power to dig them. A similar presumption, *primâ facie*, arises, that the owner of the mines is not to injure the owner of the soil above by getting them, if it can be avoided. But it rarely happens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired; and, then, the only question would be as to the construction of that deed, which may vary in each case. The question to be decided in this case is, what sort of right the defendant had upon the facts stated in the case reserved, to get and take away the coals under the plaintiff's land.' Mr. Giffard called my attention to a case in which my judgment went as far as any of the authorities in favour of the person who had reserved the reversion. And in the subsequent decisions in the House of Lords I see every reason to adhere to it. In *Dugdale* v. *Robertson* (3 K. & J. 695), there were the common powers, as in the present case, to dig, open, search for, work, &c., iron, ironstone, and coals, 'except in or upon any demesne lands and pleasure grounds belonging to and occupied with the mansion called Brymbo Hall, and coloured red upon the said plan.' And upon that the question was whether the mines and minerals under the lands coloured red were included in and passed by the lease. Then there was a proviso, 'That all pits or works sunk or raised for the purpose of working the minerals under the grounds coloured yellow in the plan should be sunk and raised at the furthest point from the mansion-house, at the part coloured yellow.' The contest there, as it has been here, was that the exception of the mansion-house did not override the general right of the plaintiff to have his surface protected, because it might well be that, having that special object in view, he would fence it with a special and particular precaution not at all waiving his general right. And that was the conclusion to which I came. I said (3 K. & J. p. 699), 'The question in this case resolves itself into the construction to be put upon the indenture; and upon the terms of the indenture it is clear that the mines and minerals under the lands coloured red were included in and did pass by the lease; but that the defendants were not authorised by that indenture to work them, or to execute any works upon those

lands, or to search for any coal or mineral therein.' I added, 'As to the rest of the lands comprised in the indenture, the common-law right is now clear from the decision of the Court of Queen's Bench in *Smart* v. *Morton* (5 E. & B. 30) — although that did not carry the law further than the decision of the Court of Exchequer in *Harris* v. *Ryding* (5 M. & W. 60). In *Smart* v. *Morton* there was a plea that in the deed by which the surface was granted to the parties through whom the plaintiff claimed there was an express reservation of the mines, with liberty to work those mines and drive drifts, and use any other ways for the better and more commodious working and winning the same; and the grantor covenanted to pay treble damages for such loss or damage as should be sustained by the grantee; that it was in the necessary and needful working of the mines that the defendant had caused the damages complained of, and that he was ready to pay damages according to the covenant. But, on demurrer, the Court held that the plea was bad; for the occupier of the surface had a *primâ facie* right to the support of the subjacent strata, and the deed did not authorise any working in derogation of that right. And so conversely, where the minerals are demised and the surface is retained by the lessor, there arises a *primâ facie* inference at common law upon every demise of minerals or other subjacent strata, that the lessor is demising them in such a manner as is consistent with the retention, by himself, of his own right to support, as in the case put in the judgment of the House of Lords (*Caledonian Railway Co.* v. *Sprot*, p. 686, *post*) of a demise of the upper part of a house. If I demise to you the lower story of a house, and reserve to myself an upper story, the presumption is that I do not part with my right to be supported by the story I demise. It is true, there may be an express stipulation, as there was in *Rowbotham* v. *Wilson* (25 L. J. Q. B. 362), by which the owner of the surface waives his right to support, and agrees to allow the mines to be so worked as to destroy his property; but in the absence of express words showing distinctly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et formâ* as it was before, and with that natural support which it possessed before he parted with the subjacent strata.' In that passage I put the case as strongly as it well can be put against the view I am entertaining in the present case; and I came to the conclusion that there was a clear indication upon the face of the deed throughout that the plaintiff was most anxious to preserve Brymbo Hall, and there was a covenant to supply the owner for the time being with coal at Brymbo Hall. The result of my investigation was that the special provisions or clauses put in to protect the particular house might be thought not to go far enough in themselves, and that the plaintiff had not waived or indicated any intention to waive the

support to the house, but, on the contrary, those clauses were put in for the purpose of reserving to himself all his general and common-law rights to support, and *ex majori cautelâ* he took care to preserve that special support, and whatever the lessees did they must not let down the house. It did not appear to me that the *expressio unius* was the *exclusio alterius*, but on the contrary, the *expressio unius* was the expression of that which it was the purport and intention of the instrument to carry out all through. The present case seems to me exceedingly different." The learned Vice-Chancellor then adverted to the special terms of the lease as above stated, and then observed that on taking the covenants together, "the necessary inference is that it is the intent that all the coal that can be got without hurting the mine shall be got, provided always that certain specified property, and that alone, shall be protected, and its surface right to support saved. In that respect, the present differs widely from the case of *Dugdale* v. *Robertson* (3 K. & J. 695). The lease protects not merely the mansion-house and dwelling-houses, but gardens, pleasure-grounds, and the parks; so that the whole surface is contemplated. The parties who had this instrument before them, and were preparing to settle their mutual rights and the rights of those who came after them under it, provided, on the one hand, for the benefit both of the lessor and of the lessees that they should work all the coal that they could get, and, on the other, for the benefit of the lessor that not only his mansion-house and certain other houses should be protected, but all those then existing upon the estate, the extent of the protection being carefully defined by the words used. When a large portion of the surface is thus selected and protected from disturbance without consent, the inference is irresistible that the working under any other part of the surface is to go on so as to get the greatest quantity of coal. . . . It seems to me, therefore, that, as far as regards any portion of the coal worked under land which was simply agricultural, either cultivated or waste, where and on which no buildings were then standing, there has been no infringement of the covenant by the lessees, as they were only bound to support that land upon which the eighteen houses stood, but which had been allowed to be let down by the working five or six years ago to the knowledge of all parties. The circumstance that five hundred or any other number of houses have since been built will not alter the rights or duties or obligations of the lessees. The lessor is the person who comes here to complain, and he has knowledge of the lease and its contents, and must be taken to have known all the consequences which result from the lease."

In *Williams* v. *Bagnall* (1867), 15 W. R. 275, 12 Jur. (N. S.) 987, a plot of land had been conveyed excepting and reserving the mines, with full power to work the minerals without entering upon the land,

and without being answerable for any injury that may arise to the land "or to any of the buildings which shall at any time hereafter be erected upon the said land or any part thereof, by reason of the working," &c. It was held by Vice-Chancellor WOOD that under the express terms of the reservation the grantor was entitled (assuming that the work is done in a reasonable way) to get the coal under the land without being answerable for letting down the surface.

In *Richards* v. *Jenkins* (1868), 18 L. T. (N. S.) 437, 17 W. R. 30, KELLY, C. B., says: "The principle of law to be deduced from all the authorities and directly established by *Harris* v. *Ryding* (cited p. 672, *supra*), and *Humphries* v. *Brogden* (p. 407, *ante*), is that a grant or reservation of mines in general terms confers a right to work the mines, subject to the obligation of leaving a reasonable support to the surface as it exists at the time of such grant or reservation."

In the case of the *Duke of Buccleuch* v. *Wakefield* (H. L. 1870), L. R. 4 H. L. 377, 39 L. J. Ch. 441, 23 L. T. 102, frequently referred to in the above principal case of *Love* v. *Bell*, the local Inclosure Act under which the surface of the waste was enclosed contained a very elaborate clause, which, besides reserving to the lord the minerals under the waste, expressly conferred upon him a large number of powers to erect works, &c., so as to spoil the surface in a variety of ways, and then were added the words, "in as full and ample a manner as could have been done if the lands had remained open and unenclosed and this Act had not been passed . . . making compensation for damages done by such works," — it was held that the express and special powers were not limited by the words "in as full and ample a manner," &c., inasmuch as the rights of the lord as owner of the soil as against the commoners having rights of pasturage, &c., under the former conditions, could not supply a measure applicable to the rights as between the owner of the minerals and the owners of the surface: — and, in effect, that the special powers amounted to an unlimited power to spoil the surface, on compensation being made.

In *Eadon* v. *Jeffcock* (1872), L. R. 7 Ex. 379, 42 L. J. Ex. 36, 28 L. T. 273, 20 W. R. 1033, a bed of coal was leased with working powers, at a certain rate per acre for coal actually got, "including all ribs and pillars left in working the said coal except" certain pillars particularly specified. It was held by Barons CLEASBY and MARTIN, BRAMWELL, B., doubting, that the lessees, working in a proper manner, were entitled to take away the pillars, except those specified, although the surface was thereby let down.

In *Smith* v. *Darby* (1872), L. R. 7 Q. B. 716, 42 L. J. Q. B. 140, 26 L. T. 762, 20 W. R. 982, there was a demise of minerals with powers and provisions for compensation in various ways which implied

the prospect of the buildings being damaged by subsidence; and it was held that there was a sufficient implication of an intention that the lessees should have the right to work the mine so as to let down the surface, paying damages.

Buchanan v. *Andrew* (1873), L. R. 2 H. L. Sc. 286, was a Scotch appeal decided in the House of Lords upon a feu contract entered into between Colonel Buchanan (owner of the land and minerals) as superior, and the appellant as feuar. The material clauses of the contract were as follows: "Reserving always [to the superior, his heirs and successors] the whole coal, fossils, fireclay, ironstone, limestone, freestone, and all other metals and minerals in the said piece of ground, with full power to work, win, and carry away the same at pleasure, as also to remove as much stone and other matter as may be necessary for the proper working of the said coal, ironstone, and others, and that free of all or any damage which may be thereby occasioned [to the feuar, his heirs, &c.]; and it is expressly agreed that the [superior, &c.] shall not be liable for any damage that may happen to the said piece of ground, buildings thereon, or existing hereafter thereon, by or through the working of the coal, fireclay, ironstone, freestone, or other metals or minerals in or under the same, or in the neighbourhood thereof, by long-wall workings or otherwise, or which may arise from or through the setting or crushing of any coal-waste, or other excavation presently existing, or which may exist hereafter within or in the neighbourhood of the ground hereby disponed, through the said [superior, &c.] working or drawing the said metals or minerals, or others as aforesaid; and that the [feuar, &c.] shall not be entitled to claim damages on the ground of any loss or inconvenience arising from any wells, &c., being diminished, &c. . . . And further the [feuar] binds and obliges himself, &c., to erect a single or double dwelling-house or villa of one story with attics, &c., and to maintain the same, &c. . . ." At the date of the contract (in 1859) the state of matters appearing on the evidence was as follows: There were a considerable number of houses on the property, under which coal had been worked for a number of years on the old stoop and room principle, under which large pillars of coal are left to support the surface. A short time previously to the contract a new system of working had been introduced, by which these pillars were taken away and nothing left for support. At the date of the action the appellant's house was still supported by the old pillars, but the respondent's lessees in their new workings were approaching this part of the property, and claimed the right to remove, and threatened to remove, these pillars. The Court of Session granted an interdict. The House of Lords reversed the orders, holding that by the express terms of the contract, and notwithstanding the feuar's obligation to erect and

maintain a house, the mineral owners were relieved of any obligation to support the surface. The LORD CHANCELLOR (Lord SELBORNE) laid down the law, applying to Scotland as well as England, as follows: "Generally speaking, when a man grants the surface of land, retaining the minerals, he is guilty of a wrongful act if he so uses his own right to obtain the minerals as to injure the surface, or the things upon it; and as prevention is better than cure, the Court would be justified in granting an interdict to prevent him from doing so. But, on the other hand, I apprehend it is the clear law of England, and also of Scotland, that when two persons meet and deliberately settle a contract, they are at liberty to enter into such terms (not being contrary to the public law) as they may think fit; and if a feuar of surface lands is willing to take the risk of any injury which may be done by the working of the subjacent minerals, it is perfectly lawful for him to do so; the person who was previously the owner of the entirety being under no antecedent obligation to part with any portion previously his own, except upon such terms as are mutually agreed upon." The question, therefore, resolved itself into one of construction; and upon an analysis of the stipulation of the contract, he considered it clear that the possible event of the surface being let down by a working of the whole coal upon the modern system was clearly contemplated and intended. Lord CHELMSFORD and Lord COLONSAY expressed opinions to the same effect.

In the case of *Aspden* v. *Seddon* (1875), L. R. 10 Ch. 394, 44 L. J. Ch. 359, 32 L. T. 415, 23 W. R. 580, referred to by Lord WATSON (p. 669, *ante*), a plot of land had been conveyed to a cotton manufacturing company under an exception of the mines with general powers to work them, "but without entering on the surface of the said premises, or any part thereof, so that compensation in money be made by [the grantor and his successors, &c.] for all damage that shall be done to the erections on the said plot by the exercise of any of the excepted liberties, or in consequence thereof." The conveyance contained a covenant by the company to erect a cotton mill and other buildings on the land, and a covenant by the grantor to pay compensation, to be determined by arbitration, for all damage, spoil, &c., to be sustained by the owner, tenant, or occupier of the land, or of any buildings, &c., in respect or in consequence of working the excepted mines. It was held by the Court of Appeal, affirming the decision of the MASTER OF THE ROLLS, that on a fair construction of the instrument the intention was, that the mines might be worked so as to damage the buildings, on compensation being made.

In *Benfieldside Local Board* v. *Consett Iron Ore Co.* (1878), 38 L. T. 530, the question was whether, under a reservation to the lord by an Inclosure Act of the mines under the waste, the mine owner had a

right to work the mines so as to injure the highways set out under the Act. It was held by KELLY, C. B., and CLEASBY, B., that whatever his powers might be as against the owner of an allotment of the surface, he could not have such a right as against the public using the highways expressly set out under the Act.

In *Davis* v. *Treharne* (H. L. 1881), 6 App. Cas. 460, 50 L. J. Q. B. 665, 29 W. R. 869, the author of the respondent (who was plaintiff in the action) had (in 1869) demised to the appellant (defendant) certain veins, mines, and seams of coal, &c., under a certain farm, with power to the lessee to enter into and upon certain parts of the said farm, and to open, get, and carry away the said veins, &c., subject to certain rents and royalties. The lessee covenanted to work the veins, &c., "in the usual and most approved way in which the same is performed in other works of the like kind in the county of Glamorgan," and at the end of the term to compensate the lessor for any damage done to the surface of the said farm. It appears that at the time of the granting of this lease the grantor had already granted a building lease of part of the farm, and that he shortly afterwards granted a building lease of the rest of it. These leases became vested in the respondent, plaintiff in the action. The action was for damages against the appellant as mine owner for working the mines so as to injure the plaintiff's land and buildings. The question was whether the *primâ facie* right of support was taken away by the terms of the mining lease. The House of Lords held that it was not. The LORD CHANCELLOR (Lord SELBORNE) observed that the existence of the covenant by the lessee to work in "the usual and most approved way of working in the county of Glamorgan," assuming that the usual way involved a letting down of the surface, could not have been intended to absolve the lessee from a legal obligation (that of support) collateral to the working of the mine. Lord BLACKBURN observed that the compensation clause was obviously meant to include surface damage arising from the powers of entry and user of the surface, and therefore did not, by implication, rebut the usual presumption against the right to let down the surface.

Lord WATSON stated the principles applying to the case as follows: "When a proprietor of the surface and the subjacent strata grants a lease of the whole or part of his minerals to a tenant, I think it is an implied term of that contract that support shall be given in the course of working to the surface of the land. If it is not intended that that right should be reserved, the parties must make it very clear upon the face of their contract; in other words, they must express their intention so clearly as to enable a Court to say that such intention is plain. I think that rule was laid down by the late Lord Justice MELLISH in the case of *Hext* v. *Gill* (L. R. 7 Ch. 699, 41 L. J. Ch. 761), and I

quite agree with that ruling. It may be done in express terms; but, of course, it is not necessary that express language must be used; for it may appear by a plain implication from other clauses of the deed, as in the case of *Taylor* v. *Shafto* (8 B. & S. 228), where an obligation was laid upon the tenant to perform certain acts which were plainly inconsistent with supporting the surface. But, applying those principles to the present case, I am quite unable to find in the terms of this mineral lease of July, 1869, anything to countenance the view that the parties did intend to take away from the landlord, who was letting his minerals, the right to have the surface supported."

In *Dixon* v. *White* (H. L. Sc. 1883), 8 App. Cas. 833, it was held that on a sale of land reserving minerals, if the vendor desires to have the power to get them so as to let down the surface, he must frame his power so that the Court may be able to say from the titles that such was clearly the intention of the parties. The grant in question was made by a feu-disposition of "all and whole the coal and ironstone in the whole lands of G." and other specified lands described with reference to a plan, "being the whole coal and ironstone which belongs to me, with full liberty and power to [the grantees and their assigns] to work and win the foresaid coal and ironstone for their own benefit and advantage; and for that purpose with full power and liberty to them to set down coal-pits, make coal-hills and mouths, drive levels, drains, erect dwelling-houses, engines, and oil-machinery necessary for the purpose of working or drawing the foresaid coal and ironstone." It was expressly declared that the grantees should not have liberty to set down any coal-pits, make any coal-hills, &c., or break the surface of the land belonging to the grantor on the north side of a line delineated on the plan — "with full power and liberty, however, [to the grantees] to work and win the coal and ironstone of the said lands lying to the north of the said line, provided the same be done from pits to the south side of the line, without breaking the surface of the land lying on the north side of the line . . . but for the whole damage and injury occasioned by the foresaid operations and roads and quarries to the foresaid lands [the grantor, his heirs, &c.], shall be completely paid and indemnified [by the grantees, &c.], who, by acceptation hereof, bind and oblige themselves to pay the damage occasioned by the said operations [to the grantors, &c.] as the same shall be ascertained by two neutral persons." Under this grant the clause stipulating for payment of damage was construed as referring to damage by accident or negligence to the surface, and not to have the effect of taking away or derogating from the presumptive right of the owner of the surface to insist that the owner of the minerals should leave sufficient support to sustain the surface uninjured. The rule in *Rowbotham* v. *Wilson* was followed;

and it was observed by Lord BLACKBURN that the same principle must be held to have been established in Scotland by the judgments delivered in the case of *Buchanan* v. *Andrew* (p. 680, *ante*).

In *Mundy* v. *Duke of Rutland* (C. A. 1883), 23 Ch. D. 81, 31 W. R. 510, a case turning on the construction of a special reservation in a grant involving the rights as between lessees of upper and lower strata of coal, there is much consideration of the general principles applying to grants of superimposed strata. Mr. Justice KAY, after observing that it was well settled that an owner of land by merely letting mines does not impliedly give up his right of having sufficient support left for the surface (*Harris* v. *Ryding*, 5 M. & W. 60, and *Davis* v. *Treharne*, 6 App. Cas. 460), and after observing that the degree of support for underlying strata is not necessarily the same as for the surface, said: "But there can be no question that when the owner of several seams of coal sells or lets some of the upper seams, he must by that grant confer on the purchaser or lessee a right to sufficient support from the underlying strata to enable him to use the strata granted for the purpose for which he acquired them." On the appeal, the MASTER OF THE ROLLS said: "It is quite plain that the grantor in a grant in fee, *à fortiori* that the lessor in a lease, cannot derogate from his own grant. If, therefore, he has granted two mines, or two veins or seams of coal, he has no right by working seams below to let down those veins or seams, nor has he a right to let down a barrier so as to drown the veins or seams." The Lords Justices COTTON and BOWEN concurred in this opinion, and they all considered that, as the special proviso in question did not clearly and unequivocally give the right to one of the lessees to break down a natural barrier to the injury of the other, he could not have any such right.

In the case of *Consett Waterworks Co.* v. *Ritson* (1888), 22 Q. B. D. 318, 702, 60 L. T. 360, the waterworks company had purchased from the allottee under an Inclosure Act land under compulsory powers, but had given no notice to treat in respect of the minerals which were vested in the lord of the manor. The Judges of the Queen's Bench (A. L. SMITH, J., and CAVE, J.) had concurred in holding that the Inclosure Act did not confer upon the lord of the manor a right to work the mines so as to let down the surface. On this assumption they proceeded to consider the effect of the clauses 18, 22, and 23 of the Waterworks Clauses Act, 1847 (10 & 11 Vict., c. 17), on which they differed in opinion, A. L. SMITH, J., being of opinion that under the 18th, 22nd, and 23rd sections of that Act, all the company were entitled to was the ownership of the surface without any right of support, CAVE, J., on the contrary, being of opinion that the lord of the manor had only the same right as he had before the purchase,

namely, the right to work the minerals, leaving sufficient support to the surface. The Court of Appeal, however, came to the conclusion, upon the special terms of the Inclosure Act in question (the Lanchester Inclosure Act, 1773), that it gave the right to the lord of the manor to work the mines so as to let down the surface without making compensation to the allottees; and, therefore, it became unnecessary to decide on the effect of the clauses of the Waterworks Act, 1847.

In *Greenwell* v. *Low Beechburn Coal Co.*, 1897, 2 Q. B. 165, 66 L. J. Q. B. 643, mines were granted by deed, with power to the grantee and his assigns to work, making reasonable compensation for all damage occasioned to the surface of the lands, or to buildings thereon, by the exercise of the powers. It was held by BRUCE, J. (following *Davis* v. *Treharne*, p. 682, *ante*), that damage by subsidence was not covered by the compensation clause, and, therefore, the assignees of the grantee were liable to an action to recover damages for injury to the surface by subsidence caused by the working of the mines.

AMERICAN NOTES.

Rowbotham v. *Wilson* is largely cited in Washburn on Easements, and *Love* v. *Bell* is cited in Jones on Real Property, sect. 538. The right of subjacent support has been sufficiently considered in notes to Nos. 1 and 2, *ante*, p. 449.

No. 21. — CALEDONIAN RAILWAY COMPANY *v.* SPROT.

(1856.)

No. 22. — GREAT WESTERN RAILWAY COMPANY *v.* BENNETT.

(H. L. 1867.)

RULE.

WHERE land is purchased under the powers of an Act of Parliament for the purposes of a railway or other artificial work authorised by the Act, then, in the absence of express provisions by the empowering Act or by the instrument of conveyance, the purchasers acquire with the land a right of support to their railway or other authorised work,

as well vertical from the subjacent minerals, as lateral from the adjacent land of the vendor.

But where land is acquired for a railway made under an Act incorporating the Railways Clauses Consolidation Act, 1845, which provides that the railway company is not to be entitled to the underlying minerals not expressly purchased, but that the landowner on giving notice may compel the company to buy them; then if the company refuse to purchase, the landowner may work the mines without regard to any support to the railway.

Caledonian Railway Company and Glasgow, Garnkirk, and Coatbridge Railway Company (Appellants) v. Sprot (Respondent).

1 Paterson (Sc. App.), 633–642 (s. c. 2 Macqueen, 449).

[633] *Railway. — Disposition. — Sale. — Reservation of Minerals. — Support of Surface. — Construction.*

S., a proprietor, sold to a railway company a portion of his land contiguous to the line, reserving right to work the minerals, but the conveyance was made subject to the conditions of an Act of Parliament previously obtained by the company, which provided that it should not be in the power of any proprietor reserving right to minerals to work them, without previous notice and security for damage to the line. It turned out that the minerals could not be worked without danger to the line.

Held (reversing judgment), that in his disposition S. by implication conveyed to the company the right to all necessary support of their line of railway, and he could not derogate from that conveyance by working the mines and removing that support.

An action of declarator and damages was raised at the instance of Mark Sprot, Esq., of Garnkirk, against the railway companies, in respect to certain minerals belonging to him under and adjacent to the Caledonian Railway.

[* 634] * On 12th December, 1834, the pursuer entered into an agreement with what was then called the Garnkirk and Glasgow Railway Company, by which, for certain sums of money, amounting in all to £624 5*s.* 11½*d.*, he sold and conveyed to them certain portions of the estate of Garnkirk, but "reserving always to me and my heirs and successors the whole mines and minerals,

of whatever description, within the said lands hereby conveyed, and full power and liberty to us, or any person or persons authorised by us, to search for, work, win, and carry away the same, and to make aqueducts, levels, drains, roads, and others necessary for all or any of these purposes, but subject always to the provisions and conditions of the said Acts of Parliament in relation to the working of minerals for the protection and security of the said company, and the said railway and works and traffic thereon."

The provisions in the Garnkirk and Glasgow Act, 7 Geo. IV., c. 103, s. 11, in the case of proprietors reserving their minerals, referred to in the above disposition, was, "Provided always, further, nevertheless, that it shall on no account be lawful to, or in the power of, any such proprietor, to work, win, or away take any of the said minerals without giving previous good and sufficient security to the said company for all damages, interruption of traffic, and other injury which may thence in any way result to the said undertaking or the said company; and in the event of the said company and any such proprietor not agreeing in regard to the extent or sufficiency of such security, then the JUDGE ORDINARY of the bounds shall regulate and determine thereupon, as to him shall appear just."

This Garnkirk and Glasgow Railway, which was at first merely a mineral line worked by horse power, was in 1844 extended and changed, by Act of Parliament, 7 & 8 Vict., c. 87, into the "Glasgow, Garnkirk, and Coatbridge Railway Company." Next year the new company was empowered to widen and improve the gauge of their rails by Act 8 & 9 Vict., c. 31, and finally, in 1846, the whole line was sold to and merged in the Caledonian Railway Company by the Act 9 & 10 Vict., c. 9.

In the first of the above-recited Acts the 7 & 8 Vict., c. 87, there were inserted several clauses in regard to the minerals under or adjacent to the line. It was provided in sect. 84, to protect the railway, that "if the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and

if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work or get the same."

And in sect. 85: "That if before the expiration of such thirty days, the company do not state their willingness to treat with such owner, lessee, or occupier, for the payment of such compensation, it shall be lawful for him to work the said mines, so that the same be done in manner proper and necessary for the beneficial working thereof; and if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the same shall be forthwith repaired or removed, as the case may require, by the owner, lessee, or occupier of such mines or minerals, and at his own expense; and if such repair or removal be not forthwith done, it shall be lawful for the company to execute the same, and recover from such owner, lessee, or occupier the expense occasioned thereby, by action in any competent courts."

In the Caledonian Company Act are incorporated the general regulations as to mines and minerals in the Railway Clauses Consolidation (Scotland) Act, 8 & 9 Vict., c. 33, ss. 70, 71, 72, 3, 4, 5, 6, 7, and 8.

Since 1834 the pursuer discovered that there was a valuable field of fire clay in that part of his estate traversed by the railway, lying partly under the line of railway, as well as on both sides of it, and he proceeded to work the minerals very extensively, having, according to his averment, expended upon the works a sum of between £20,000 and £30,000.

In August, 1848, he received a letter from the defender's agents intimating that the works carried on in the fire clay mines were endangering the safety of the railway, and calling upon him to find security to the company for damages, interruption of traffic, and other injury. To this there was appended a report by G. W. Robson, engineer, who stated that "Directly under the railway the depth from the surface to the top of the fire clay bed does not exceed eighty feet, and the thickness of the clay being eight feet, it follows that the excavation or void will also be eight feet, except at those places where the roof has already sunk; and recommended: 1. That if possible the railway company should stop any further working of the fire clay within sixty feet of the

centre of the railway between the points A. and B. on the plan. 2. That the spot should be watched, and if partial sinking takes place, the rails should be raised and laid on strong longitudinal sleepers, resting on cross sleepers, and that these cross sleepers should be twenty-four feet long, so as to extend under, and some distance beyond, both lines of rails. 3. That any future working of this clay to the west of A. or east of B. should only be permitted * if done by means of narrow mines, not exceed- [* 635] ing eight feet in width, to be driven at right angles to and under the railway. These mines not to be closer to each other than thirty feet, and to have no cross mines or rooms between them, until they extend beyond the distance of sixty feet from the centre of the railway on each side; but after passing these limits the workings may be widened out to the usual dimensions and form."

The ground conveyed by the pursuer to the railway company did not comprehend the whole space mentioned in Mr. Robson's report, extending sixty feet on each side from the centre of the railway, between the points A. and B. on the plan, and within which the company's engineer has reported the fire clay cannot be worked without endangering the security of the railway.

In these circumstances the pursuer, on 13th September, 1848, in terms of the 71st section of the Railway Clauses Act, 8 & 9 Vict., c. 33, served a notice on the secretary of the Caledonian Company, intimating his intention of working the minerals under and adjacent to the railway.

The company, however, declined to avail themselves of the option given by that statute of purchasing the minerals, or of paying compensation to the pursuer for leaving them unworked, and insisted on his finding caution for damages, &c., before proceeding.

The pursuer consequently raised the present action of declarator of his right to work the minerals both in the lands contiguous to and under the railway. The value of these minerals was estimated by him at £50,000. He likewise claimed damage for the loss sustained by the interruption of his workings since August, 1848, estimating it at £10,000.

The Court of Session held that this was a *casus omissus*, and that the company were bound to purchase the minerals under the line of railway and adjacent thereto.

No. 21. — Caledonian Railway Co. v. Sprot, 1 Paterson (Sc. App.), 635.

The railway company appealed against the judgment of the Court of Session, maintaining that it ought to be reversed, because, 1. The rights and obligations of parties, as fixed by the statute of 1826, and the disposition of 1834, are inconsistent with the findings and interlocutors appealed from. According to a just view of these rights and obligations, the appellants were entitled to be secured against, and indemnified on account of, operations dangerous and injurious to the railway, whether these operations are carried on under or near it; and the respondent was bound, before commencing operations on the minerals below the line, to find caution to indemnify the appellants against the consequences of these operations. 7 Geo. IV., c. 103; *Samuel* v. *Edinburgh and Glasgow Railway Co.*, 11 D. 968, 13 D. 312; Bell's Principles, s. 963. 2. The original rights and obligations of parties in regard to the minerals under and near the line were not affected by the statutes, special or general, passed subsequent to 1834. 9 & 10 Vict., c. 329, s. 3; 7 & 8 Vict., c. 87. 3. Neither the contract, nor the rights and obligations under the contract, were rescinded or altered by reason of the increase of traffic on the line.

The respondent supported the judgment on the following grounds: 1. Because the matters remitted by the Court under their interlocutor of date 31st March, 1853, to be reported upon, formed a proper and relevant subject of inquiry; and because the information obtained under the report had a most important bearing upon the main question in dispute. 2. Because, under the transaction of 1834, viewed in conformity with the local statutes upon which it proceeded, the condition as to finding security was not intended nor calculated to destroy the reservation of the whole minerals, and the reservation formed a material part of the transaction; and the respondent was entitled either to work his minerals so reserved, or to receive compensation for such part as the interests of the railway required to be left unworked. 3. Because the minerals in the lands of the respondent, situated on either side of the strip of ground sold by him to the railway company, did not fall within, nor were in any respect affected by, the transaction, or by local Acts; and because, in so far as the minerals were not regulated by the statutory provisions aftermentioned, the respondent, at common law, was entitled to the unrestrained use and enjoyment, or at least his use and enjoyment was only liable to be restrained within fair and reasonable limits, upon full com-

pensation. 4. Because the questions at issue were conclusively regulated in favour of the respondent, not only by the mining clauses contained in the local Act of 7 & 8 Vict., c. 87, but also, and more particularly, by the analogous and more complete provisions in the general Act 8 & 9 Vict., c. 33, entitled "The Railway Clauses Consolidation (Scotland) Act, 1845." Act 7 Geo. IV., c. 103, s. 6; Act 7 Geo. IV., c. 103, ss. 26 and 27; first branch of the case, the subjacent minerals, 7 Geo. IV., c. 103, 26th May, 1826; 7 & 8 Vict., c. 87, 17th July, 1844; Clauses Act, 8 & 9 Vict., c. 33, 21st July, 1845; Lord FULLERTON'S note in *Murray* v. *Johnston*, 13 S. 119; Ersk. ii. 1, s. 2; *Dunlop* v. *Robertson*, Hume's Dec. 515; *Robertson* v. *Strang*, 4 S. 6; 5 & 6 Vict., c. 55.

Sir F. Kelly, Q. C., Rolt, Q. C., and Anderson, Q. C., for the appellants. — The Act of 1826 empowered the owner of any lands taken "or prejudiced" to claim satisfaction for all damage to be sustained in or by the execution of the powers of that Act, so that the respondent was entitled to include every possible kind of damage, actual or contingent, in his demand. It is a well-known rule under Acts of this kind, that the owner, in making his claim, must include everything in the shape of damage that can accrue to the end of time, and is not entitled to return, time after time, on some fresh and unforeseen damage emerging, and thus eke out his claim. *R.* v. *Leeds and Selby Railway Co.*, 3 Ad. & El. 683. Landowners in such cases seldom err in including * too [* 636] little. Since, therefore, the respondent here chose to reserve his property in the minerals beneath the line of railway, he ought to have made a claim for the damage he must needs suffer by being unable to work them without giving security. The conveyance, in granting the surface of the land for the purpose of a railway being constructed on it, necessarily conveyed also, by implication, a right of support from the subjacent and adjacent soil; besides, it expressly states that the property in the minerals, and the right to work them, are subject to the safety of the railway. It is a well-settled principle, which has often been discussed of late in the English Courts, and is universal law, that when a party conveys his land for a particular purpose, he cannot by his acts derogate from that purpose. Thus, when the respondent disponed the surface of the land, in order that a railway might be constructed on it, he could not by working his minerals, whether in the soil subjacent or adjacent, do anything to defeat the purpose

for which the land was granted. *Harris* v. *Ryding*, 5 M. & W. 60; *Hilton* v. *Earl Granville*, 5 Q. B. 701; *Jeffreys* v. *Williams*, 5 Ex. 792; *Humphries* v. *Brogden*, 12 Q. B. 739 (p. 407, *ante*); *Smart* v. *Morton*, 5 Ell. & Bl. 30. So it is in Scotland. Bell's Prin. 670 (4th ed.); *Bald's Trustees* v. *Earl of Mar*, 16 D. 870. There was nothing in the subsequent Acts of Parliament which altered this relation of the parties.

Solicitor-General (Bethell), R. Palmer, Q. C., and A. Brown, for the respondent. — The Act of 1826 contemplated that the damage might be sustained from time to time, and that satisfaction might be demanded from time to time. See sect. 89. It was the duty of the company to pay for all that was necessary to enable them to construct their railway, and to support it when made, and they cannot complain if they are now called upon to pay for the minerals which they knew they did not pay for in the first instance, probably because they thought they would not require the whole of the subjacent soil to support the railway. It is not denied that a conveyance of the surface of land generally carries with it an implied right of support from the subjacent soil; but it is otherwise when there is an express reservation of the soil below, for then the grantee of the surface takes his chance of the minerals being necessary to support the surface. [Lord BROUGHAM. — You say, if I grant the surface of my land to you for the purpose of enabling you to construct a railway on it, and reserve to myself the minerals, I may go on working these so long as an inch thick of surface remains?]

Yes, we go that length. The one is as much entitled to the minerals as the other is to the surface. This seems to be taken for granted in *Hilton* v. *Earl Granville*, 5 Q. B. 701. If, however, the respondent is not entitled, under the original Act and his conveyance, to demand compensation, he is entitled under the General Railways Clauses Consolidation Act, which was incorporated with the other Acts, and expressly empowers him to demand compensation.

Sir F. Kelly replied. — The General Railways Clauses Act cannot govern the rights of the parties, which must stand on the original Act and the conveyance. The general Act applied only to future local Acts, and has no retrospective operation. If it were otherwise, great mischief would be produced, for almost every railway made under previous local Acts would have to be taken to pieces in order

to reconstruct the bridges and levels, &c., so as to correspond with the minute provisions enacted by the general Act, which is absurd.

Cur. adv. vult.

Lord Chancellor CRANWORTH. — This appeal arose out of an action which had been brought by the respondent against the appellants, the object of which was to compel them to purchase certain minerals belonging to him, situate under and near the line of their railway. Several Acts of Parliament came in question in this case, — first, the original Act 7 Geo. IV., c. 103, which is an Act for making a railway from the Monkland and Kirkintilloch Railway by Garnkirk to Glasgow. Under that Act there were the usual powers enabling the company to be incorporated for the purchase of lands; and pursuant to the powers given by that Act on 12th December, 1834, between eight and nine years after the passing of the Act, the respondent sold to the company, in consideration of a sum of about £620, some land of his over which the railway was to pass, reserving, however, the minerals. Then there passed some amending Acts. Before that conveyance had been made, two Acts extending the powers of the company had passed; but they are not material to be considered. By the Act of 1844 the name of the company was changed, and it was called at that time the Glasgow, Garnkirk, and Coatbridge Railway Co. There was then another Act improving the gauge of the railway, and there passed on the 21st of July, 1845, the Scottish General Railway Act. In the same year an Act was passed by which the Caledonian Railway Co. was incorporated, and then, in the year 1846, an Act enabling the Caledonian Railway Co. to purchase the Glasgow, Garnkirk, and Coatbridge Railway.

The respondent having sold his land to the original company, but having reserved to himself the mines, was proceeding to work certain mines under and near the line of railway in the year 1848, when, upon the 17th August in that year, he received a notice from the company calling upon him to desist from what he was so proceeding to do. Having set forth the rights of the company, the summons states this: "Under these circumstances, the pursuer proceeded with * the working of the fireclay [* 637] and other minerals in his said lands of Garnkirk, in due and ordinary course, until he was interrupted by the said Caledonian Railway Co. That on or about the 17th August, 1848, the

agents for the company addressed a letter to the manager at the Garnkirk works, intimating that they had received a report from their engineer that the works then in the course of being carried on in the fireclay mines under the line of the Garnkirk Railway, at the Garnkirk brickworks, were of a nature to endanger the safety of the railway, and calling upon the proprietor of the minerals to find security to the company for all damages, interruption of traffic, and other injury which might result to the company before any further workings were proceeded with." The summons then states what took place upon that; but eventually the appellants persisting that he had no right to work them, the respondent brought the action out of which the present appeal arose, in which, stating all these Acts of Parliament, and stating what had been done, he concludes thus: "Therefore, it ought and should be found and declared, by decree of the Lords of our Council and Session, that the said Caledonian Railway Co., or the said Glasgow, Garnkirk, and Coatbridge Railway Co., or either of them, defenders, have no right of property in the minerals in the lands of Garnkirk, situated under and adjacent to the Glasgow, Garnkirk, and Coatbridge Railway, or any part thereof; but that the property of the said minerals is still vested in and belongs to the pursuer, subject to any right of purchase or right to prevent the working thereof, on making compensation for the same, competent to the said defenders, or either of them, under the said Acts of Parliament." And further, "it ought and should be found and declared, by decree aforesaid, that the proviso or enactment in the 11th section of 7 Geo. IV., c. 103, whereby it is declared that it shall not be lawful to or in the power of any proprietor to whom satisfaction has been made, to work, win, or away take the said minerals, without giving previous security to the Glasgow and Garnkirk Railway Co., or their successors, for damages, interruption of traffic, and other injury resulting to the said company, and their said undertaking does not in any respect apply to the minerals in the lands adjacent to the railway belonging to the pursuer, which were not conveyed or included in the disposition granted by him to the railway company in 1834; and notwithstanding the proviso or enactment in the said statute, and the terms of the said disposition, the pursuer is entitled to obtain compensation from the defenders, or either of them, for all minerals under or adjacent to the line of railway which were not purchased by the railway company or their suc-

cessors, and which the pursuer or his tenants are prevented from working by reason of the necessity of maintaining the railway in a state of security, or by reason of the restriction imposed upon him not to injure the railway: and further, it ought and should be found and declared, by decree foresaid, that the pursuer is entitled to obtain full compensation from the defenders, that is, the Caledonian Railway Co., and other companies, or either of them, for the whole minerals in the lands of Garnkirk not purchased by the railway company or their successors, and which cannot be wrought without danger to the railway and works, and that within the limits specified in the report of Mr. Robson, the engineer of the company, dated 3rd August, 1848, or as the same may be ascertained in the course of the process to follow hereon."

That being the summons, there was a condescendence and a statement in answer; and eventually, on the 8th March, 1851, the LORD ORDINARY pronounced an interlocutor assoilzieing the defenders, having come to the conclusion that the respondent, by the sale to the defenders of his lands, although he reserved the minerals, had nevertheless precluded himself from working the minerals, either under or adjacent to the railway, so as to prejudice the railway. That decision of the LORD ORDINARY was brought by way of reclaiming petition to the Court of Session, and they took this course: "Before answer, and under express reservation of all pleas or questions competent to the parties under the record," they remitted the case to Mr. Leslie and Mr. Lonsdale, the one a civil engineer, and the other a mining engineer, "to examine the subjects, and to inquire and report, first, whether, having reference to the nature of the railway, which was made under the powers of the original Acts, the minerals under the railway could have been worked with safety to the railway," and with reasonable prospect of advantage to the proprietor, subject to the obligation of fair caution, in terms of the original Act; and, second, whether, and in what respects, and to what extent, the alterations made in the uses and structure of the railway by or under the authority of the Acts of 1844, 1845, and 1846, or any of them, materially affected the practicability of working the minerals. These gentlemen made their report: "That, having reference to the nature of the railway made under the powers of the original Acts, the minerals could not have been worked with safety to the railway as they were in the habit of being worked; but that fully one-third or nearly

one-half of the fireclay could have been taken out from under, or for sixty feet on each side of, the centre of the railway, by single mines," and so on, which is not the ordinary way of working; and, secondly, "that the railway being thus secured, it is of no consequence to the stowed mines or cased pillars how many or how frequent the trains are;" and they added: "The reporters do not think that the increased traffic, or the alterations of the structure and uses of the railway, have materially affected the practicability of working the minerals under and adjacent to the railway." When that report was brought before the First Division of the Court of Session, they took a different view from that [*638] which had been *taken by the LORD ORDINARY. They found that the consideration paid to the respondent did not include compensation for the loss of the minerals, and that he was entitled to work the minerals unless the company thought fit to purchase them. From that decision the present appeal was brought.

The respondent, by his conveyance, dated 12th December, 1834, conveyed to the original Garnkirk Co. a portion of his land required for the line of the company, in consideration of a sum of money agreed on as a price and then paid to him. The conveyance was expressly made for the purpose of the land conveyed being used as a railway. He, however, reserved all mines under the land so conveyed, with full liberty to win and work the minerals. Independently of any provisions contained in the Act of Parliament, the effect of that conveyance was to convey the land to be covered by the railway to the company, together with a right to all reasonable subjacent and adjacent support. A right to such support is a right necessarily connected with the subject-matter of the grant. If the owners of a house were to convey the upper story to a purchaser, reserving all below the upper story, such purchaser would, on general principles, have a right to prevent the owner of the lower stories from interfering with the walls and beams upon which the upper story rests so as to prevent them from affording proper support, so far, at all events, as to prevent a person who has granted a part of his land from so dealing with that which he retains as to cause what he has granted to sink or fall. How far such adjacent support must extend is a question which, in each particular case, will depend on its own special circumstances. If the line dividing that which is granted from that

which is retained traverses a quarry of hard stone or marble, it may be that no adjacent support at all is necessary. If, on the other hand, it traverses a bed of sand, a marsh, or a loose gravelly soil, it may be that a considerable breadth of support is necessary to prevent the land granted from falling away upon the soil of what is retained. Again, if the surface of the land granted is merely a common meadow or a ploughed field, the necessity for support will probably be much less than if it were covered with buildings or trees; and it must be further observed, that all which a grantor can reasonably be considered to grant or warrant, is such measure of support subjacent and adjacent as is necessary for the land in its condition at the time of the grant, or in the state, for the purpose of putting it into which the grant is made. Thus, if I grant a meadow to another, retaining both the minerals under it and also the adjoining lands, I am bound so to work my mines and to dig my adjoining lands as not to cause the meadow to sink or fall over; but if I do this, and the grantee thinks fit to build a house on the edge of the land he has acquired, he cannot complain of my working or digging, if by reason of the additional weight he has put on the land, they cause his house to fall. If, indeed, the grant is made expressly to enable the grantee to build his house on the land granted, then there is an implied warrant of support subjacent and adjacent, as if the house had already existed.

Applying these principles to this case, it is clear that, by the effect of the conveyance of the 12th December, 1834, the Garnkirk Company acquired a right to the surface of the ground traversed by the railway, together with a right, as against the respondent, to such subjacent and adjacent support as was necessary for enabling them to maintain and work the railway. The conveyance is in these terms: "I, Mark Sprot, Esq., of Garnkirk, considering that, in the year 1826, by Act of Parliament, 7 Geo. IV., c. 100, entitled, &c., the Garnkirk and Glasgow Railway Co. was incorporated, and that it was agreed between me and the committee of proprietors of said railway, that the value of the land belonging to me to be occupied by said railway, as well as all damages done to my property, should be ascertained by David Leighton, then factor at Coltness. That the railway company having in the year 1827 commenced making said railway" (and then there is a calculation of the interest and certain other damages, making altogether £624,

the original purchase-money being only £379, and it proceeds thus): "and in consideration of the foresaid sum of £379, being the specific and agreed on value of the land hereby conveyed, I, the said Mark Sprot, do, by these presents, grant and convey to the said company of proprietors, but always for the said railway and works thereto belonging and not otherwise, All and whole that portion of my estate described, &c., declaring that I shall have full power to take into my own hands the slopes or banks on that portion of the line betwixt the parish road and the crossing of the Cumbernauld road, at or near Stepps, for the purpose of feuing or otherwise, under such conditions and restrictions always as shall not interfere with the due and regular operations of the said railway; I, the said Mark Sprot, and my foresaids, paying such annual value for said slopes and banks as may be fixed by two persons mutually chosen; And I hereby warrant this conveyance at all hands, and against all mortals, as law will; and declare that all feu, teind, and other parish and public burdens whatsoever, affecting the lands hereby conveyed, up to the term of Martinmas, 1833, have been paid — my said disponees being obliged to pay whatever proportion of such burdens have fallen due since, or may hereafter fall due, and be held as applicable to said lands; reserving always to me, my heirs and successors, the whole powers and privileges of access to or crossing said railway and otherways, conferred by said recited Acts on the landed proprietors whose lands are intersected; also always reserving to me, and my heirs and successors, the whole mines and minerals, of whatever description, within [* 639] the said lands hereby conveyed, * and full power and liberty to us, or any persons authorised by us, to search for, win, and carry away the same, and to make aqueducts," and so on. Subject to the rights thus given to the company, the respondent had, and retained, a right to work the minerals under and adjoining the line, subject only, as to the minerals under the line, to the obligation of giving the security created by the first Act, to which I have referred.

Starting, then, from this proposition, the next question is, Have the rights of each party been affected by the several Acts of Parliament relating to the railway? At the time when the conveyance was made in 1834 three Acts had passed, viz., the original Act 7 Geo. IV., c. 103, and two amending Acts, viz., 7 & 8 Geo. IV., c. 88, and 11 Geo. IV., c. 125; the two latter, however, do not affect the

present question, and therefore may be disregarded. The 11th section of the original Act is that which relates to the conveyance of land to the company, the reservations of mines, and the restrictions in their working. It is this: "And be it further enacted, that all and every body or bodies politic, corporate, or collegiate, trustees, and other person or persons hereinbefore capacitated to sell or convey lands or other heritages, through, in, or upon which the said railway, bridges, roads of communication, or other works, hereby authorised, shall be made, may accept and receive satisfaction for the value of such lands, &c.; but provided always, that notwithstanding anything herein contained, it shall be lawful and competent to any proprietor or proprietors whose lands are hereby authorised to be taken, to reserve and except from the bargain or sale to the said company, the whole of the minerals in the said lands, for and to his or her own proper use and behoof; and the said company shall have no right of property of or in such minerals, which any proprietor or proprietors may desire to be reserved as aforesaid; but provided always further, nevertheless, that it shall on no account be lawful to, or in the power of, any such proprietor to work, win, or away take any of the said minerals without giving previous good and sufficient security to the said company for all damages, interruption of traffic, and other injury, which may thence, in any way, result to the said undertaking or the said company; and in the event of the said company and any such proprietor not agreeing in regard to the extent or sufficiency of such security, then the JUDGE ORDINARY of the bounds shall regulate and determine thereupon as to him shall appear just."

The first observation which occurs on this section is, that though under its provisions and other clauses in the Act the respondent might have been compelled to sell the land in question to the company, yet when, by arrangement between him and the company, it was settled what should be the price paid, and the conveyance is made accordingly, the effect of the transaction, so far as relates to the conveyance of the land and the rights acquired under it, must depend on the terms of the deed, subject only to the provision in the clauses regulating or restricting the right of working the mines. By virtue of the conveyance the company acquired by grant from Mr. Sprot an absolute right to the surface of the land; and, by implication, a further right to such subjacent and adjacent support as was necessary, taking into account the purpose

to which the land was to be put. Mr. Sprot, on the other hand, retained his former right of working the mines, subject only to the rights which he had impliedly granted of subjacent and adjacent support, and subject also to the statutory restriction in the 11th clause, preventing him from working the mines under the land conveyed without first giving to the company good and sufficient security for all damage which might accrue to it from such workings. Such, certainly, would have been their rights if no further Act of Parliament had passed. If, while these original Acts and no others were in force, Mr. Sprot had proceeded to work the mines, he might have been restrained from any working of the minerals, whether under the line of railway or under adjoining lands, which should interfere with the due support of the line, because by so working he would be acting in violation of his own implied grant or warranty of reasonable subjacent and adjacent support; and, further, he would have been bound, before he worked at all under the land conveyed to the railway, to give the security required by the statute.

Reliance was placed in the argument on the 89th section. It was argued that the inability to win the minerals by reason of the danger which would be thereby occasioned to the railway, was a damage to Mr. Sprot for which no remedy is provided by the Act, and so was within the provisions of the 89th section. This section is this: "That if at any time or times hereafter, any person shall sustain any damage in his, her, or their lands, tenements, heritages, or property, by reason of the execution of any of the powers hereby given, and for which no remedy is hereinbefore provided, then, and in every such case, the recompense or satisfaction for such damage shall, from time to time, be settled and ascertained in such manner as hereinbefore directed in respect of any other recompense or satisfaction hereinbefore mentioned." I think the argument arising out of that section is untenable. The damage complained of is a damage arising solely from the fact that the respondent, by his conveyance of 1834, impliedly bound himself to secure to the company adequate subjacent and adjacent support. He incurred that obligation by the mere fact of the conveyance. He was not bound to convey at all, till he had taken the steps pointed out by the statute for having it ascertained what was the sum which he ought to receive as the price of his convey-
[*640] ance, including consequential damage. In *calculating

that sum, the circumstance that he was to convey not merely the soil of the line upon which the railway was to be formed, but also, impliedly, a right in his disponees to have subjacent and adjacent support for the land disponed, must necessarily have been taken into account; and when, in afterwards proceeding to work the mines, he finds that he cannot win the minerals, because in so doing he would be interfering with the necessary support of the line of railway, he has no more right to complain than he would have had, if he had found that to work the mines effectually it would be necessary to sink a shaft in some portion of the line of railway that is on the land actually conveyed. This conveyance operates to deprive him of his rights to disturb the lateral and interior support, in the same way as it prevents him from interfering with the surface itself of the land conveyed. The 89th section, therefore, is inapplicable, because the damage of which the respondent complains is a damage arising not by reason of the execution by the company of the powers given to them by the Act, but by reason of his having by the conveyance of 1834 impliedly bound himself to secure to the company adequate support to the line of railway, or rather, negatively, not to interfere by his acts with such support.

This being so, the only further question is as to the effect of the subsequent Acts of Parliament. Do they or do they not alter the rights which, if no such Acts had passed, the company would have possessed under the original Act? I will refer to the several Acts in the order of their dates. The first Act which passed after the conveyance in December, 1834, was that of 1 & 2 Vict., c. 60. This Act did no more than enable the company to raise further sums of money, and make some amendments in the details of the former Acts. It in no respect touched the question as to the rights of the respondent and of the company in respect of the mines. The next Act was that passed in 1844, viz., 7 & 8 Vict., c. 87. By that Act, after reciting that the railway authorised by the former Acts had been completed and opened to the public, and had proved of great public and local advantage, and further reciting that its utility would be increased if the company were authorised to make two extensions of the railway, it is enacted that the former Acts shall be in force for carrying the purpose of that Act into execution. The name of the railway is then changed, the Act providing that it shall thereafter be called the Glasgow, Garnkirk, and Coatbridge Railway, this new name having

been adopted with reference to the extension of the line then already made or in progress. The usual powers are then given for enabling the company to purchase lands, and exercise the necessary works for the two new branch lines; and among the provisions relative to the mode in which the works are to be executed are five clauses, having for their object the regulating of the working under or contiguous to the lines. Those clauses are numbered 84 to 88. The 84th section says, that "for the purpose of protecting the railway and works from danger to be apprehended from the working of any mines either under or closely adjoining the railway, be it enacted, that if the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose, and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company and such owner do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation." By the 85th clause it is enacted, that if the company be unwilling to purchase, the owner may work the mines. Then, by the 86th section, in order to prevent the mines being worked in such a way as to damage the railway, it is enacted that the railway company may enter and inspect the mines, after giving twenty-four hours' notice in writing; and powers are given to enable them to make proper supports, if supports are wanted, and to make mining communications.

The object of these clauses may be stated to be, first, to compel all owners of mines near the railway to give notice to the company before they begin to work them, and to enable the company, if they think fit, to prevent such working by purchasing the mines from the owner, or rather by compensating him for his loss in not working them; and, secondly, to compel the owner of the mines, if the company do not purchase, to work them so as not to damage

the railway by improper working; and the Act then gives powers to the company enabling them to ascertain that no improper workings are in progress. With reference to these enactments it was contended on the part of the appellants that they did not apply to the original railway, but only to the new extension lines authorised by the Act in which the clauses are found. The respondent, on the other hand, argued that the enactments are general, and applicable to the whole railway, including as well the original as the branch lines. In the view which I take of this case, it is immaterial which of these constructions is correct, for, assuming the respondent to be right, and that these clauses apply to the whole line, and so to the mines of the respondent under and contiguous to the railway, still they cannot interfere with the pre-existing rights of the company, which they had acquired ten years before this last Act became law. Under the deed of 1834 the * company had acquired by purchase a right, [* 641] as against the appellant, to have adjacent and subjacent support to their railway. The effect of the mining clauses in the Act of 1844 was not to deprive the company of the right they had thus purchased, but to prevent the respondent from working his mines without first giving the option of stopping the workings by compensating the respondent, when they refuse to exercise that option. The respondent has the same right of working his mines which he had before, that is, a right to work them, not interfering with the support of the railway. It is true the 85th section enacts, that if the company do not exercise the option given by the Act, the mine owner may work his mines in the manner proper and necessary to the beneficial working thereof; but all this must have reference to the existing rights of the mine owner and of the company. The Legislature certainly did not intend to give to the mine owner, as against the company, rights which he had previously sold to them; and when the Act of 1844 passed, the respondent had no right to work his mine in any way which would interfere with the security of the railway. So also as to the clause in sect. 11 of the original Act, whereby the owner of the reserved mines under the land conveyed is restrained from working at all until he has given security to the company. I see nothing in the Act of 1844 to prejudice that right. The mining clauses in that Act must all be read with reference to the rights of the mine owner as they existed when the Act passed.

The only other Act affecting the railway which passed previously to the General Railway Clauses Consolidation Act was a short Act which received the royal assent on 30th June, 1845, the 8 & 9 Vict., c. 31, whereby the company was empowered to alter the gauge of the railway, but it did not affect the question of mines.

Three weeks after the passing of that Act, that is, on the 21st July, 1845, the General Scotch Railway Consolidation Act, 8 & 9 Vict., c. 83, received the royal assent. The provisions of that Act relative to the working of mines are nearly the same with those contained in the local Act of 1844, to which I have already adverted. It is immaterial to consider them in detail. In fact, they were inapplicable to the rights of the parties under prior Acts, the general Act being expressly confined to Acts to be afterwards passed. Ten days after the passing of the General Scotch Act, that is, on the 31st July, 1845, the Caledonian Railway Company obtained their Act, the 8 & 9 Vict., c. 162. The general Act was incorporated in the Caledonian Act, and would therefore regulate the mode in which mines under or contiguous to that line of railway should be dealt with.

The only other Act affecting the question now under discussion is the Act of 1846, under which the Glasgow, Garnkirk, and Coatbridge Railway was sold to and became incorporated with the Caledonian Railway. By that Act, the 9 & 10 Vict., c. 329, it was enacted, that the Glasgow, Garnkirk, and Coatbridge Railway, with all its lands, powers, and privileges, with the benefit of all contracts relating thereto, should, on the execution of a deed of conveyance under the seal of the said company, which said conveyance has since been duly executed, be vested in and belong to the Caledonian Company for their absolute benefit. The effect of this was merely to put the Caledonian Company in the place of the former company, whose interest they purchased, so that whatever had been the right of the Glasgow, Garnkirk, and Coatbridge Co., in relation to the respondent became, after the passing of this latter Act, the right of the Caledonian Company.

It appears, therefore, from an examination of all these Acts, that the rights acquired by the original company, by virtue of the conveyance of 12th December, 1834, remained unaffected up to the time of their final transfer to the Caledonian Company; and as the respondent rests his claim to relief on the ground that he is

entitled by virtue of the reservation of mines contained in his conveyance of 1834, to work those mines adjoining the railway without regard to the question, whether, by so doing, he will be damaging the necessary support of the railway, and that the company can only prevent his doing so by purchasing the mines, I have only to add, having already explained the grounds on which I conceive this view to be incorrect, that I think the LORD ORDINARY was right, when he sustained the defences and assoilzied the defenders. I am aware that I adopt the view of the LORD ORDINARY in opposition to the opinion of the First Division of the Court of Session, who concurred in reversing his decision. Those able Judges seem to me to have overlooked, or not to have given due weight to, the effect of the conveyance of 1834. If I am right in saying that by that conveyance the respondent conveyed to the company not only the land to be covered by the railway, but also, by implication, the right to all necessary support, then he cannot, by reason of his having reserved the mines, derogate from his own conveyance by removing that support. In reserving mines, he must be understood to have reserved them so far only as he could work them consistently with the grant he had made to the company. The Judges of the Court below have overlooked this principle, and in so doing have been led into an erroneous conclusion.

The subject of the right of the owners of the surface to adequate subjacent and adjacent support has on several occasions been discussed in the English Courts. The principles which there governed the decisions were not derived from any peculiarities of the English law, but rested on grounds common to the Scotch, and as I believe, to every other system of jurisprudence. They were considered in the case of *Harris* v. *Ryding*, 5 M. & W. 60, and very fully * developed in the judgment of the Court of [* 642] Queen's Bench, delivered by Lord CAMPBELL in the case of *Humphries* v. *Brogden*, 12 Q. B. 739 (p. 407, *ante*).

It may be proper that I should notice an argument relied on to some extent, namely, that the railway originally contemplated was not one on which the traffic would be equal to that which now exists, so that the support contemplated could not have been so great as that which is now required. To that, I think, there are two answers: First, when the respondent granted his land for the avowed purpose of enabling the disponees to make a railway, without any limitation as to its nature, I think he must be under-

stood to have warranted proper support, however the railway might be used, or to whatever purpose it might be applied; and, secondly, the gentlemen to whom the Court of Session referred this very question, expressly say that neither increased traffic, nor the alteration of the structure or uses of the railway, have materially affected the practicability of working the minerals.

Although this judgment and the reasons I have given for it are my own, they are to be considered likewise as those of my noble and learned friend Lord BROUGHAM, to whom I communicated the judgment, and who has authorised me to express his entire concurrence with it.

Interlocutor of the First Division of the Court of Session reversed — Reclaiming Note against the interlocutor of the Lord Ordinary refused, with expenses — Interlocutor of the Lord Ordinary affirmed, and cause remitted.

Great Western Railway Co. v. Bennett.

L. R. 2 H. L. 27–42 (s. c. 36 L. J. Q. B. 133; 16 L. T. 186; 15 W. R. 647).

[27] *Railways Clauses Act. — Mines. — Subjacent and Adjacent Support.*

By the effect of the 77th, 78th, and 79th sections of the Railways Clauses Consolidation Act, 1845, a railway company on purchasing, under that statute, land for the purposes of the railway does not become entitled to the mines under the land; the owner may work them after notice duly given; and if, after such notice, the company, though desiring to prevent the working, does not give compensation for the minerals, the owner may work them up to and under the railway, working them in a "proper manner" and "according to the usual manner of working such mines in the district." The company cannot, [*28] under this statutory purchase, claim the benefit of the right of an * ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters, by which alone the rights of the company and the mine owner are regulated.

This was a proceeding on error on a judgment in the Court of Queen's Bench, which had been affirmed by the Exchequer Chamber.

The Shrewsbury and Birmingham Railway Company, under the powers of the Shrewsbury and Birmingham Railway Act, 1846, had acquired in fee simple certain lands lying in Wombridge, in the county of Salop, for the purpose of constructing the railway. That Act incorporated the Lands Clauses Consolidation Act, 1845,

and the Railways Clauses Consolidation Act, 1845. These lands, and the Birmingham and Shrewsbury Railway itself, afterwards came, under the 17 & 18 Vict., c. ccxxii., to be vested in the plaintiffs in error, who constituted the Great Western Railway Company.

The original conveyance, dated the 11th of September, 1849, was made by the then owners of the lands, who were also owners of the mines and minerals lying under the same, and conveyed to the Shrewsbury Company for the purposes of the railway, in the form given in the schedule to the Lands Clauses Consolidation Act, 1845, the lands, "excepting and always reserved, &c., the mines and minerals in and under the said hereditaments and premises, with all the necessary powers and privileges for getting and working the same." The railway and works were then constructed on the lands, partly on the surface, and partly in a tunnel. In the year 1856, Bennett, the defendant in error, purchased the reserved mines and minerals. On the 9th of June, 1856, he gave to the plaintiffs in error, under the 78th section of the Railways Clauses Consolidation Act, 1845, notice of his intention, within thirty days after the date of the notice, to work the mines and minerals lying under the railway and tunnel, and within forty yards therefrom, unless they stated their willingness to treat for compensation. On the 9th of July, 1856, the plaintiffs in error gave Bennett notice of their willingness so to treat with respect to * the mines and [* 29] minerals lying under so much of the lands as were coloured pink in a plan annexed. These lands lay under two ends of the line of railway and a tunnel connecting them, and on both sides of the same.

On the 1st of December, 1857, Bennett gave to the plaintiffs in error notice that he was also the owner of other mines and minerals which lay under another portion of the lands (coloured blue in the plan), and situate just outside the line of the other lands, which he would, by severance, be prevented from working, and for which he also required compensation; and that he was desirous that the amount of his claim, if not agreed to, should be settled by arbitration in the manner provided in the Railways Clauses Consolidation Act, 1845. This claim did come under arbitration, and on the 28th of October, 1858, an award was made containing the following special finding: "Supposing that the said John Bennett had not been interrupted and prevented from working and getting the said mines and minerals, and had the right to

work and get the whole as against the company as owners of the surface, then I find the whole of the said mines and minerals, for which compensation is hereby awarded, could properly have been worked and gotten in the manner proper and necessary for the beneficial working of the same, and according to the usual manner of working such mines and minerals in the district within which the same are situated. But I also find that no greater portion than one-third of the said mines and minerals could properly, and in such manner as aforesaid, have been so worked and gotten, if in working and getting the same a sufficient portion of the said mines and minerals was to be left to give reasonable support to the said surface land, and to prevent any damage by the sinking thereof; and I also find that the same amount of support would have been necessary for the surface land if the said railway and tunnel had not existed." The award further declared that, in respect of the minerals lying under the land coloured pink, the plaintiffs in error were to pay to Bennett, if he would have been entitled to work out the whole of them, the sum of £8649 10*s.*, but that if he would have been bound to leave reasonable support to the surface, the sum of £1085 3*s.* 8*d.*; that Bennett was entitled to compensation for the additional loss and damage which he had incurred [* 30] in respect of the other portion of * the mines and minerals which could not be worked by reason of severance; and that the further amount to which Bennett was entitled, if he would have been entitled to work out the whole of the said last-mentioned portions of mines and minerals, was £1042 7*s.* 2*d.*; but that if Bennett was bound to leave reasonable support, then the amount of compensation in respect of the last-mentioned mines and minerals was £140 16*s.* 7*d.*

An action was brought on this award. A special case was stated by consent, and in Michaelmas Term, 1862, the Court of Queen's Bench gave judgment in favour of Bennett for the two larger amounts. This judgment was given on the authority of *Fletcher* v. *Great Western Railway Company*.[1] In Easter Term,

[1] 4 H. & N. 242 (affirmed 5 H. & N. 689). The following is the marginal note of that case: "A railway company having, by agreement with the owner, purchased land for the purpose of making the railway, and having taken a conveyance in the form given by the Lands Clauses Consolidation Act, 1845, Schedule A, and not being willing to purchase the minerals after notice of the owner's intention to work them, pursuant to sect. 78 of the Railways Clauses Consolidation Act, 1845, is not entitled to the adjacent or subjacent support of the minerals; but the owner is

1863, the judgment was affirmed in the Exchequer Chamber. The case was then brought up to this House.

Mr. Manisty, Q. C., and Mr. Field Q. C., for the appellants: —

The question raised is, whether, having regard to the 77th and two following sections of the Railways Clauses Consolidation Act, 1845,[1] and to the deed by which the surface land was conveyed * to the appellants, the defendant in error may [* 31] work the mines and take the coal, leaving no support to the surface; or whether, if they had not availed themselves of the powers in the general Act, he could have removed all the coals under the railway and for forty yards on each side of it, leaving no support whatever; and, finally, whether he was not bound, at all events, to leave support to the surface. In substance, the point to be determined is raised by the award, and is, what is the effect or

entitled to get them, notwithstanding that the getting of such minerals would cause the surface to subside. *Held*, accordingly, that where, under such circumstances, the company had given notice that the working of the mines was likely to damage the works of the company, the owner of the minerals was entitled to recover compensation which had been assessed under the said 78th section."

[1] 8 & 9 Vict., c. 20 (Railways Clauses Consolidation Act, 1845).

Sect. 77. "The company shall not be entitled to any mines of coal, &c., under any land purchased, except only such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

Sect. 78. "If the owner, &c., of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distances, or, when no distance shall be prescribed, forty yards therefrom, be desirous of working the same, he shall give to the company a notice in writing of his intention so to do thirty days before the commencement of working, and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines, or any part thereof, to such owner, &c., then he shall not work or get the same; and if the company and such owner, &c., do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

Sect. 79. "If before the expiration of such thirty days the company do not state their willingness to treat with such owner, &c., for the payment of such compensation, it shall be lawful for him to work the said mines, or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate; and if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the same shall be forthwith repaired or removed, as the case may require, and such damage made good by the owner, &c., at his own expense," and if that is not forthwith done by the owner the company may do it, and recover the amount by action.

the consequence of a company availing itself of the statutes, and making a purchase of lands under their provisions?

Bennett can only claim to be paid for so much of the coal as he might take away without diminishing the reasonable support of the surface. To that the appellants are entitled as purchasers of the surface. They would be so entitled as purchasers in the ordinary way; they are even more entitled under the provisions of the railway Acts. He has, in the price of the land, got compensation for the surface, and having sold the surface, he is bound by law not to work his mines so as to withdraw from the surface sufficient reasonable support.

[* 32] * If the case had stood on the deed alone, he would have been in the condition of an ordinary owner of mines lying under the land, having reserved a power of working them. That power would have been a power reasonably to work with reference to the safety of the surface.

As there might be more danger where a railway ran over the surface than in an ordinary case, the Legislature interfered to compel an owner of the mines to give to the railway directors notice of his intention to work, either under the railway itself, or within forty yards of it; and if the company prevented his working, the company was to pay him compensation for that coal which, but for the notice, he might have taken away. But he is not entitled to be paid for coal which, even without any notice, he could not have taken away, because its removal would have been the removal of reasonable support to the surface.

The Caledonian Railway v. *Sprot* (p. 686, *ante*) laid down that doctrine in the case of a private conveyance, and is, therefore, directly applicable here. [Lord WESTBURY. — The conveyance under the statute excepts the mines and minerals; does that mean all the mines and minerals, or only so much of them as can be got with due regard to the safety or advantage of the railway company?] It has the latter meaning, as is shown by the case of *Elliot* v. *The North Eastern Railway Company*, 10 H. L. C. 333, which decided that a conveyance granting land for a special purpose, must be construed as conveying all the rights necessarily incident to the due execution of that purpose. In the former of these cases, there was a private Act (7 Geo. IV., c. ciii.), by which a company had the right to take lands compulsorily; they were taken, but leave was reserved to work the mines; but the Act prohibited the proprietor

who sold the surface from working the mines to the disadvantage of the company. [The LORD CHANCELLOR. — In that case, the conveyance was dated ten years before the Scotch Railways Act, 1845 (8 & 9 Vict., c. 19), passed, and Lord Chancellor CRANWORTH thought that that Act did not apply.] But he recognised on any sale or grant, however made, the right of the purchaser of the surface to subjacent and adjacent support, and the positive obligation to leave it, even though there was an absolute * reservation [* 33] of mines and minerals. In *Elliot* v. *The North Eastern Railway Company*, 10 H. L. C. 333, Lord CHELMSFORD remarked, that a company must pay for extraordinary support, which itself showed that he thought, as Lord CRANWORTH had said, in the *Caledonian Railway* v. *Sprot*, that the company, on an ordinary purchase of land, would be entitled to ordinary support; and he also declared that whether a sale was voluntary or compulsory made no difference, for every grant carried with it the ordinary incidents of a grant, and he applied those incidents in that case, though he considered the sale to have been made under the compulsory powers of the Act of Parliament. There is nothing in this case which excludes the operation of this ordinary rule. It is perfectly clear that the purchaser of land, without anything to exclude the operation of the common law, would be entitled to reasonable support of the surface: *Harris* v. *Ryding*, 5 M. & W. 60; though there the reservation of the mines, and of the right and means to work them, was in very general and extensive terms. *Smart* v. *Morton*, 5 E. & B. 30, *Roberts* v. *Haines*, 6 E. & B. 643, 7 E. & B. 625, *Humphries* v. *Brogden*, 12 Q. B. 739 (p. 407, *ante*), show that the language of deeds before the Act was at least as strong in favour of the owner of the mines, as the language of the sections in the statute, and, consequently, that the sections could not be construed as affecting, certainly not as diminishing, the common-law right to support on the surface. And *Backhouse* v. *Bonomi*, 9 H. L. C. 503, establishes that it is the duty of a mine owner, even where he has the clearest right to work the mine, to leave sufficient support to the surface. In that way, those cases may fairly be taken as interpreters of the statute.

But there certainly was a difference with respect to one matter, and that difference is in favour of the appellants. The common law required that reasonable support should be afforded, but there was no precise limit fixed within which that support must be given.

Now railway works might require more support than works of an ordinary kind, and so the 78th section gave a distance of forty yards within which mines must not be worked, except after certain notices had been given. But, though that section gave a com-
[* 34] pany the power to treat for the purchase of the right * to work the mines, there was no power in a company to compel the sale of that right. Yet it never could have been the intention of the Legislature to expose railways to greater danger than houses built in the ordinary way on the surface of land covering mines. The section must, therefore, be construed with reference to the cases previously decided upon common-law rights, and then it is obvious that that which the common law gave, the statute had not taken away.

Mr. Mellis, Q. C., and Mr. Hannen (Mr. Crompton was with them), for the respondent:—

The real question here is the construction of the three sections of the Railways Clauses Act. The effect attributed to an ordinary conveyance of the surface may be admitted, and, according to the case of *The Caledonian Railway* v. *Sprot* (p. 686, *ante*), that may apply in the case of a conveyance to a railway as much as to any other. But the Courts have distinguished between the two classes of cases, and have held that the effect of the Railways Clauses Act is to postpone the compensation to the mine owner till he comes within a certain distance of the railway. The object was fair to both parties. The owner was not to lose his property if there were mines; the railway company was not to pay for them if they were not found to exist, or if they were not worked or about to be worked. Here they did exist, and were intended to be worked. A large quantity of coal was required for the support of the railway works. It cannot be contended that the mere sale of the surface bound the mine owner to make such a sacrifice of the coal lying under it, without proper compensation. A part might be got here without injury; the mine owner was entitled to get that part, or if prevented from getting it, must be compensated for it. He was also entitled to get that part, the getting of which might, without improper working, be considered injurious to the works of the railway. This latter was to be subject of notice and compensation. In *The Caledonian Railway Company* v. *Sprot*, the whole of the compensation was really paid at the time of making the purchase; it was not so here. There is no pretence for say-

ing that so much of the minerals as are under or near the * railway were purchased at the time the surface was [* 35] purchased; yet such is, in effect, the argument on the other side. That is contrary to common sense, and to the interpretation put by the Courts on the sections of the statute.

What was the rule regulating the right to get the minerals before this Railways Clauses Act was passed? In *The Dudley Canal Company* v. *Grazebrook*, 1 B. & Ad. 59 (35 R. R 212), there was a special proviso that in working the mine no injury was to be done to the navigation. Those words were stronger than any to be found in these Acts, but the Court said that they meant no unnecessary, no extraordinary damage. [The LORD CHANCELLOR. — But the appellants say that they have got the right to reasonable support, that by law they are entitled to it, and that the respondent has no right to take it away.] But the answer to that general allegation is the other general allegation, that the owner is always entitled to work his mines in the ordinary and usual mode; and that is all that is proposed to be done here. The practical result of overruling those decisions, which have established his general right, would be to give to railway companies the means, by a mere purchase of the surface, to possess themselves of the most valuable minerals without paying for them at all.

The provisions of the statute which require notice to the company of the intention to work the mine, and which give the company the right to inspect the working, so as to see whether any damage is likely to arise, show distinctly that in purchasing the surface the company obtained the surface and nothing more, and if it desired to obtain more must proceed under the 78th and 79th sections, and must compensate the mine owner for the additional rights taken from him. If the right to get the minerals was already gone, there was no necessity for the insertion of these provisions. Nor was there any need to guard against the improper working of the mines if the owner was not entitled to work them at all. The use of the word "proper" shows that the mine owner was entitled to work the mines, and pointed out the mode and manner in which he was to work them. The 78th and 79th sections do but render effectual the exception contained in the 77th section, which would otherwise be illusory and absurd.

* The case of *Fletcher* v. *The Great Western Railway*, 4 [* 36] H. & N. 242, 5 H. & N. 689, was properly decided, and is

directly in point here. There it was insisted that the company was to be protected against damage from any working whatever. The special case found that the working would have taken away the support, and the question was, whether the mine owner was, under these circumstances, entitled to compensation for what he would lose if prevented from working the mine. It was held that he was, and that decision was, after full argument on error, confirmed in the Exchequer Chamber.

The case of *The Caledonian Railway Company* v. *Sprot*, 2 Macq. Sc. Ap. 449 (p. 686, *ante*), was on an Act of Parliament entirely different from the present, and is inapplicable here. *Elliot* v. *The North Eastern Railway Company*, 10 H. L. C. 333, is more complicated, but the same observation applies there.

Here, as the grant of the surface is by the statute, and the conveyance is expressly made subject to the rights of the owner of the mines, who is authorised to work them by all proper and necessary means, the simple question here is one of the construction of the words of the 79th section. The word "improper" was meant only to protect a railway company against the wanton exercise of the rights of an owner of mines whose rights were thus reserved. If the work is properly conducted he is entitled to work the mines, or to compensation if the company desires him to abstain from working them.

This question has lately, and since the case of *Fletcher* v. *The Great Western Railway Company*, been under consideration in the Court of Chancery, and a decision has been pronounced upon it by Vice-Chancellor WOOD in the case of *The North Western Railway Company* v. *Ackroyd*, 31 L. J. Ch. 588, where it was held that the owner of land granting to a railway company the right to make and maintain a tunnel, was in the same position with respect to his right to work mines, under the sections of the Railways Clauses Act, as if the land had been purchased, and under them he was held entitled to work the mines, and a bill filed to require the owner of the mines to leave sufficient subjacent and adjacent support was dismissed. In the case of *The Wyrley Canal Company* v. *Bradley*, 7 East, 368 (8 R. R. 642), a canal
[* 37] * Act, like the Railways Clauses Act, excluded the company from purchasing mines under the canal, and reserved to the owner the power to work them after giving notice, the company having power to stop the working on paying compensation. It

was there held that the right to work was left as before the Act if, after notice given, the company did not purchase the owner's rights. The case of *The Dudley Canal Company* v. *Grazebrook* 1 B. & Ad. 59 (35 R. R. 212), followed, and then came *The Stourbridge Canal Company* v. *The Earl of Dudley*, 3 E. & E. 409, where clauses similar to these existed; and in both it was held that the owner of the mines was entitled to work them in the usual and ordinary manner, though damage might ensue from his so doing, if, after notice, compensation were not made to him. These authorities are decisive as to the construction which ought to be put on the sections of the statute in the resent case.

Mr. Manisty replied.

March 18. The LORD CHANCELLOR (Lord CHELMSFORD): —

My Lords, this writ of error is virtually brought upon the decision of the Court of Exchequer and the Court of Exchequer Chamber in the case of *Fletcher* v. *The Great Western Railway Company* (p. 708, *note*, *ante*), as upon the authority of that case the present one was decided without argument.

The question to be determined is whether, the plaintiffs in error having purchased the lands of the defendant in error for the purpose of constructing a portion of their railway, and the conveyance to them containing an exception of "the mines and minerals in and under the hereditaments and premises, with all the necessary powers and privileges for getting and working the same," the plaintiffs in error are entitled to sufficient support to the railway from the portion of the mines and minerals lying under or adjoining the same, without being bound to make compensation to the defendant in error.

The question depends entirely upon the clauses contained in the Railways Clauses Consolidation Act, 1845, under the heading, "with respect to mines lying under or near the railway," beginning with * sect. 77. This will at once render inap- [* 38] plicable the two cases of *The Caledonian Railway Company* v. *Sprot*, 2 Macq. Sc. Ap. 449 (p. 686, *ante*), and *Elliot* v. *The Directors of the North Eastern Railway Company*, 10 H. L. C. 333, decided in this House, neither of which decisions turned upon the sections in question.

By the 77th section of the Railways Clauses Consolidation Act a railway company is not "to be entitled to any mines of coal, ironstone, slate, or other minerals, under any lands purchased by them,

except only such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the works, unless the same shall have been expressly purchased." The provision contained in this section is extremely beneficial to railway companies. They are not to have any mines or minerals, that is (any part of the mines or minerals) under the land purchased by them; but they may secure sufficient support to the railway by purchasing it from the owner of the mines, or, if they think it likely that the mines under the railway may not be worked for an indefinite period, they may postpone the purchase until the necessity for it arises.

That this section reserves to the mine owner all the minerals, however near they may be to the surface, unless the company chooses to purchase them, appears very clearly from the exception of "the parts necessary to be dug, or carried away, or used in the construction of the company's works," as these will, of course, be the minerals lying nearest to the surface. But if the company desires to postpone the purchase of the mines until it is known that they are to be worked, the company is enabled to do so, with perfect safety, from the protection afforded by the 78th section, which compels the mine owner whose mines lie under the railway, or within a certain distance of it, who is desirous of working the same, "to give thirty days' notice of his intention, and the company may then cause the mines to be inspected, and if it appear that the working of the mines is likely to damage the railway, and if the company be willing to make compensation for the mines to the owner, he shall not work or get the same." This section appears to me to leave the mine owner to work his mines exactly as he would if the surface belonged to him, unless the railway company chooses to prevent him by expressing willingness to
[*39] make him compensation. *If the company should not, within thirty days, state their willingness to treat with the mine owner for the payment of compensation, he is, by the 79th section, left at liberty to work the mines, "so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district." But to guard railway companies, under these circumstances, against any unfair mode of working the mines to their prejudice, it is provided by the same section that "if any damage or obstruction be occasioned to the railway or works by

improper working of such mines, the owner shall repair and make it good." And the 83rd section gives the company power "to ascertain whether the mines are being worked, or have been worked, so as to damage the railway or works."

The mine owner, therefore, may work his mines in a manner beneficial to himself, in order to win the largest quantity of minerals that the mine will yield, but so as not to depart from the usual manner of working in the district.

As to the obligation imposed upon the mine owner to make good any damage occasioned by his improper working of the mines, if the argument of the plaintiffs in error is correct, that the company is, from the first, entitled to a sufficient support to the railway from the mines, every working which diminishes that support must be improper. It then becomes difficult to understand how any case can arise for the application of the provisions of the 78th section. If the working of the mines and minerals is likely to produce damage to the works of the railway, it must be by taking away the support to which the company is supposed to be entitled; but then, instead of the company being required to make compensation to prevent the owner from working at all, any working would be improper, and the owner would be compellable, under the 79th section, to make good, at his own expense, any damage done.

The case of *The Dudley Canal Company* v. *Grazebrook*, 1 B. & Ad. 59 (35 R. R. 212), appears to me to be a strong authority in favour of the construction of the sections of the Railways Clauses Consolidation Act which I have adopted.

I am, therefore, of opinion that the judgment of the Court below ought to be affirmed.

* Lord CRANWORTH: — [*40]

My Lords, I have very little to add to what has fallen from my noble and learned friend. Independently of the statute, I think the contention of the company would have been unanswerable. I should be extremely sorry if this case should at all bring into doubt the doctrine which was enunciated and acted upon by this House in the case of *The Caledonian Railway Company* v. *Sprot*, which doctrine is this: that if I sell my land for the purpose of a railway being made upon it, I impliedly sell all necessary support, both subjacent and adjacent, that is required for the purpose of supporting that railway. In the case of *The Caledonian Railway Company* v. *Sprot*, the conclusion at which this

House arrived was, that although the sale of the land was one which might have been compelled, probably, under the statutes then in force (not the present statute, because it was before the passing of the statute now in force), yet, in truth, it was a mere contract between Mr. Sprot and the company, and must be dealt with just as if no statute existed. But the difficulties which had arisen upon this subject were, I presume, what gave rise to these provisions of the Railways Clauses Act which are now under discussion.

It was obviously the intention of the Legislature, in making these provisions, to create a new code as to the relation between mine owners and railway companies, where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface; and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface. That being so, justice obviously requires that when the mine owner thinks it beneficial to him to work his mines, and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all. If he had not compulsorily parted with the surface, he might have worked his mines, sinking his shaft from the very surface down to the very bottom of the mine. The object of the statute was that, for the [* 41] purpose of * the railway, the company was to take (and it was a very beneficial provision for the company) that, and that only, which is necessary for the purpose of the railway; and that all the rest should be left to be dealt with, whenever the time for working the mine should arrive. It is plain to me, upon the construction of that clause of the statute, that that was the intention of the Legislature; and that intention is fully carried into effect by giving to the mine owner, in this case the respondent, Mr. Bennett, that which the Court below has given to him, namely, the full right in all the mines which he worked, just as if he had not sold the surface.

I think, therefore, the judgment below is perfectly right, and that, consequently, judgment ought to be given for the defendant in error.

No. 22. — Great Western Railway Co. v. Bennett, L. R. 2 H. L. 41, 42.

Lord WESTBURY: —

My Lords, this case presents no difficulty when the true relation between the railway company and the mine owner, as settled by the statute, is once ascertained. A railway company is under no obligation, I should rather say, is under a disability, to purchase mines unopened, mines lying beneath the land required for the railway. They are absolutely reserved and excepted out of the conveyance to be made by the landowner to the company. The chief argument for the present appellants, embodied in their second reason, that the conveyance grants to the company as much as is requisite for the support of the railway, is entirely taken away by the 77th section of the statute. In that section it is positively declared that "all such mines, excepting as aforesaid," — that is, except the small portion of minerals which may be disturbed or brought to bank by the operation of making the railway, — "all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby." In the face of these words there is no room for the ordinary implication which applies to a common grant, namely, that it extends by implication to all that, though not named, which is necessary for the support or enjoyment of the thing granted.

Then what relation remains between the railway company and the mine owner? It is defined by the statute. Although the
* mines *in solido* are, without any exception, reserved to [* 42]
the mine owner, he is not at liberty to win them, or to proceed to get them, without notice to the railway company. That notice expires after a month. During that month the railway company is under an obligation to ascertain whether it may be requisite, for the support of the railway, to purchase any part of the subjacent minerals. If the company should not think it requisite, the mine owner is left under no other obligation than that he is to win the mines in a proper manner; and if there is a custom of the country it must be done according to that custom; and the railway company is armed with authority to inspect the working from time to time, in order to ascertain whether any damage is likely to ensue, or whether any proceeding of the mine owner is inconsistent with the ordinary beneficial manner of winning the minerals. The relation, therefore, between the railway company and the mine owner is one so clearly defined, so

useful to the railway company, and at the same time so fair and just to the mine owner, that one is astonished that any argument could have been raised upon the ordinary implication applicable to a grant, which is so entirely excluded by the express enactment of the statute, and also by the accompanying provisions that define, beyond the possibility of mistake, the true relation which, after the land has been conveyed to the railway company, continues to exist between the company and the mine owner. There can be no doubt that the decision of the Court below is right; and I entirely concur with my noble and learned friends, that the judgment must be affirmed. *Judgment affirmed.*

Lord's Journals, 18th March, 1867.

ENGLISH NOTES.

The cases arising upon the earlier Special Acts show by contrast how the general principles applicable to the right of support are modified when land has been taken under Acts incorporating the Railways Clauses Consolidation Act, 1845.

The following case, of comparatively recent date, illustrates the effect of one of these earlier Acts.

In 1830, under the powers of a Special Act of 1825, land was conveyed to a tramway company for the purpose of a tramway, which was intended to be worked by horses. The Act reserved to the owner of the land conveyed the subjacent mines, with power to work them, but not so as to injure the tramway. By a Special Act of 1855 the tramway was vested in another company, incorporated with power to alter the tramway into a railway of the modern type. This Act incorporated the Railways Clauses Consolidation Act, 1845, and repealed the Act of 1825, but without prejudice to anything done under it, and to all rights and liabilities which, if the repealing Act had not been passed, would be incident to or consequent on anything so done. Under the Act of 1855 the tramway was reconstructed and made into a broad gauge passenger railway suitable for locomotive engines. Under subsequent Acts the railway became part of the Great Western Railway system. In June, 1892, — the mines having been previously worked so as to leave supports sufficient for the horse tramway, — the defendants, the mine owners, gave notice under sect. 78 of the Railways Clauses Consolidation Act, 1845, of their intention to work the minerals under and near the plaintiff's railway. The plaintiff company declined to treat or to admit any claim to compensation. The defendant having accordingly commenced to work the minerals, the plaintiff company claimed an injunction. It appeared by the evidence that the mode of working was such as to cause

subsidence, even if the burden on the surface had not been increased by the conversion of the horse tramway into a railway carrying locomotive traffic. It was held by KEKEWICH, J., that the plaintiffs were entitled to an injunction; for they were entitled under the original conveyance of 1830 to a right of support (sufficient for the old tramway) without payment of compensation; that the Act of 1855 did not operate to alter the express contract contained in the conveyance of 1830; and that the right under that contract had not been lost by reason of the conversion of the old tramway into a railway. *Great Western Railway Co.* v. *Cefn Cribbwr Brick Co.*, 1894, 2 Ch. 157, 63 L. J. Ch. 500, 70 L. T. 279, 42 W. R. 493.

In the case of *Elliot* v. *North Eastern Railway Co.* (appeal from *North Eastern Railway Co.* v. *Elliot*, H. L. 1863), 10 H. L. Cas. 333, 32 L. J. Ch. 402, referred to in the arguments of the latter principal case, there was a conveyance to a railway company under a Special Act of 1834 which provided that all coal or other mineral should be deemed to be excepted out of any purchase of land by the company, and might be worked by the owner thereof "so that no damage or obstruction be done or thereby occur to or in such railway or other works;" and by another section (sect. 28), that whenever the workings should approach within twenty yards of any masonry or building belonging to the company, the mine owner should give notice to the company, and the company might deliver a declaration requiring the minerals under such masonry or building to be reserved for their protection, and in that case they should purchase the same; but if they should not deliver such declaration, the mineral owner might work the minerals in the usual way, doing no avoidable damage. The land was taken for the purpose of building a bridge of great weight, and the bridge was built accordingly. At the time of building the bridge there existed under the land some workings of an old mine which had been drowned; and the support to the bridge consisted partly of the pillars which had been left in the old mine and partly of the water in the mine. In 1859 the appellant, a lessee of mines deriving title from the vendor, threatened to drain the old mine and renew the workings. It was held that in addition to the special protection afforded by the Act in respect of workings within twenty yards of any masonry or building, the railway company was entitled, by way of necessary incident to the grant of the land, to such lateral support from the adjacent land of the vendor not within the twenty yards, as might be necessary to uphold the bridge; and the House affirmed the decree of the Court of Chancery granting a perpetual injunction restraining the appellant from working the mines within twenty yards unless notice should be given pursuant to the 28th section of the Act, and the company should have neglected, &c., and from work-

ing the mines beyond the twenty yards in such a manner as should affect the stability of the bridge.

The clauses (77, 78, and 79) of the Railways Clauses Consolidation Act, 1845, have been held to have been enacted for the benefit of the railway company to exempt them from the obligation of purchasing the mines along with the surface. They do not deprive the company of the power to purchase the mines compulsorily either along with the purchase of the surface, or at any time subsequently within the time limited by the Act for the exercise of the compulsory powers. *Errington* v. *Metropolitan District Railway Co.* (C. A. 1882), 19 Ch. D. 559, 51 L. J. Ch. 305, 46 L. T. 443, 30 W. R. 663.

The purchaser from the railway company of superfluous land acquires no greater right of support than the railway company had; and where the railway company constituted under an Act incorporating the Railways Clauses Consolidation Act, 1845, has not purchased the mines, neither they nor the purchaser from them of the superfluous land has acquired any right of support against a mine owner who works the mines in the usual way. *Pountney* v. *Clayton* (C. A. 1883), 11 Q. B. D. 820, 52 L. J. Q. B. 566, 49 L. T. 283, 31 W. R. 664.

The decision of the Judges of the Queen's Bench (MATHEW, J., and KENNEDY, J.) in the matter of an arbitration between *Gerard and the London and North Western Railway Co.*, 1894, 2 Q. B. 915, 63 L. J. Q. B. 764, 71 L. T. 548, 43 W. R. 9, is further instructive as to the effect of sections 77–80 of the Railways Clauses Consolidation Act, 1845. The railway company gave notice to treat for certain land "together with the stones and clay and gravel within and under the same," and a notice to treat for certain other land "together with the mines and minerals thereunder except all mines, beds, and seams of coal." The compensation under the notices was referred to arbitration. There were valuable beds of coal under the land comprised in the notices and under the adjacent land of the landowners; but at the date of the arbitration this coal was not being worked, nor was there any immediate prospect of its being worked in the ordinary course of mining. At the hearing of the arbitration evidence was admitted by the arbitrator of the value of the subjacent and adjacent coal which it would be necessary to leave for the support of the railway. The Court held that the evidence was wrongly admitted; that the rights of the landowner and the railway company were not altered by the fact that the company had taken some of the underground strata as well as the surface of the land; and that the landowner was not entitled to recover compensation in respect of the ungotten coal until the time arrived for working the coal-beds, and then only by proceedings under sect. 77 and the following sections of the Act.

The rule is further illustrated by the cases of *Glasgow* v. *Farie* and *Midland Railway Co.* v. *Robinson*, Nos. 8 and 9, pp. 485 and 516, *ante*, and by the case of *Ruabon Brick and Terra Cotta Co.* v. *Great Western Railway Co.*, cited in notes thereto, p. 532, *ante*.

AMERICAN NOTES.

The *Sprot* case is cited by Washburn on Easements on the point of lateral support, with *Elliot* v. *N. E. R. Co.*, 10 H. L. Cas. 333, and *Bonomi* v. *Backhouse*, 8 id. 348.

SECTION V. — *Limited Owners.*

No. 23. — SAUNDERS'S CASE.

SAUNDERS *v.* MARWOOD.

(1599.)

No. 24. — CLEGG *v.* ROWLAND.

(1866.)

RULE.

A LESSEE of land (without mention of mines) may work open mines, but cannot open new mines.

Saunders's Case.

Saunders v. Marwood.

Co. Rep. 12 a–12 b. (s. c. 1 Brownl. 141, Cro. Eliz. 683).

Lease. — Open and Unopened Mines. — Waste.

1. If a lease of land be made for life, or for years, in part of which there [12 a] is a mine open, the lessee may dig in it. 2. If the mine were not open at the time of the lease made, the lessee cannot open it. 3. If a man hath mines hid within his land, and leases his land and all mines therein, the lessee may dig for them. 4. If land be leased in which there is a hidden mine, and the lessee opens it, and then assigns over his estate, the assignee cannot dig in it. 5. If a lessee assigns his term with an exception of the profits of the mines, or the mines themselves, or of the timber, trees, &c., such exception is void.

If lessee devises his term and dies, and then his executors do waste, and afterward assent to the devise, an action of waste in the *tenuit* lies against the executors.

SAUNDERS brought an action of waste against Marwood, assignee of the term in the tenement, for waste done in digging sea-coals;

the defendant pleaded in bar, that the first lessee, who opened the mine, granted to him all his interest in the land *cum omnibus profic' (except' & semper reservatis sibi & hæred' suis tot' benefic' & profic' miner' Anglicè* the coal mine, *in præd' parcell' terr' ac omnibus arboribus mæremii)*; and averred, that the said mine was at the time of the assignment, and yet is open. Whereupon the plaintiff demurred in law. And on great deliberation it was adjudged for the plaintiff; and in this case three points were resolved.

1. If a man hath land in part of which there is a coal mine open, and he leases the land to one for life, or for years, the lessee may dig in it; for inasmuch as the mine is open at the time, &c., and he leases all the land, it shall be intended that his intent is as general as his lease is; *scil.* that he shall take the profit of all the land, and by consequence of the mine in it. *Vide* 17 Ed. III., 7 a, b, *John Hull's* case, acc'; and so the doubt in F. N. B. 149 c well explained.

2. If the mine were not open, but included within the bowels of the earth at the time of the lease made, in such case by leasing of the land the lessee cannot make new mines, for that shall be waste. F. N. B. 59, and 22 Hen. VI. 18 b, acc'.

3. If a man hath mines hid within his land, and leases his land, and all mines therein, there the lessee may dig for them, for *quando aliquis aliquid concedit, concedere videtur & id sine quo res* [*12 b] *ipsa esse non potest,* and therewith * agrees 9 Ed. IV. 8, where it is said, that if a man leases his land to another and in the same there is a mine (which is to be intended of a hidden mine), he cannot dig for it; but if he lease his land and all mines in it, then although the mine be hidden, the lessee may dig for them; and by consequence the digging of the mine in the principal case was waste in the first lessee.

4. It was resolved, that although the mine was first opened by the first lessee, yet if his grantee dig in it, it is waste in him.

5. It was resolved, that the exception was void, for first by the exception of the profits of the mine, or of the mine itself, the land is not excepted; and then it follows, that he hath excepted that which he could not have or take: as if a man assigns his term, and excepts the timber trees on the land, or the gravel, or clay within the land, it is void, for he cannot except to himself a thing which doth not belong to him by the law. And although it

was said, that forasmuch as the lessee first opened the mine, and thereby committed waste, and so had *quodam modo* appropriated it to himself, and by his wrong has subjected himself to lose the place wasted, and treble damages, it should be a reason that he might keep it to himself, and so continue punishable for the waste of which he was the first author: but notwithstanding that, it was resolved as above; for his wrong which he committeth cannot devest the interest in the mine, being in the land demised to him out of the lessor; and therefore he cannot except that to himself which belongs to another: and it was adjudged, Pasch. 28 Eliz., in the Common Pleas, Rot. 820, between *Foster and Miles*, plaintiffs, and *Spencer and Bode*, defendants, that where the lessee for years assigns over his term except the timber trees, and afterwards the trees were felled, that the action of waste was maintainable against the assignee, for the exception was utterly void for the causes aforesaid, *quod nota bene.*

And in this case it was said, if lessee for years devises his term to another, and makes his executors, and dies, the executors do waste, and afterwards assent to the devise, in that case, although between the executors and the devisee it hath relation, and the devisee is in by the devisor, yet an action of waste shall be maintainable against the executors in the *tenuit.* So if grantee of a term on condition doth waste, and afterwards the grantor enters for the condition broken, the action of waste shall be maintainable against the grantee in the *tenuit.* 30 Ed. III., 16 a, b, acc'.

Clegg v. Rowland.

L. R. 2 Eq. 160–167 (s. c. 35 L. J. Ch. 396; 14 L. T. 217; 14 W. R. 530).

Power to lease Mines. — Open and Unopened Mines. [160]

A lease of land (without mentioning mines) will entitle the lessee to work open but not unopened mines. If there be open mines, a lease of land with the mines therein will not extend to unopened mines; but if there be no open mines, a lease of land, together with all mines therein, will enable the lessee to open new mines.

Where there was a conveyance to trustees of land, together with the mines thereunder, and a power to grant leases for fourteen years without mentioning mines: —

Held, that the trustees had no power to grant leases of unopened mines.

By a settlement made upon the marriage of Brierly Rowland and Charlotte Rowland, then Charlotte Clegg, and dated the 22nd of

May, 1833, Charlotte Rowland conveyed to J. Whittaker and J. Fallowfield, their heirs and assigns, among other hereditaments, one undivided moiety of certain messuages or dwelling-houses, cottages, closes, fields, pieces or parcels of land and hereditaments, [*161] * in Oldham, devised to the said Charlotte Rowland by the will of her father; and also of and in certain yearly chief rents issuing out of the said hereditaments, together with the mines, minerals, and quarries thereunder, and the appurtenances thereto belonging, to hold the same upon trust to pay the rent and proceeds thereof to Charlotte Rowland during the joint lives of herself and Brierly Rowland, but not by way of anticipation, for her separate use, and after the death of either of them, then to the survivor for life, and after the death of the survivor, then upon certain limitations for the benefit of children, and in default of children, then the property was to be in trust for and to be conveyed and paid to such person or persons for such estate and estates as Charlotte Rowland should by will appoint, and in default of appointment, upon certain trusts therein expressed. The settlement contained a power of leasing in the following words: "Provided always, and it is hereby further declared and agreed, that it shall be lawful for the trustees at any time or times whilst this moiety shall remain vested in them under the trusts of these presents, and during the joint lives of Brierly Rowland and Charlotte his wife, with their joint consent and approbation in writing, and after the decease of either of them, then with the consent and approbation of such survivor, to demise and lease all or any part of the said moiety of the said hereditaments, lands, and other premises, granted, released, and assigned for any term or number of years not exceeding fourteen years in possession, but not in reversion or by way of future interest, so as upon every such demise or lease there be reserved and made payable during the continuance thereof respectively, to be incident to and go along with the reversion expectant on the same, the best and most improved yearly rent or rents that can be reasonably had or gotten for the same, without any sum or sums of money being taken by way of fines in respect of such demises or leases, and so as none of the said demises or leases be made dispunishable of waste by any express words therein, and so as in every such demise or lease there be a clause of re-entry on non-payment of the rent or rents to be thereby reserved." The settlement contained no express power of granting mining leases.

On the 1st of September, 1834, being about a year and a half after the marriage, a lease was made between Brierly Rowland and *Charlotte Rowland of the first part, the [*162] trustees of the settlement of the second part, Mary Anne Clegg (the sister of Charlotte Rowland, and the owner of the other undivided moiety of all the premises) of the third part, Humphrey Nicholls of the fourth part, and James Stopherd and Thomas Brideoake (the lessees) of the fifth part. By that lease two mines of coal, known as the Higher and Lower Bent Mines, and also a mine known as the Black Mine, lying under certain parts of the premises comprised in the above settlement, were demised by the trustees with the privity and approbation of Brierly Rowland and his wife, and by Mary Anne Clegg, to J. Stopherd and T. Brideoake for ten years, subject to a fixed or tie-rent of £100 per annum, and certain royalties therein specified, and with various reservations not necessary to be specified.

Of the mines comprised in the lease, the Higher and Lower Bent Mine had never been worked. The Black Mine had been worked, but the working had been abandoned for some time, and it was now an open mine.

One moiety of the rents and royalties reserved by the lease were received from time to time by Brierly Rowland under a belief that he was entitled to them, and he applied them to his own use. This went on till his death. There were no children of the marriage. The wife survived, and she made a will by which she appointed the premises to persons who were now represented by the plaintiffs.

The bill was filed against the legal personal representatives of Brierly Rowland, and also against John Rowland the elder, who was a substituted trustee under the settlement three years and a half after the date of the lease, and it prayed that it might be declared that Brierly Rowland was, at the time of his death, liable to account to the trustees for the time being of the settlement for the various sums received by him in respect of such mining lease, and that his estate was now liable to account for and pay to the plaintiffs, as the executors and trustees of the will of Charlotte Rowland, the said principal sums, together with interest thereon from the time they were received; and the bill prayed that the defendant, John Rowland the elder, as the surviving trustee of the settlement, might be declared liable for and ordered to pay to the plaintiffs *such of the several principal sums as were [*163]

received by Brierly Rowland with the privity of the defendant John Rowland.

To this bill the defendants demurred.

Mr. Baily, Q. C., Mr. Glasse, Q. C., and Mr. Jolliffe, for the demurrer, contended that the power contained in the settlement of May, 1833, enabled the trustees to grant leases of unopened as well as open mines. The parcels in the deed comprised the words, "mines, minerals, and quarries," which were therefore conveyed to the trustees, and the subsequent power to lease must necessarily have included all that was passed by the parcels. There could be no reason why the trustees should not have this power given them, as it was evidently for the benefit of the property that the mines should be worked. One of the mines was actually opened at the time, and it could not be said that there was no power to grant a lease of that mine. Must it not, therefore, have been the intention of the parties that all mines should be worked? It made no difference that there was a clause in the power "that none of the demises or leases should be made dispunishable of waste;" for in the case of *Daly* v. *Beckett*, 24 Beav. 114, where similar words were to be found, the MASTER OF THE ROLLS held that these words must be rejected, since they could not apply to an existing open mine, which was comprised in the lease in that case as in this.

They also cited *Morris* v. *The Rhydydefed Colliery Company*, 3 H. & N. 473, 885, and *Campbell* v. *Leach*, Amb. 740.

Mr. Osborne, Q. C., and Mr. Karslake, in support of the bill submitted that this was no more than the ordinary power to grant leases at rack-rent, and was similar to most of the forms used for that purpose. It never could be contended that such a power would confer the right to grant leases of unopened mines. It was true that the parcels, after describing the property, contained this addition, "together with the mines, minerals, and quarries thereunder," but there was no mention of the word "mines" in the power to grant leases. The ordinary power to grant mining leases was very different in every respect, and such a form would have been introduced if mining leases had been intended.

[*164] *They referred to Bainbridge on Mines, Davidson's Forms, Rogers on Mines, and Davidson's Conveyancing Forms, to show what was the usual clause giving power to grant mining leases.

In the case of *Pearse* v. *Baron*, 1 Jac. 158, where it was stipulated

that a settlement should be executed, which was to contain a power of leasing for twenty-one years, "and all such other powers, provisoes, clauses, covenants, and agreements, as are usually inserted in settlements;" it was held that these words would not authorise the introduction of a power of granting building leases for longer terms. The case of *Daly* v. *Beckett* was certainly not like the present, or it would probably have been decided in the plaintiff's favour. Sir Edward Sugden, in his book on Powers (vol. ii. p. 328, 7th ed.), in speaking of *Campbell* v. *Leach*, said: "The MASTER OF THE ROLLS held that the unopened mines could not be demised, as that would be an authority to commit waste, and the power expressed that no authority was to be given to commit waste." If any owner in fee had granted such a lease as this, it would not have enabled the lessee to open mines; therefore, *a fortiori*, a power to grant leases would not comprise a power to grant such a lease.

They also referred to *Whitfield* v. *Bewit*, 2 P. Wms. 240, and Platt on Leases, vol. i. p. 21.

As to the demurrer by John Rowland, it was necessary that he should be made a party to the suit, since the *cestui que trust* could not file a bill on the subject of the trust without making the existing trustee a co-plaintiff or defendant; but nothing was prayed against him, further than as to the receipt of rents by Brierly Rowland, with the privity of John Rowland.

Sir R. T. KINDERSLEY, V. C., after stating the facts of the case, continued: —

In considering the question, what was the effect of the power contained in the settlement, this principle must be borne in mind, that if there be open mines and unopened mines on the same land, belonging to an owner in fee, if the owner grants a lease of that land, whether the mines be expressly included in the lease or not, the lessee may work the opened mines, but he is not justified * in opening an unopened mine. That is laid down by [* 165] Lord Coke very explicitly, Co. Litt. 54 b. He says: "A man hath land in which there is a mine of coals, or of the like, and maketh a lease of the land (without mentioning any mines) for life or for years; the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any new mine that was not open at the time of the lease made, for that would be adjudged waste. And if there be open mines and the owner make a lease of the land, with the mines

therein, this shall extend to the open mines only, and not to any hidden mine. But if there be no open mine and the lease is made of the land together with all mines therein, there the lessee may dig for mines and enjoy the benefit thereof; otherwise those words should be void."

The ground of the law thus clearly laid down by Lord Coke must of course be, that where there are an open mine and an unopened mine, unless the lease contains an express authority to work the unopened mine, it must be assumed to have been the intention of the parties that the lessee should not open the unopened mine. That is very clear. It is true that in the present case the question is, not what is the construction of a lease, but what is to be the construction of the power to grant leases? But if it be a sound doctrine that a lease by an owner in fee of the land and the mines, there being an open and an unopened mine, does not justify the lessee in opening the unopened mine, then it appears to me that a power to make a lease of the land and mines (even mentioning mines) ought to be construed only to authorise the granting of a lease, so as to entitle the lessee to work the open mines, and not to entitle him to work the unopened mines. That, I think, is a legitimate and reasonable, I might almost say a necessary, corollary from the proposition of law laid down by Lord Coke. It will be observed that that view proceeds on the supposition that in the power not only the lands and hereditaments, but mines, were specifically mentioned. But in the present case the power does not specifically mention mines at all. It is true that mines and minerals are mentioned in the description of the property conveyed, and the power mentions the hereditaments, lands, and other premises before conveyed, which words are [*166] * large enough to comprise the mines. But the power is in form the ordinary leasing power to enable the granting of leases of land for fourteen years; and not only are there none of the usual provisions applicable to leases of mines, but there is the express provision that none of the demises or leases be made dispunishable of waste. This is not very accurate language, but of course it must mean that the lessees are not to be dispunishable for waste. And it is justly said by the plaintiffs, that the opening of an unopened mine is in itself waste. And no doubt opening an unopened mine by a tenant for life, or lessee, who has no special authority to open it, is waste as between him and the remainder-

man or reversioner. If he had such authority, it might be questioned whether his doing so would be properly termed waste; but that is perhaps rather a question of words than of substance. In the case before the MASTER OF THE ROLLS, where he interpreted the power to be an express power to grant leases to work unopened as well as opened mines, there followed the clause that the lessee was not to be made dispunishable of waste. It might, perhaps, have been suggested, that the meaning of the clause prohibiting waste was, that the lessee was to be restricted to the customary and workmanlike mode of working the mines, whether already opened or not, so as not to injure the mine for future working, or prejudice the reversioner. But that would be a forced construction of the clause. It is no doubt waste for a lessee to open an unopened mine. The MASTER OF THE ROLLS looked at it in that point of view. He considered that the terms of the prohibition were such as to prevent the lessee from committing waste — that is, from opening an unopened mine; and being of opinion that the terms of the power were such as expressly to authorise the working of unopened mines, he came to the conclusion that there was so much contradiction in the clause which imported a prohibition against waste that he rejected the clause altogether. That case is a strong authority for this proposition, — that such a clause is inconsistent with a power to work unopened mines; and, therefore, the existence of that clause in the present case appears to me to afford a strong argument for holding that this power was not intended to authorise the granting of a lease of any unopened mines.

*I am of opinion that this lease was invalid so far as it [*167] authorised the opening of a new mine, and that, therefore, the demurrer of the representatives of Brierly Rowland must be overruled.

The other demurrer is by John Rowland the elder, who became a trustee two or three years after the granting of the lease, and it is contended that he ought himself to have received the rents and accumulated them. It is insisted that his acquiescence has made him liable. I do not see any ground for that. There is, in fact, nothing to show that he knew anything of the lease. It was done by Brierly Rowland and the then trustees. Brierly Rowland went on receiving the rents, and it does not appear that the trustees ever received any of them. There is no ground for holding that John

Rowland is liable for want of diligence in the execution of the trusts, and, therefore, his demurrer must be allowed.

ENGLISH NOTES.

The cases relating to powers to grant leases are fully considered under the next following rule (Nos. 25 and 26, *post*).

AMERICAN NOTES.

The first case is cited in Wood on Landlord and Tenant, p. 138. The second case is cited in Washburn on Real Property. The rule finds support in *Owings* v. *Emery*, 6 Gill (Maryland), 260 (citing the principal case); *Burr* v. *Spencer*, 26 Connecticut, 159; 68 Am. Dec. 379. The doctrine is found in *Lynn's Appeal*, 31 Penn. State, 44; *Reed* v. *Reed*, 16 New Jersey Equity, 248; *Harlow* v. *Lake Superior Iron Co.*, 36 Michigan, 105.

No. 25. — ELIAS *v.* SNOWDON SLATE QUARRIES COMPANY.

(H. L. 1879.)

No. 26. — IN RE KEMEYS-TYNTE. KEMEYS-TYNTE *v.* KEMEYS-TYNTE.

(1892.)

RULE.

A TENANT for life (impeachable for waste) is entitled, as against the reversioner, to work a mine for commercial profit, if it has been worked with a view to profit under lawful authority derived from the settlor; or if the settlor, for a consideration yielding a present profit, had committed the working of it to another.

Elias v. Snowdon Slate Quarries Company.

4 App. Cas. 454–466 (s. c. 48 L. J. Ch. 811; 41 L. T. 289; 28 W. R. 54).

[454] *Mines. — Quarries. — Term of Years. — Reversioner.*

A termor of land, with no grant of a power to work quarries on the land, cannot open any in order to work them; but if the quarries have been worked before the commencement of the term, he may continue the working.

No. 25. — Elias v. Snowdon Slate Quarries Co., 4 App. Cas. 454, 455.

The owner of land demised it in 1802, by way of mortgage, for a term of five hundred years at a peppercorn rent. A quarry, called the lower quarry, appeared to have been then open on the land, and had been worked by the mortgagor. In 1820 the mortgagee foreclosed the equity of redemption, and took possession of the property, and worked not only the lower quarry, but another, which received the name of the upper quarry. In 1873 the plaintiff, the reversioner of the term of five hundred years, having, not long before, become acquainted with the fact that he was the reversioner, filed a bill to restrain the termor from working the quarries and for an account. At the trial the great dispute of fact was as to the time when the upper quarry had been opened. Vice-Chancellor HALL had thought that it was not shown to have been opened in the time of the mortgagor, and so granted, as to that, an injunction and account. The Court of Appeal came to a different conclusion on the evidence, and dismissed the plaintiff's bill. On appeal to this House, the decision of the Court of Appeal was upheld.

Where the lease of a quarry reserves, not the payment of a fixed sum by way of rent, but a share of the profits of the quarry, it is to be treated as opened for purposes of commerce.

The consideration of the facts and circumstances of a case must determine on whom the *onus* lies of showing when a mine or quarry was first opened for working.

A mine or quarry opened by the owner of the inheritance, while he was still in actual possession, even though after the date of the mortgage, will inure for the benefit of the mortgagee.

Per Lord SELBORNE: Where a mine or quarry has been opened for a restricted or definite purpose, as to obtain fuel, or the means of repairing a particular tenement on the estate, that would not give a tenant for life, or other owner of an estate impeachable for waste, the right to work it for commercial profit. But when a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, the sinking of a new pit on the same vein, or the breaking ground in a new place on the same rock, is not, necessarily, the opening of a new mine or a new quarry.

Robert Bulkeley Owen was the owner in fee simple of a farm called Fridd-Issan, in the parish of Beddgelert in North
* Wales. He borrowed a sum of £400 from Morris Griffith [* 455] in 1802, and by way of mortgage security demised the farm to Griffith, his executors, administrators, and assigns, for a term of five hundred years, at a peppercorn rent. He afterwards borrowed a further sum of £800, and in September, 1810, charged the same with interest upon the mortgaged premises. The premises were situated partly at the base, and partly on the slopes of Snowdon. In 1808 Owen granted a lease of the farm, and in 1811 a lease for twenty-one years of the mines and slate quarries under the whole property. In 1816 Griffith brought an action of ejectment to obtain possession of the farm, and recovered judgment in the action

in 1818. He also instituted a suit for foreclosure, and obtained a decree thereon in 1820. He thus became possessed of the whole property, and in 1830 seemed to have made an attempt to work for the slate. He died in 1835, and the property passed to his widow, to his son John Griffith, and then to his son William Morris Griffith, who was originally a defendant in this suit. In May, 1847, John Griffith made a lease of the farm in question with liberty to search for and get slate, &c., under the said tenement, and this lease passed to the "Snowdon Slate Quarries Company," and on the winding-up of that company, was sold by the liquidator to the "West Snowdon Slate Company." In the course of the proceedings in this sale, namely, in December, 1872, an objection to the title was taken, and in consequence a letter was written to the present appellants, — the persons who appeared to be the reversioners after the expiration of the term of five hundred years, — and they, in May, 1873, filed their bill against W. M. Griffith complaining of the working of the quarries as waste, and asking for an injunction to restrain further working, and for accounts, and for further relief. The bill was afterwards amended by making the two companies parties to the suit.

The various defendants put in answers which in substance set forth the facts already stated, and relied on them for a defence, and they also alleged that the quarries were open working quarries upon the lands comprised in the demise and mortgage of 1802. Whether the upper quarry was so, was the matter really in dispute, and on that a great deal of evidence was given. Its effect is fully stated in the judgments.

[*456] * Vice-Chancellor HALL was of opinion that the lower quarry had been open before the demise of 1802, but "that neither the mortgagor nor his lessees, while he remained in possession, opened a quarry elsewhere on the mortgaged premises," and therefore, as to the upper quarry, he granted the prayer of the bill for an injunction and account, but dismissed it as to the lower quarry.[1] On appeal the Lords Justices came to a different conclusion on the evidence, reversed the decision, and ordered the bill to be dismissed with costs (8 Ch. D. 531). This appeal was then brought.

Mr. Osborne Morgan, Q. C., and Mr. Ford North, Q. C. (Mr. Edward Rolland was with them), for the appellants: —

They stated the facts of the case with great minuteness, and

[1] *Nom. Elias* v. *Griffith*, 8 Ch. D. 521, where the facts are fully detailed.

insisted that there was no evidence to warrant the conclusion that the owner of the inheritance ever worked both mines or quarries with a view to profit — or had ever authorised them to be so worked — and especially it was clear that there had not been, by him, such working of the upper quarry before the mortgage demise. Assuming the fact to be so, then the conduct of the respondents in working both of them was without warranty in law. They were mere termors, and as such their working the mines or quarries amounted to voluntary waste, from the committing of which the Court would, upon equitable principles, restrain them. There had not been any laches here, and the appellants proceeded as soon as they were aware of their rights. *Moyle* v. *Mayle*, Owen, 66; *Coppinger* v. *Gubbins*, 3 J. & Lat. 397; *Purcell* v. *Nash*, 1 Jo. Ir. Eq. Rep. 625, 2 id. 117; *Mansfield* v. *Crawford*, 9 Ir. Eq. Rep. 271; *Viner* v. *Vaughan*, 2 Beav. 466; *Jegon* v. *Vivian*, L. R. 6 Ch. 742 (No. 36, *post*); *Countess of Salop* v. *Crompton*, Cro. Eliz. 779, 784; *Goodson* v. *Richardson*, L. R. 9 Ch. 221; *Whitfield* v. *Bewit*, 2 P. Wms. 240; see also 3 P. Wms. 267; *Bays* v. *Bird*, 2 P. Wms. 397; *Saunders's Case*, 5 Co. Rep. 12 (p. 723, *ante*); *Clegg* v. *Rowland*, L. R. 2 Eq. 160 (p. 725, *ante*); *Vyvyan* v. *Vyvyan*, 30 Beav. 65, 4 D. F. & J. 183; *Browne* v. *McClinlock*, L. R. 6 H. L. 456, were cited.

*Mr. Dickinson, Q. C., and Mr. Bradford, for the [*457] Snowdon Slate Quarries Company.

Mr. Horne Payne, and Mr. C. H. Turner, for the West Snowdon Slate Company.

Mr. Dickinson and Mr. Horne Payne addressed the House: —

It was a maxim of the law of England to give effect to what had been done for a series of years, and done with the knowledge of those who had the power, if they had the will, to prevent it, but who allowed it to be done without offering the least objection to it. That had been the case here, and the present claim of the plaintiffs was therefore answered.

The evidence here was sufficient to satisfy the Judges of the Court of Appeal that both quarries were open before the respondents went into possession of the premises, and they were therefore entitled to work them.

The cases cited on the other side were commented on, and the following were also referred to: *Gibson* v. *Doeg*, 2 H. & N. 615; *Bulley* v. *Bulley*, L. R. 9 Ch. 739; *Wolfe* v. *Birch*, L. R. 9 Eq. 683; *Clavering* v. *Clavering*, 2 P. Wms. 388.

Mr. Osborne Morgan replied.

The LORD CHANCELLOR (Earl CAIRNS):—

My Lords, the argument of this case has occupied at your Lordships' bar a considerable time, but the result of that argument is that every fact in the case has, I think, been brought with great clearness before your Lordships' attention, and I shall be able in a very short space to submit to your Lordships the view which I at least take of the case now presented to us.

My Lords, I will in the first place remind you of the mortgage title. That starts in the year 1802, when the mortgage was made by Owen, the then owner of the inheritance, to Griffith, for five hundred years, and I pass over as immaterial the further charge which took place a few years afterwards. From 1816 to 1820 proceedings were going on for foreclosure of this mortgage. [*458] In *the course of those proceedings, namely, in 1818, Griffith appears to have entered into possession, and the proceedings were terminated by complete foreclosure in 1820. From that we pass on, still only dealing with the mortgage title, till 1847, when a lease was made by a son of this Griffith to three persons for the purpose of adventuring in, and continuing to work, mines or quarries upon the property, and under that lease the present respondents claim.

Now, turning on the other hand to the title to the inheritance, that continued in the mortgagor Owen up to the time of his death in 1837; therefore from the complete foreclosure in 1820, for seventeen years, he (the mortgagor) was in existence and was the owner of the inheritance of the property in fee simple. He died in 1837, and was succeeded by Rice Owen, his heir, who continued in life until 1860, a period of forty years from the foreclosure. When he died in 1860, the inheritance fell to one of the present appellants.

That being the title to the mortgage term on the one hand and to the fee on the other, let me remind your Lordships in a few words of the actual facts which are proved with regard to the opening of the slate quarries upon the property. And I must first observe with regard to these facts, that, whatever may be their proper description, there is no controversy as to them, because they are facts which come from the witnesses on the one side only, in their evidence in chief, and in their cross-examination; and although criticisms may be made as to the limited extent to which

these witnesses speak, there is nothing which shakes their credibility or their accuracy so far as they do speak.

My Lords, it is sufficient for my present purpose that I should state what I am about to state as to their evidence. Their evidence appears to me to amount to this, that in 1812 and 1814 (upon the evidence of witnesses old enough to remember those years) there were open quarry holes or quarries, whichever may be the proper word, in the *locus in quo*, that is to say, the land subject to this mortgage. It is a question upon the evidence, what the size of the openings was, but that has been left as it is upon the evidence to which I have already referred, the evidence of one side. No evidence has been contributed from witnesses equally old, or from * any witnesses at all, upon the other [*459] side. The witnesses, it is true, do not pretend to speak with certainty upon the exact size of the openings, but in a mineral country where the terms may be supposed to be well known and persons accustomed to use the terms proper to describe what actually is in existence, these witnesses all, without exception, speak of that which existed upon the property as what they would describe as open workings, and they are careful to say that they were workings which for some purpose were actually worked; for they saw certain slates taken out of them and pressed and laid on one side, and the *débris* in other places, which would show that slates had been taken out and worked. That evidence is added to by the evidence of another witness who speaks with very considerable accuracy of what he saw in 1818. What he saw then was working of the same description; it may have occurred between 1812 and 1818, or it may have been the same working which the other (the older) witnesses saw in 1812. Then passing on to 1825, or thereabouts, your Lordships have clear testimony of working of a very much more extensive description at that time. I say "more extensive," because it appears to me the witnesses agree in saying it was carried on by a number of persons who were acting upon a system, and for some purpose or other, who were acting as a company, or as persons engaged in a common undertaking, for the purpose of either trying or carrying on the works.

Now that being the character of the evidence which is the only evidence in the case, of course it would have been perfectly competent for any person interested to show that the working, such as I have described it to be, took place without the knowledge, and

without anything that could be called consent or authority on the part of the owner of the inheritance. Nay more, it might have been shown that the workings were actually workings by way of trespass, and had not even the consent of the termor, the mortgagee; or it might further have been shown that those workings were not workings of the ordinary kind for the purpose of commerce, for the purpose of disposing of that which was gained; but were workings for what I may call home consumption, for some ordinary purpose with reference to the farm on which the workings took place. Any one of those things might have been [*460] shown, but no *one of them has been shown in opposition to the evidence which I have referred to, and that evidence stands, *valeat quantum*, without any counter evidence for the purpose of putting a complexion upon the character of the working which I have mentioned.

That being the state of things, then, we proceed a step farther, and your Lordships find this important element introduced into the case. It is proved without contradiction, and even I may say without controversy, that in 1811, after the mortgage had been made, — for that was made in 1802, — but while the mortgagor was still in possession of the property, and was representing the property, and was for all practical purposes, in accordance with the sense in which the word is commonly used, in ownership of the property, living upon, at all events exercising the ordinary acts of ownership over, the property, he made a lease covering the land subject to the mortgage. I pass by the lease of 1807. What is stated in that lease of 1811 is, that it was a lease from Robert Bulkeley Owen to Richard Owen, Hugh Hughes, and Richard Henry Davys, of slate rocks and beds of slate, and all mines, &c., from that date for twenty-one years at the farm of "one-fourteenth share of clear profits;" and that lease is recognised as subsisting in 1815, because in certain conditions of sale of the property advertised in that year, it was spoken of as a lease to which the property was subject.

That lease being therefore established as having been made by the owner of the inheritance at the time that he was in possession, what appears to me to result from that fact is this. It appears to me that, just as any quarry opened by the owner of the inheritance himself, even although opened after the date of the mortgage, — provided it had been opened while he still was in possession, and

while he still was acting as the owner of the property, — just as any quarry opened by him would inure to the benefit of the mortgagee after he took possession and foreclosed, and would entitle him to call that an opened quarry, and to go on and work it as a source of profit arising from the property, so also any quarry opened by the lessees under this lease of 1811 would give the same rights to the mortgagee. And, my Lords, this also would flow from the lease of 1811; it not only would result from it that any quarry opened under that lease upon any part of the property would be * lawful, but it would also stamp [* 461] that quarry when opened with a commercial character, because the lease in its nature, and in its terms, is a lease for the express purpose of making money by quarrying as a commercial operation, and the product, the remuneration, upon which the landlord relies, is not a fixed sum by way of rent, but is, as it were, a sum arising from a partnership with those who were to be the tenants. He is to have a share of the profits of the quarry. Therefore, you have it in the clearest way that, provided it be established that any quarry was opened under the powers of that lease, that was a quarry the opening of which was rendered lawful by the owner of the inheritance, and was stamped by him as an opening for the purpose of commerce on the property.

Then, my Lords, that being so, the only question is, whether these openings to which I have referred, whether those quarries, which I have shown were commenced and carried on to a certain point at all events, were quarries the opening of which is to be referred to this lease of 1811 or not. Now, my Lords, there it is that it appears to me to be extremely important to consider upon whom the *onus* in the case lies, and I am far from laying down or wishing to suggest to your Lordships any general rule with regard to the question of the person upon whom in a case of this kind the *onus* must lie. If the case is recent, if there be no lapse of time or other circumstance to be brought into consideration, if you have simply a case of a term of years granted, and the landlord comes forward and says, "I complain that my termor is working a quarry upon his land," in that state of things it may well be that it is for the tenant to answer, and to show that quarry was opened at the time when he entered into possession. But it may be very different when a long lapse of time has occurred, and especially it may be different, and it appears to me it must be different, where

your Lordships have the singular fact which I have already referred to as existing in the present case, namely, that from 1820 to 1860, at all events, for a period of forty years, there was the owner of the inheritance, of full age, competent to act, and to bind himself, and living more or less in the neighbourhood of the land in question, and that, during the whole of that time, [* 462] that owner of * the inheritance made no complaint whatsoever as regards the opening of these quarries, or the existence of these quarries, or that which was done with these quarries at the dates to which I have referred.

Now, my Lords, that being so, and it being the case that your Lordships are called upon after this lapse of time to examine into acts which were done between the year 1811 and the year, we will say, 1825, and having it proved in evidence that those acts were done, and having before you a document which would render those acts lawful, and would make it a right and proper thing that those acts should have been done, and being called upon to say what was the power or the authority under which the acts were done, it appears to me that the presumption will be and ought to be, by any Court, that they were done under that authority which would render them lawful, unless those who are in the position of the appellants in the present case will come forward and can satisfy you by proper and apt evidence, that the acts were done, not under the authority which would render them lawful, but were done without authority and without any connection with the lease of 1811.

My Lords, there has been no attempt on the part of the appellants to dissever the acts which were done, from the lease of 1811. It appears to me that the *onus* lay upon them to do so. It appears to me that if there was any ignorance on their part of the lease of 1811, when it became known to them, they ought to have been able to disconnect the acts from the lease, and might have had time accorded to them by the Court for the purpose of producing evidence upon the subject. They have not produced any evidence of the kind, and in that state of things it appears to me that the legitimate and proper presumption for the Court to make is, that it was the lease of 1811 which led to and gave authority and legality to the acts done in the shape of quarrying under the property in question; and that that presumption is as strongly fortified as any presumption can be, by the further circumstance

that for forty years no complaint was made of these acts by the owner of the inheritance, who might have complained of them.

My Lords, under these circumstances, without going further * into the details of the case, it appears to me that [* 463] the conclusion of the Court of Appeal was correct; and I submit to your Lordships that this appeal should be dismissed with costs.

Lord SELBORNE: —

My Lords, I am of the same opinion.

The facts of the present case, which admit of no controversy, are that when the respondents' predecessor in title entered into possession, foreclosed his mortgage, and became the absolute owner of the term of five hundred years created in 1802, the whole of this property was subject to a lease granted by the reversioner while in possession, by which it was contemplated and intended that slate quarries should be worked in it, — without distinction of the upper from the lower part, — for commercial purposes; that the lower quarry was then confessedly open; and that the upper quarry, which alone is now in question, has been worked, to a greater or less extent, for or with a view to commercial purposes, from time to time since that date, as well during the continuance of the term granted by that lesse, as afterwards; the earliest date of such working which is fixed at all distinctly by the evidence being in or about 1826, forty-seven years before the filing of the bill.

There are many circumstances, more or less material to a correct appreciation of these facts, of which neither of the parties to the present controversy has given — perhaps at this distance of time neither of them was able to give — any evidence. The existence of the lease of 1811 is proved by notes or other statements in the nature of admissions made by the solicitor who in 1815 represented the predecessor in title of the appellant; but the lease is not itself in evidence, and any light which might have been derived from a knowledge of its precise contents is wanting. It seems to me to be uncertain, upon the whole evidence, whether Griffith, the mortgagee, under whom the respondents claim, was a party to it or not. From what had taken place when an earlier lease of the lower quarry was contemplated (if not granted) in 1808, from the relations (so far as they appear) between Mr. Williams, who prepared that earlier lease as solicitor for both the mortgagor and the mortgagee, and Mr. Pritchard, who prepared the lease of

1811, — and from the fact that two of the lessees of 1811 [* 464] were also * two of the intended lessees of 1808, — there is, I think, a strong probability that the mortgagee would have been made a consenting party to it. But, on the other hand, it seems clear that in 1815 this lease was not among the documents of title then in the possession of Mr. Williams, of which an abstract was furnished by him to Mr. Pritchard; and in Mr. Pritchard's notes of that date it is described as a lease from Robert Bulkeley Owen to Richard Owen, Hugh Hughes, and Richard Henry Davys, not mentioning Griffith. Whether Griffith was a party to it or not, any workings proved to have taken place under that lease would, I think, have been decisive of the present controversy; and, if he was a party to it, its mere existence when his title became absolute would have been enough, in my opinion, to make the quarry now in question then open as between him and the reversioner. The working of both quarries, in or about 1826, by a company locally connected with Carnarvon, under a quarry agent from Maennturog, is left unexplained, unless it ought to be referred to that lease. On all these points the questions of *onus probandi* and of the presumptions of fact (if any) which, under such circumstances and after such lapse of time, ought to be made, become highly important.

It is not, however, without aid from some other facts, besides those already mentioned, that these questions have to be determined. There is the evidence of several old witnesses who prove that there were, before the lease of 1811 was granted, two pits (or, as they call them, "holes"), already opened within a short distance of the present works of the upper quarry, from which some slates had been obtained, and dressed or prepared for some kind of use. The size of these pits or holes is a point on which the recollection of those witnesses did not enable them to speak; and it was insisted by the appellants' counsel that they must have been of very small extent; and also (there being at that time no road to the upper quarry), that they must have been worked with a view, either to a mere search or trial of the ground, or to some repairs of buildings, or roofs of buildings, on the adjoining farm, and not for any purpose of commercial profit. The indistinctness of this evidence (considering the remoteness of the time, and the age of the witnesses) is not at all surprising; but it proves what is, in my opinion, sufficient when considered in connection

with the lease of *1811 and the other facts of the case, [*465] to determine the question of *onus probandi*, as to all that afterwards took place, adversely to the appellants. It seems to be the most reasonable and probable conclusion that those pits or holes were opened with a view to such workings as those which were at the same time actually going on in the lower quarry, and which were authorised throughout the whole estate by the lease of 1811, although they may have been in some sense experimental, and though further works, such as roads, were undoubtedly requisite to enable any slates quarried from them to be profitably brought to market. More than this does not appear to me to have been necessary to open, *de facto*, before the lease of 1811 was granted, a quarry, the working of which might lawfully be continued, not by the lessees only, but also by the respondents' predecessor in title, who, on the foreclosure, succeeded to all the rights of the lessor. I agree with the Court of Appeal in thinking that, under the circumstances of this case, all reasonable presumptions of fact, not inconsistent with what is proved on either side, ought to be made in favour of the lawfulness of what has so long been done.

Upon the questions of law which were argued at the bar, I think it unnecessary to make more than two remarks. The first is, that I am not at present prepared to hold that there can be no such thing as an open mine or quarry, which a tenant for life or other owner of an estate impeachable for waste may work, unless the produce of such mine or quarry has been previously carried to market and sold. No doubt, if a mine or quarry has been worked for commercial profit, that must ordinarily be decisive of the right to continue working; and, on the other hand, if minerals have been worked or used for some definite and restricted purpose (*e. g.*, for the purpose of fuel or repair to some particular tenements), that would not, alone, give any such right. But, if there has been a working and use of minerals not limited to any special or restricted purpose, I find nothing in the older authorities to justify the introduction of sale, as a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. Use, as well as sale, is a perception of profit. None of the *dicta* which are to be found in some of the more modern cases (each of which turned upon its own *particular circumstances) can have been [*466]

intended to introduce a condition or qualification not previously known into the law of mines.

The other observation which I desire to make is, that, when a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or a new quarry; and for this, authority is to be found in the cases, which were cited at the bar, of *Clavering* v. *Clavering*, 2 P. Wms. 388. And see *Spencer* v. *Scurr*, 31 Beav. 334, and *Millett* v. *Davey*, 31 Beav. 470; *Bagot* v. *Bagot*, 32 Beav. 509; and *Lord Cowley* v. *Wellesley*, 35 Beav. 635, L. R. 1 Eq. 656.

Lord GORDON entirely concurred with the observations of his noble and learned friends, and agreed that the judgment of the Court below must be affirmed.

Judgment appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 12th May, 1879.

In re Kemeys-Tynte.

Kemeys-Tynte v. Kemeys-Tynte.

1892, 2 Ch. 211–218 (s. c. 61 L. J. Ch. 377; 66 L. T. 752; 40 W. R. 423).

[211] *Mining Lease. — Contract. — Tenant for Life impeachable for Waste. — Settled Land Act*, 1882, 45 & 46 *Vict.*, c. 38, ss. 11, 12.

The owner of an estate contracted to lease coal to be worked by instroke from adjoining mines in the occupation of the intended lessees. The owner died before his coal was reached or the leases granted.

Held, that the tenant for life, under his will, though impeachable for waste, was entitled to the rents and royalties.

Sect. 11 of the Settled Land Act, 1882, does not apply to a mining lease granted by a tenant for life for giving effect to a contract entered into by a predecessor who was absolute owner.

This was an originating summons to determine certain questions arising upon the effect of the will of Colonel Charles Kemeys Kemeys-Tynte, who died on the 10th of January, 1891.

One of the questions was whether a tenant for life of
[* 212] real estate, * impeachable for waste, under his will, was entitled to the dead rents and royalties of coal mines.

The testator was (subject to certain incumbrances) entitled to appoint and deal with an estate called the Unsettled Cefn Mabley Estate, Glamorganshire, which included the entirety of a piece of land (and the minerals thereunder) ninety-eight acres in extent, and a moiety of other land and the minerals thereunder seventy acres in extent, of the other moiety of which the representatives of the late Mr. Crawshay Bailey were the owners.

By an agreement between the testator and a colliery firm dated January, 1885, and certain subsequent agreements binding on the testator, it was contracted that the testator should grant a mining lease of the coal under the ninety-eight acres for a term of sixty years from the 1st of May, 1884, to the Ocean Coal Company, Limited, that he should join with the representatives of the late Mr. Crawshay Bailey in granting a lease for the same term of the coal under the southern portion of the seventy acres to the Ocean Coal Company, and a lease for the same term of the coal under the northern portion of the seventy acres to the Penrhihyber Company. Under the lease of the ninety-eight acres in addition to royalties, a dead rent of £280 was to be paid to the testator after the fifth year, and a smaller dead rent for earlier years. Under each of the other leases the testator was to receive after the fifth year a moiety of £120 a year as dead rent, in addition to a moiety of royalties. No surface rights were to be given to the lessees; but the respective lessees were to work the coal granted to them by means of adits driven from adjoining mines in the occupation of the respective lessees.

The testator appointed the three plaintiffs to the summons executors and original trustees of his will; he appointed the Unsettled Cefn Mabley Estate, subject to the charges affecting the same upon trust out of the rents and profits thereof to pay a certain annuity, and, subject as aforesaid, he declared that his trustees should hold the Unsettled Cefn Mabley Estate in trust for his eldest son Halswell Milborne Kemeys-Tynte for life, with remainder in trust for his eldest son Charles Theodore Halswell Kemeys-Tynte for life, with remainder in trust for the first or other sons of the latter successively in tail male, with remainders over.

*During the testator's life the dead rent was paid in re- [*213]
spect of all the coal, and the testator received his share of the same. Since his death his executors received dead rent. The Penrhihyber Company commenced drift working in their adjoining

mine with a view to get the coal under the northern portion of the seventy acres, and the Ocean Coal Company commenced drift working in their adjoining colliery with a view to get the coal agreed to be leased to them. Such drift working had been continued since the testator's death, but in neither colliery had the working quite reached the coal under the testator's land.

The plaintiffs to the summons were the trustees of the will. The defendants were the equitable tenant for life in possession under his will, and persons interested in another question.

During the testator's life a lease of the coal under the northern portion of the seventy acres to the Penrhihyber Company in accordance with the agreements was duly executed. Leases were prepared of coal under the ninety-eight acres, and the southern portion of the seventy acres, in accordance with the agreements during the testator's lifetime, but were not executed. It was intended that such leases should be executed by the tenant for life under the testator's will under the provisions of the Settled Land Acts, 1882 to 1890.

The question for the decision of the Court as to the coal was, what parts of the dead rents and royalties payable under the leases already granted or intended to be granted ought to be paid to the defendant Halswell Milborne Kemeys-Tynte as equitable tenant for life.

Everitt, Q. C., and Kingdon, for the trustees: —

The tenant for life can under sect. 12, sub-sect. 1, of the Settled Land Act, 1882, or under sect. 6 of the Act of 1890, carry out the contract made by the testator, though he could not have granted a lease himself in such wide terms.

[NORTH, J. — Sect. 6 of the Act of 1890 does not apply to leases.]

But he is not entitled to the whole rents and royalties as part of the income in cases where a lease either was or was not [*214] granted * by the testator. The test is whether the mine was opened in the life of the testator; no mine has been opened here even now. *Stoughton* v. *Leigh*, 1 Taunt. 402, 410 (11 R. R. 810); *Elias* v. *Snowdon Slate Quarries Company*, 4 App. Cas. 454 (p. 732, *ante*); *Dickin* v. *Hamer*, 1 Dr. & Sm. 284.

The intended lease when granted by the tenant for life will come into operation under the Settled Land Act, 1882; therefore the provisions of sect. 11, which are not limited in terms, apply,

and the tenant for life impeachable for waste will be entitled only to one-fourth of the rent and royalties.

Cozens-Hardy, Q. C., and Bramwell Davis, for the defendants: —

The mines are being and are to be worked under a contract made by the testator; the rents and royalties are payable under that contract, and have by him, therefore, been impressed with the character of income, and belong to the tenant for life. *Campbell* v. *Wardlaw*, 8 App. Cas. 641, 649, 655. *Stoughton* v. *Leigh* is an authority in favour of the tenant for life, showing that the widow in that case, not being dowable out of the minerals in lease, took her share of the rent and royalties as incident to the reversion.

As to the point on sect. 11 of the Settled Land Act, 1882 —

[NORTH, J. — I do not wish to hear you on that. I think that the leases, when granted, will be in exactly the same position as if they had been granted by the predecessor, who made the contract himself.]

Everitt, in reply.

NORTH, J. (after stating the facts and reading sect. 12, sub-sect. 1, of the Settled Land Act, 1882, continued): —

I have not examined the exact terms of the contract; but, assuming for this purpose that it did contain something that could not have been inserted in a lease made by a tenant for life under the Settled Land Act, I am of opinion that the tenant for life can now grant a lease with such terms and having exactly the same effect as if it had been granted by the testator * in [*215] all respects, a valid contract having been made to that effect by the settlor who was owner in fee.

The question then is, What is the effect of such lease under which the tenant was to have had the right to possession some time before the testator died, and a dead rent and royalties were to be paid? The tenants have had the benefit of the intended leases for some time, and, as matter of fact, have paid dead rent; but, by reason that the mines were to be worked by instroke, though the operation of tunnelling has proceeded continuously, the workings have not yet reached the confines of the testator's property. In that sense the mines are not yet opened. The testator received dead rent, and since his death the trustees have received dead rent; and there will shortly be royalties payable in addition. Who is entitled to these sums? In my opinion

the tenant for life is entitled to the whole of them. If, the day before the testator's death, the coal had been reached, it is conceded that the tenant for life would have been entitled to the whole rent and royalties; and what difference can it make in principle whether the coal was reached a day before or a day after the testator died? The leases were created by the act of the testator, who was owner in fee, and whatever he would have taken as income, in my opinion, the person who has a right to the income is entitled to receive, including the dead rent and royalties accruing during his life tenancy.

I do not wish to multiply references to authorities when there are so many in the books. One such case is that of *Daly* v. *Beckett*, 24 Beav. 114. There an estate with the mines and minerals was settled, and power was given to the trustees to demise the hereditaments, and the coal and minerals, but so as the lessees should not be dispunishable for waste. It was held that the last clause was repugnant, and that the trustees might demise mines, both opened and unopened, at the date of the settlement: and, also, that the royalty reserved was in the nature of rent, and was payable to the tenant for life, and did not form *corpus*, and included royalties under leases not existing at the time of the settlement. The MASTER OF THE ROLLS says (24 Beav. 123): "With respect to the second point, as to how the produce of the [* 216] mine is to be * considered, I must treat it, if I am right in my view as to the first point of the case, as if this were an ordinary power to lease the mines and minerals, in which case all the authorities establish this: that the produce of the mines is made part of the annual profits of the estate, and whether in royalties, or in whatever other way it is produced, it forms part of those profits, and that it is not to be treated like timber cut, where the produce of it is invested, and the interest only is paid to the tenant for life." Then, again, there is a case under a will: *Earl Cowley* v. *Wellesley*, 35 Beav. 638. The side-note is this: "Rents and royalties of brickfields, one of which had been leased by the testator and the other by the trustees of his will under a power, held to belong to the tenant for life." From the statement of facts, I understand that the field leased by the testator was worked as a brickfield during his life by William Hill, the lessee. After the testator's death, his trustees had, in pursuance of an arrangement made by the testator in his lifetime, and under a

leasing power contained in his will, granted a lease to the said William Hill of an adjoining piece of land also for a brickfield, reserving similar rents and royalties; which is precisely the present case, except that it related to brick-earth instead of coal. The MASTER OF THE ROLLS said: "I think that the lease being made by the trustees makes no difference, and that it is clear, from scope of leasing power, that the leases were intended for the benefit of the tenant for life." There are several other cases of the same import. I do not intend to refer to any other except *Stoughton* v. *Leigh*, 1 Taunt. 402 (11 R. R. 810). That is said by Mr. Everitt to be in point and binding on me. I assent. I think it is binding on me, and in favour of the tenant for life. The material facts were these. One John Hanbury was in his lifetime, at the time of his marriage and at his death, actually seised of divers landed estates, and of several mines of lead and coal, — namely, in his own hands, a lead mine, and a coal mine neither opened, wrought, or demised: two lead mines and two coal mines which during the coverture he had demised to tenants for years, reserving pecuniary rents, to be paid whether they did or did not open and work them; and of each sort of these one had been opened before his death by the tenant, * who still [*217] continued now to work it, and the other had not been opened; a lead mine and a coal mine had been demised during the coverture to tenants for years, rendering not pecuniary rents, but quantities of the lead ore and coal when gotten, and the tenants were by the terms of their leases at liberty to work or not to work these mines; the coal mine was at the time of John Hanbury's death, and of that action, wrought by the tenant; the lead mine had not been opened; and of two lead mines and two coal mines, which had been opened and were wrought by the deceased himself at the time of his death, one of each sort had, from the time of his death, ceased to be wrought, his heir thinking them unprofitable; the other of each sort the heir continued to work to profit. The deceased was also entitled to the following minerals lying under land which was not his own, but wherein he had purchased of the landowner liberties to work through his land: namely, a mine of coal, and another of lead ore, which he had opened and wrought during the coverture, and was working at the time of his death, since which the heir had ceased to work the lead, but continued to work the coal; a mine

of lead, and another of coal, which he had not opened or wrought; a mine of lead, and another of coal, which he had demised to tenants for years, rendering at their own option, which they might annually make, either pecuniary rents or rents in kind, commencing from the time when the mines should be wrought. The lead mine had been opened before the death of John Hanbury, and the tenants had paid their rents in ore in kind. The coal mine had not been opened.

The material part of the judgment given in answer to certain questions put by the Court of Chancery (1 Taunt. 410, 11 R. R. 816), is reported thus: "The Court certified to the High Court of Chancery that their opinion upon the questions proposed to them was that the widow of John Hanbury was dowable of all his mines of lead and coal, as well those which were in his own landed estates as the mines and strata of lead or lead ore, and coal, in the hands of other persons, which had in fact been open and wrought before his death, and wherein he had an estate of inheritance during the coverture, and that her right to be endowed of [* 218] them had no * dependence upon the subsequent continuance or discontinuance of working them, either by the husband in his lifetime, or by those claiming under him since his death. They thought too that her right of dower of such mines, &c., could not be in any respect affected by leases made by the husband during the coverture" — that is, her right was exactly the same as if no lease had been granted by him during coverture; "but if any of the existing leases for years" (and no distinction was made as to whether the mines were open or not) "were made by the husband before marriage, then the endowment (if made of the mines) must be of the reversions and of the rents reserved by such leases as incident to the reversions, in which case they thought the widow would be bound, so long as the demises continued, to take her share of the renders, whether pecuniary or otherwise, according to the terms of the respective reservations. They were also of opinion that the widow was not dowable of any of the mines or strata which had not been opened at all, whether in lease or not."

It came to this, that if at the time of the testator's death a mine was not opened at all, she was not entitled to dower. But if any leases had been made before her right to dower attached, although she was not dowable out of the mines, she was entitled

to the rents and profits as incident to the reversions. So in this case, where mines have been let by the settlor before the will came into operation, the tenant for life under the will is entitled, in my opinion, to the rents and royalties as incident to the reversion of which he is tenant for life.

ENGLISH NOTES.

Tenant for life of estate in which mines had been opened and were being worked under a twenty-one years' lease, demises to the tenants under that lease the mines opened and unopened, for twenty-six years, reserving ore as rent to the lessor, his heirs and assigns. Under the settlement the tenant for life had power to grant leases in possession for twenty-one years at the best rent, &c. On a bill filed on behalf of the remainder-man to set aside the lease as not conformable to the power, it was held: 1. That the original twenty-one years' lease must be deemed to be surrendered; 2. That the demise purporting to be granted for twenty-six years shall bind the remainder-man for twenty-one years; 3. That the rent in ore, assuming it to be a fair proportion, satisfied the condition as to the best rent; 4. That the rent reserved, not being a gross rent for all the mines, but separate on each, the power was well executed as to the open mines, though not of mines unopened. *Campbell* v. *Leach; Leach* v. *Campbell* (1775, before Lord Apsley, C., De Grey, L. C. J., and Smythe, L. C. B., on appeal from the Rolls), Ambler, 740.

Ferrand v. *Wilson* (Wigram, V. C., 1845), 4 Hare, 344, 15 L. J. Ch. 41, was a suit by a remainder-man against the tenant for life under a will, for an account (*inter alia*) of coal mines opened since the death of the testator and of stone obtained from quarries open at the testator's death. The testator had devised his lands in strict settlement, with liberty for each tenant for life in succession to cut down timber, and to get stone upon the premises, for buildings and repairs, but for no other purpose; and in the latter part of his will he recited that he had already restrained, and did thereby intend to restrain, each and every such tenant for life from cutting any timber or getting any stone upon the premises, save for the purposes aforesaid. The decision of Vice-Chancellor Wigram upon the points as to mines and quarries was as follows: "With respect to the coal mines, I apprehend the law is clearly settled, that a tenant for life may work such mines as are open at the death of the testator, but cannot open new mines. Whether a pit open is properly to be considered a pit open for the purpose of working an old mine or a new mine, may be a question; but the proposition appears to be stated in all the cases, that a tenant for life may work open mines, but cannot open new ones. Upon that part of the case which relates to

the working of the coal mines I shall give no opinion, except that which is involved in the inquiry I propose to direct, namely, whether any coal mines have been opened and worked by any and what persons, which were not open at the death of the testator; and the Master is to state the grounds of the conclusion to which he shall come with reference to the last-mentioned inquiry. With respect to the quarries: if this question stood upon those clauses of the will which in terms empower the successive tenants for life to cut down timber, and to get stone for building and repairs upon the premises, but for no other use or purpose whatsoever, I should have felt little difficulty in answering it. Without those clauses, the tenant for life would have had a right within certain limits to get stone out of open quarries, but would not have had a right of cutting down timber or wood for building and repairs, or of getting stone for that purpose, except out of open quarries: with those clauses the tenant for life would have power, for the purposes of building and repairs, to cut down timber and wood, and get stone from any part of the estate. The clauses are clearly enabling clauses, so far, and inserted for that purpose; and it would, I conceive, be against sound principles of construction, if the case stood here alone, to read the clauses as restrictive, without something more express than is found in the will. But the question does not rest upon those clauses alone. In a subsequent part of the will, the testator again refers to the same subject; and the question arises, whether the subsequent part of the will does not show that the clauses I have already referred to were intended to be restrictive. The words are these: 'That the testator has restrained, and does hereby restrain, the parties from cutting timber or getting stone, except for special purposes.' This clause refers to the antecedent clauses, as being restrictive; and although I cannot say the construction I put upon this clause is, strictly speaking, absolutely necessary, I think it safer upon the whole to give literal effect to the words of the will, and hold that the tenant for life could not take stone, even from open quarries, except for the purposes of building and repairs. A construction which thus supposes the testator to have restrained the tenant for life from selling stone or getting it, except for use upon the estate, is not unreasonable. That was clearly the intention, in my opinion; and I find nothing at all unlawful in the testator saying that the stone shall not be taken from open quarries during a life *in esse*."

In *Mostyn* v. *Lancaster; Taylor* v. *Mostyn* (C. A. 1883), 23 Ch. D. 583, 52 L. J. Ch. 848, 48 L. T. 715, 31 W. R. 686, a testator had devised his estate in strict settlement, the life tenancies being without impeachment of waste; and after giving powers to the tenants for life to jointure their wives and provide portions for younger children, the testator authorised the tenants for life when in possession and the

guardian of infant life tenants in possession to demise any parts of the estates, except the mansion-house, for any term not exceeding twenty-one years at the best rent without fine or premium; and then empowered such tenants for life and guardians to grant any lease or leases of any mines or collieries or of any parcels of land for the purpose of digging for, winning, or gaining minerals or coal in any part of his estates "for such terms or number of years, and under and subject to such rents or reservations and agreements as to such tenant for life or guardian or guardians shall seem reasonable and proper," and also to grant building or repairing leases for any term not exceeding ninety-nine years without any fine or premium. The tenant for life in possession under this settlement, by a deed reciting the leasing power, in consideration of £6000 paid to him by X., demised the mines, included in a mining lease made by the testator and having at the date of this latter demise only five years to run, to X. for ninety-nine years at a peppercorn rent, subject to redemption on payment of £6000 and interest. It was held that this was a valid exercise of the power contained in the testator's settlement, and that a good legal mortgage in the mines comprised in the testator's lease was thereby created.

As to mining leases in glebe lands an important case is *Ecclesiastical Commissioners* v. *Wodehouse*, 1895, 1 Ch. 552, 64 L. J. Ch. 329, 72 L. T. 257, 43 W. R. 395. It was held by ROMER, J., that, after the passing of the restraining statutes 13 Eliz., c. 10, and 14 Eliz., c. 11, a rector could not, even with the consent of the patron and ordinary, open new mines upon the glebe lands; that the Ecclesiastical Commissioners have now such an interest in the leasing of mines under glebe lands as enables them to apply to the Court for an injunction to restrain the illegal working of such mines; and that the consent of the Ecclesiastical Commissioners which is necessary under 5 & 6 Vict., c. 108, and 21 & 22 Vict., c. 57, to any valid lease of glebe lands, cannot be inferred from the mere fact of receipt by them of rents and royalties derived from a mine which had been illegally opened and worked under an agreement for a lease to which the Ecclesiastical Commissioners had refused to consent.

The Settled Land Act, 1882, by section 6, gives power to the tenant for life to grant a mining lease for sixty years; and, in special circumstances, under section 10, for a longer term.

The clause (11) of the Settled Land Act, 1882, referred to in the judgment of the latter principal case is as follows: "Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent, as follows, namely: where the tenant

for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits."

On this clause Mr. Wolstenholme (7th ed. p. 311) observes: "The portion of rent set aside under this section is in effect the consideration paid by the tenant for life for the privilege of granting the lease for sixty years. But the Act does not affect any of his common-law rights, as tenant for life, to open and work mines if he is unimpeachable for waste, and to work open mines if he is impeachable for waste."

What is a "contrary intention" under this clause was considered in the case of *In re Duke of Newcastle's Estates* (1883), 24 Ch. D. 129, 52 L. J. Ch. 645, 48 L. T. 779, 31 W. R. 782. The settlement gave the trustees power during the minority of any person entitled to possession to receive and apply rents and profits in the management of estate and maintenance of infant, and to accumulate and apply the surplus in paying off charges, or in purchase of real estate to be settled to the same uses; and it gave power to the guardians during minority to grant mining leases for sixty years. It was held by PEARSON, J., that the rents derived from mining leases were to be applied by the trustees in the manner directed by the settlement, as coming within the term "contrary intention." And in the case of *In re Bagot's Settlement, Bagot* v. *Kittoe*, 1894, 1 Ch. 177, 63 L. J. Ch. 515, 70 L. T. 229, 42 W. R. 170, where the settlement conveyed the estate subject to an existing rent-charge, upon trust for sale, with power to postpone, and to pay the income arising from the investment of the proceeds of sale, or *the rents and profits until sale*, to a married woman for life for her separate use without power of anticipation, and gave the trustees power (*inter alia*) to work mines, and grant mining leases for ninety-nine years, it was held by CHITTY, J., that a "contrary intention" was shown by the settlement, and that the whole rents under the mining leases should be treated as income.

AMERICAN NOTES.

Tenant for life may work an opened mine and follow up the same vein by new shafts. *Coates* v. *Cheever*, 1 Cowen (N. Y.), 476; *Billings* v. *Taylor*, 10 Pickering (Mass.), 460; *Crouch* v. *Puryear*, 1 Randolph (Virginia), 258; *Neel* v. *Neel*, 19 Penn. State, 324; *Findlay* v. *Smith*, 6 Munford (Virginia), 134 (new salt-well in connection with old one). He may even exhaust the mine. *Sayers* v. *Hoskinson*, 110 Penn. St. 473. See *Shaw* v. *Wallace*, 25 New Jersey Law, 453; *Irwin* v. *Davidson*, 3 Iredell Equity (Nor. Car.), 311; *Lenfers* v. *Henke*, 73 Illinois, 405; 24 Am. Rep. 263; *Harlow* v. *Lake Superior Iron Co.*, 36 Michigan, 105.

SECTION VI. — *Rules of Construction, &c.*

No. 27. — DAVIS *v.* SHEPHERD.

(1866.)

RULE.

WHERE, in an agreement for a lease of a mine, the mine is described as bounded by a fault (the position of which is not exactly ascertained), and containing a certain number of acres "or thereabouts:" — although this last expression may be construed with greater latitude than similar words in an agreement for a lease of the surface, yet, if the real position of the fault is such that the area of the mine extending to the fault would be very much larger, the lessee, who has commenced working, is not to be considered as in possession of, or entitled to, the whole of that larger area.

Davis v. Shepherd.

L. R. 1 Ch. 410–421 (s. c. 35 L. J. Ch. 581; 15 L. T. 122).

Agreement. — Quantity. — Falsa Demonstratio. — Boundary. — Mining Lease. [410]

The owners of land agreed to demise to A. the minerals under it to the west of a certain fault supposed to run through the land in the direction of a line drawn on a certain plan, the quantity of the land being described as supposed to be eighty-three acres or thereabouts. The owners made a similar agreement with B. as to the minerals under the land to the east of the fault, supposed to contain ninety-eight acres or thereabouts. The fault was afterwards found to run so as to leave on the west eight acres only.

Held, on a bill filed by B. to restrain A. from working coal to the east of the fault, that the Court would not, in a suit by B. for specific performance against the owners, have decreed a demise of all the minerals to the east of the fault, and that he could not be deemed in constructive possession, so as to maintain his suit against A.

Quære, whether B. was tenant from year to year, or what his title was, and whether, under the circumstances, if the fault had run nearly in the direction of the line, a different construction would not have been given.

Miss E. M. Turberville, Sir G. L. Glyn, and W. R. King were, in 1861, joint owners in fee of a farm and lands called Blaenamman Fach Farm, in the parish of Aberdare, in the county of Glamorgan.

No. 27. — Davis v. Shepherd, L. R. 1 Ch. 410, 411.

The plaintiff Davis was at that time working coal to the east of the farm, the defendant Shepherd to the west. Other persons were working coal to the south, and from their workings it was supposed that a certain fault or dislocation of the strata called a "downthrow fault to the west," or an "upthrow fault to the east," traversed the farm in a direction nearly north and south, cutting it into two nearly equal parts, as mentioned below.

On the 1st of September, 1861, an agreement was made and signed between the agent for the owners of the farm on the one part, and Shepherd and D. Evans (who afterwards died) of the other part; and thereby it was agreed "that the said Miss Turberville, Sir G. L. Glyn, and W. R. King shall grant, and the Messrs. Shepherd and Evans shall take a lease of the coal, ironstone, and fireclay in and under a portion of the Blaenamman Fach Farm, situate in the parish of Aberdare, which lies to the westward of a downthrow fault to the west, supposed to run through the [* 411] said farm in * the direction shown upon the plan. The exact quantity cannot at present be ascertained, but it is supposed to be eighty-three acres or thereabouts." The agreement also provided that the lessees were to have power to take portions of the surface, not exceeding ten acres, for the purpose of sinking pits and shafts, constructing railways and engine-houses; that the term was to be fifty years from the 1st of November, 1861, at a certain rent of £185 a year, and royalties also to be paid on the coal raised, according to the seam from which it came; and that the lessee should leave a barrier where required in each vein; and contained several other provisions. A plan was annexed to the agreement, in which a straight blue line was drawn, representing the supposed direction of the fault.

On the 19th of July, 1862, the owners made an agreement with the plaintiff Davis for a lease of the coal, ironstone, and fireclay to the eastward of the same fault, the quantity of land being therein described as supposed to be ninety-eight acres or thereabouts, and the fault being called "an upthrow fault to the east," which was admitted to mean the same as "a downthrow fault to the west." The term was to be forty years, at a fixed rent of £200 and royalties. A similar plan was annexed, and the agreement was *mutatis mutandis* nearly in the same terms as that with Shepherd. It was in evidence that Davis had notice at this time of Shepherd's agreement.

No leases were granted pursuant to these agreements, but both the lessees commenced working the mines which they had agreed to take, Davis from his former works on the east, and Shepherd from his former works on the west. Shepherd very soon encountered a fault not running near the line marked on the plan, but far to the west of it; so that, supposing it to continue, it would cut off to the west, not eighty-three acres, but only about eight acres. He, however, prosecuted his working through this fault, and proceeded to get the coal beyond it.

Davis thereupon filed his bill against Shepherd and the owners of the farm, alleging that this was the fault mentioned in the plan, and that Davis was entitled to a lease of all the coal to the east of this fault, and praying that Shepherd might be restrained from working coal to the east of this fault, and for an account.

* A great quantity of evidence was given on each side, [* 412] the plaintiff, amongst other things, adducing evidence to show that a fault was the natural and proper boundary between two collieries, that to take another line and leave a fault within the bounds of a colliery would be contrary to the rules of good mining, and would render it necessary to leave a barrier of good coal between the two collieries, at a loss to one or both, and to the owners; also, that the owners refused to let the coal to the plaintiff unless he took it up to this fault.

The plaintiff moved for an injunction before Vice-Chancellor WOOD, and the matter afterwards came on upon motion for decree, when the VICE-CHANCELLOR decreed an injunction and an account, without prejudice to any proceeding which any of the parties to the suit might take, for enforcing the specific performance of the agreements for leases.[1]

[1] May 4, 1865. Vice-Chancellor WOOD said that he could not hold that there was any right in the defendant. As regarded him, his limit was the fault, which undoubtedly existed. Though the acreage was called eighty-three acres or thereabouts, how could he say that, having a distinct boundary, he must go to the other side of it, or else he will not get his eighty-three acres. That might be a good ground for him to resist specific performance of his agreement against the owner; but his construction could not be enforced on others. His boundary was clearly to be a fault, though no one knew where it ran. The plaintiff had his agreement, and was on the east of the fault; there was no opportunity given before the agreement was made of testing the course of the fault, and all that was said was that the lessors believed it to run in a certain direction, in which they were wrong. If you have once got your boundary, it makes no difference whether you call the land agreed to be let eighty-three acres or one thousand acres. The plaintiff was in possession; the landlords did not threaten to turn him out, and did not even say at the bar that they would file a bill to have

The defendants appealed, and the appeal having been appointed to be heard before the full Court, they moved that they might be at liberty to bring forward new evidence, discovered by them since the hearing. The plaintiff did not oppose this, and a great deal of further evidence was gone into on both sides, the defend-
[* 413] ants * attempting to show that the fault in the adjoining colliery never reached the Blaenamman Fach Farm at all, and that the fault through which Shepherd had worked was not the fault mentioned in the agreement, but an independent fault.

The Attorney-General (Sir R. Palmer), Mr. W. M. James, Q. C., and Mr. Freeling, for the plaintiff: —

It is clear that the plaintiff has the legal interest in all the land up to the fault, the position of which was uncertain, and the defendant took his chance of what his lease might comprehend; it was an aleatory contract, and each party took his chance. As to the acreage mentioned, *falsa demonstratio non nocet.* Shep. Touch. 99, 101; *Llewellyn* v. *Jersey*, 11 M. & W. 183. The evidence is conclusive that a fault is the natural and proper boundary between two collieries, and that a landowner would never sanction any other. The defendant is tenant from year to year. *Doe* v. *Bell*, 5 T. R. 471 (2 R. R. 642); *Doe* v. *Amey*, 12 Ad. & E. 476.

Mr. Rolt, Q. C., Mr. G. M. Giffard, Q. C., and Mr. Marten, for the defendant Shepherd: —

This is not a demise, but a license: Shep. Touch. 96; *Doe* v. *Wood*, 2 B. & Ald. 724; Coll. Mines, 11 (p. 775, *post*); *Jones* v. *Reynolds*, 4 Ad. & E. 805; and the right to take minerals cannot be the subject of a demise; the plaintiff is therefore not in possession. The imaginary boundary was to be the real boundary, subject to any trifling deviation which might be found in the course of the fault, or unless a fault was found substantially in the same direction, but the agreements were never intended to give one man nearly the whole.

Mr. E. Smith, Q. C., and Mr. T. H. Hall, for the landlords, as to

the agreement rescinded; and if they did not rescind it, they must complete it, and grant a lease of the coal up to the fault. Everything had reference to the fault. It might be doubtful whether, if the plaintiff filed his bill for the purpose, he would get specific performance; but he was in possession, and could work on, unless his landlord brought ejectment. There was a legal interest in the plaintiff, who, until he was disturbed, had an equitable interest also; that was strengthened by the landlords declining to rescind the agreement, and on the part of the defendants there were no such interests.

the power of the Court to interfere in the case of trespass, cited *Flamang's Case*, cited in 7 Ves. 308; *Haigh* v. *Jaggar*, 2 Coll. 231; *Vice* v. *Thomas*, 4 Y. & C. Ex. 538.

The Attorney-General, in reply: —

Whatever was the legal interest in the plaintiff, it continues * unaltered, and the landlord has done nothing to [* 414] determine it. Moreover, it is clear from the cases that this is an agreement to demise, and not a license. This is a suit for an injunction, not for specific performance. There is nothing inequitable in enforcing this agreement; there has been no fraud; the plaintiff has a legal right, and why should it be taken away and he be deprived of his remedy?

This may be a case where the Court would refuse specific performance of the agreement to lease, and leave the parties to law, but while we are tenants, we have a right to protection. Where a tenant from year to year applies to the Court for protection, what answer is it that the Court would refuse to assist him in getting a higher title? But there is no equity between these parties at all; if the plaintiff is right the defendant is wrong. There was neither fraud nor mistake; each party took his chance. The substance of the agreement was that each party should take the coal-field, bounded by its natural boundary, the fault, wherever that might be. The line on the plan is not to indicate the boundary, but merely that the fault was supposed to run in that direction — a simple statement of fact. The defendants try to make out that the line is the boundary, which by the terms of the agreement it clearly was not. As to the theory that if there was a fault substantially in the direction of the line drawn, then that was to be the boundary, and if not, then the line, how can any one say what is substantially in the direction of the line?

April 21. Lord CRANWORTH, L. C., after stating the facts of the case and the pleadings, continued: —

The case as it came before us was partly an appeal and partly an original cause. It was very fully and ably argued, and numerous points were made both as to the law and to the facts. I have given the case my best attention, and the result is, that I am unable to concur in the view taken of it by the VICE-CHANCELLOR. His Honour considered it clear that the plaintiff was in possession of the mine from the eastern side of it up to the fault, and that the defendant, having worked through that fault, * was [* 415]

a mere trespasser. I am unable to go with his Honour in this view of the case.

When the owner of real property, whether surface land or minerals, binds himself by a written agreement to grant a lease, and suffers his intended lessee, without a lease, to take possession, he must be understood to allow the lessee to take possession of all which he has engaged to demise. In the case of a demise of unworked minerals, there can hardly be said to be actual possession of any part of them except of what the intended lessee is actually working; but I think that when the lessor allows his intended lessee to take possession, and the lessee does take possession and commences working accordingly, he must be considered as constructively in possession of all which the lessor has bound himself to demise. I cannot, however, think that the lessee can be treated by this Court as constructively in possession of anything of which the lessor did not intend to put him in possession, and of which this Court shall say the lessor is not bound to grant a lease. The result of granting an injunction in such a case might be that, when in subsequent ligitation in this Court the question should arise directly as to the extent of the property to be demised, it would turn out that the Court had improperly restrained the owner from dealing as he thought fit with his own land or mines.

Proceeding then on this principle, the question to be answered is this: Has the plaintiff shown that the defendants, the lessors, are bound to grant him a lease of the mines under Blaenamman Fach Farm, beginning from the eastern boundary up to the fault, through which the defendant Shepherd has been working? I think he has not. For assuming the plaintiff to be right in saying that the upthrow fault to the east, through which the defendants have been working, is the same fault which diverges so much to the west before it reaches Blaenamman as to leave to the west of it not eighty-three acres, as marked on the plan, but only eight acres — assuming, I say, this to be so, I think this Court would refuse to compel the intended lessor to grant a lease which should embrace an area of mine so very largely in excess of that which, as is obvious from the agreement and the plan, both parties contemplated.

[*416] *It was said in argument that both the contracting parties knew there was uncertainty as to the extent of what was to be demised. No doubt that is true. But the amount of that uncer-

tainty is indicated, so far as such a matter can be indicated, by the language used. The fault is said to be "supposed to run in the direction shown by the line on the plan." The exact quantity cut off to the east of the line is said to be "supposed to be ninety-eight acres or thereabouts." It is impossible in such a case to define with accuracy what latitude can be allowed as to the quantity to be demised, — how much in enforcing the agreement the Court would compel the lessor to allow beyond ninety-eight acres if the line of the fault should be proved to run to the west of the line shown on the plan. It is impossible, on such a subject, to lay down any general abstract rule, and if the deviation had been such as to include one hundred and eight acres, or even one hundred and eighteen acres, instead of ninety-eight acres to the east of the line, it would have been open to fair argument that the excess might be covered by the vague words "or thereabouts."

But I do not feel myself driven to solve any such questions in the present case. It is certain that neither party contemplated such an addition to the ninety-eight acres as the plaintiff is now contending for. The lessor had already agreed to demise to the defendant Shepherd all the mine to the west of the fault described as supposed to be eighty-three acres or thereabouts. This was known to the plaintiff. And when the plaintiff entered into this agreement, it could not have been in the contemplation of either party that under such loose and vague words as "or thereabouts" it could have been intended to oblige the defendant to accept eight acres instead of eighty-three acres; and I see no reason why the same principles which would guide the Court in construing words of this sort in an agreement for sale or demise of the surface, should not be acted on when we are dealing with minerals, though, no doubt, there is in such subjects more difficulty in fixing a boundary.

On this short ground, I am of opinion that the plaintiff cannot, in this Court, be considered as being constructively in possession of any minerals not coming within the description of ninety-eight acres or thereabouts, and not separated from the western border * of Blaenamman Fach by a line running in the [*417] direction, or nearly in the direction, of the line marked on the plan.

I have considered the case hitherto, adopting the hypothesis of the plaintiff, that the fault through which the defendant Shep-

herd has pushed his workings is the fault intended to be shown on the plan. But I desire it to be understood that I am by no means satisfied that this is the case. It is extremely difficult to appreciate accurately the evidence of the persons who describe the nature and direction of the faults as traced in the adjoining mine. But I concur with both my learned brothers in the opinion that there seem to be very strong grounds for thinking that the fault marked on the plan may not be that through which the defendant Shepherd has penetrated. In order to establish his title, the plaintiff was bound to make this part of his case out, so as to leave no reasonable doubt on the subject — and he has failed to satisfy me on this point.

But I do not go into this question in detail, because, for the reasons I have stated, I think that, even if all this were made out in proof, this Court cannot treat the plaintiff as being constructively in possession of the mine now in dispute. My opinion therefore is, that the decree we ought to make is simply to dismiss the bill, with costs.

Sir G. J. TURNER, L. J.: —

I fully concur in the LORD CHANCELLOR'S judgment, and in the reasons on which it is founded, and I should not have thought it right to occupy the time of the Court in stating the reasons which have led me to the same conclusion, had I not fully considered the case and formed my opinion upon it before I was aware of the conclusion at which the LORD CHANCELLOR had arrived.

The first question which presents itself is, What, according to the true construction of the agreement of the 19th of July, 1862, is the boundary of the mine agreed to be demised to the plaintiff? It is contended for the plaintiff that this boundary is the fault in question, through whatever part of the farm that fault may run. It is not necessary to consider what would have been the proper construction of this agreement if it had stopped at the words "upthrow fault to the east," for these words are fol-
[*418] lowed by a *description of the fault as "supposed to run in the direction shown upon the plan annexed to the agreement," and by a statement that the quantity cannot at present be ascertained, but is supposed to be ninety-eight acres or thereabouts, and the plan annexed to the agreement lays down the direction of the fault as leaving about ninety-eight acres to the

east of the supposed fault. It is argued for the plaintiffs that the parts of the agreement to which I have last referred amount to no more than *falsa demonstratio* of the words "upthrow fault to the east;" but I do not agree in that view. I think that the description of the property intended to be demised cannot be taken merely from the words "which lies to the eastward of the upthrow fault to the east," but that the following words, at least so far as they refer to the supposed direction of the fault and as they refer to the plan, and likewise the plan itself, must also be considered as descriptive of the property intended to be demised, and that from the whole description of the property, taken together, it sufficiently appears that what was really intended by this agreement was an agreement to demise the ninety-eight acres or thereabouts bounded by the fault, if fault there was, in the direction marked on the plan; the reference to the supposed direction of the fault being inserted like the common words "more or less" in the description of parcels in a deed, to allow of any trifling diminution or increase which might be occasioned by the fault not running in the precise direction laid down upon the plan.

It was further argued for the plaintiff that it was intended both by the lessor and lessee that each of them should take the chance of the quantity of the mine to be included in the demise, and that this was a mere matter of speculation on both sides; but this appears to me inconsistent with the whole tenor of the agreement. Could it have been intended that the lessee should pay a dead rent of £200 a year, when he might take a mere fraction of the mines from the fault happening to run nearer to those mines which he was already in the occupation of. And again, how is this supposed case of speculation to be reconciled with the mention of ninety-eight acres or thereabouts in the agreement and in the plan?

The view which I have thus taken of the construction of this *agreement is, I think, much strengthened by [*419] reference to the correlative agreement of the 14th of September, 1861, which indeed more pointedly illustrates the observations I have made; inasmuch as, if the plaintiff's contention be well founded, and be applied to that agreement, Shepherd would have to pay a dead rent of £175 for eight acres of mine, and could not even have the ten acres of surface provided by that agreement.

I think, therefore, that the plaintiff's case, even upon his own agreement, cannot be maintained; but supposing this point to be open to more doubt than it seems to me to be, there are other points which, in my judgment, are scarcely, if at all, less fatal to the plaintiff's case. The plaintiff coming into equity must, as it seems to me, found his title to relief upon one or other of these grounds, — either upon his right under his agreement, or upon the footing of his being entitled to call for the assistance of this Court in aid of a legal right. If we look at this case with reference to the plaintiff's right under his agreement, then I think it reasonably clear, for the reasons which the LORD CHANCELLOR has stated, that specific performance of the agreement would not be decreed. I do not, however, go the length of saying that this is a case in which this Court would set the agreement aside and order it to be cancelled, as founded in mistake; although I am by no means prepared to say that the Court would not do so, as the agreement seems to me to have proceeded on both sides upon the footing that the fault was supposed to run in the direction laid down upon the plan, and it has subsequently appeared that it does not in fact run in that direction.

If, then, the Court would not have decreed specific performance of this agreement, ought the Court to interfere at the instance of a plaintiff claiming under a title giving him no right in equity against a third person claiming with or without right under a title similarly derived and antecedently created? I think it ought not so to interfere; for its interference must be based upon some equitable right giving title to such interference.

It was said on the part of the plaintiff that the question whether he was or was not entitled to have his agreement performed, was a question between him and his intended lessors, and that the defendant Shepherd has no right to set up the *jus tertii*.

[* 420] But a * defendant in equity has surely a right to show that the plaintiff has no equitable title, and the evidence in this cause satisfies me that, so far as the plaintiff's case rests upon specific performance, he has no such title. The fact which appears upon the evidence that the plaintiff, when he entered into his agreement, had notice of the agreement under which the defendant Shepherd holds, tends, I think, very much to strengthen this part of the case against the plaintiff.

Then as to the plaintiff's right to call for the assistance of this

Court in aid of his alleged legal right, the case rests upon this: that possession having been given to him under his agreement, he became tenant from year to year upon the terms of that agreement. But assuming that there would be a tenancy from year to year in a case of this nature, on which I give no opinion, this argument, at all events, involves an inquiry of what mines possession ought to be considered to have been given to the plaintiff under his agreement. This case of interference upon the footing of a legal title therefore works round again, as it seems to me, to the question what was intended to be demised, as to which I have already expressed my opinion.

I may add that, looking to the evidence adduced since the hearing before the VICE-CHANCELLOR, the plaintiff, on whom the *onus probandi* plainly rests, has certainly not satisfied me that the fault is not in fact a distinct and separate fault; and I may further add that the effect of this decree, proceeding as it does upon the assumed legal title, seems to me to give the plaintiff indirectly the full benefit of his agreement according to his construction of it, although this Court, if directly applied to for performance of that agreement, would not in my opinion have been justified in enforcing it.

Upon these grounds I find myself unable to agree in the opinion of the VICE-CHANCELLOR, and I think that this bill ought to have been dismissed, and dismissed with costs.

SIR J. L. KNIGHT BRUCE, L. J.: —

Independently of any view which I may take, the concurrent opinion of the LORD CHANCELLOR and LORD JUSTICE is sufficient, * and the bill stands dismissed. But I am [*421] bound to say that the plaintiff has not, in my opinion, established a sufficiently clear case to justify this Court in interfering. The case is too obscure and difficult for an injunction, and the only course is to dismiss the bill.

Bill dismissed with costs. No costs of the appeal.

ENGLISH NOTES.

An analogous point will be found considered in the case of *Haywood* v. *Cope*, No. 32, p. 816, *post*, and the notes there.

The passage of Lord CRANWORTH'S judgment as to the constructive possession of mines (p. 760, *ante*) is cited and applied by AMPHLETT, B., in *Low Moor Co.* v. *Stanley Coal Co.* (1875), 33 L. T. 436, 446, to show that the purchaser under an unenrolled deed of bargain and sale of

minerals who had worked an upper seam was constructively in possession of the lower seams which were intended to be included in the purchase, and so could make a title under the Statute of Limitations, 3 & 4 Will. IV., c. 27, ss. 2, 3, and 7.

No. 28. — LEWIS *v.* FOTHERGILL.

(1869.)

RULE.

Primâ facie, and in the absence of express provisions to the contrary in a lease of mines, the lessee is not bound to work by a pit or shaft sunk in the land of the lessor, but may get the minerals, if he can, by instroke through the shaft of a mine on adjoining land.

Lewis v. Fothergill.

L. R. 5 Ch. 103–111.

[103] *Agreement. — Mining Lease. — Working by Instroke. — Irremediable Damage. — Word "win." — Evidence of Expert.*

The owner of a piece of land agreed to demise the seams of coal under the land to the owners of an adjoining colliery, at a royalty on each ton of coal worked, and at a dead rent of £500 if the royalties did not amount to so much; the dead rent not to be charged for the first three years if the necessary steps were *bonâ fide* taken with ordinary despatch to win and work the coal. The lease was to contain a covenant by the lessee for working the coal in a proper and workmanlike manner. The lessees proceeded to work the coal by instroke or headings from their adjoining colliery, which was situated to the rise of the seams agreed to be demised; the lessor alleged that the lessees ought to sink a pit and work the coal from the deep, and filed a bill to restrain them from working from the adjoining colliery, and to compel payment of the dead rent, on the ground that they had not taken the necessary steps to win and work the coal.

Held, that, under the circumstances, working the coal by instroke was working in a proper and workmanlike manner, and that if the lessor had intended to compel the lessees to sink a pit, it should have been provided for in the agreement.

Held, that as the lessees were actually working the coal, irremediable damage would not be presumed.

Quære, as to the meaning of the word "win."

Semble, that the lessor was not entitled to the dead rent for the first three years.

No. 28. — Lewis v. Fothergill, L. R. 5 Ch. 103, 104.

By articles of agreement, dated the 27th of April, 1864, and made between W. W. Lewis, of the one part, and T. A. Hankey and B. Bateman, trading under the name of the Plymouth Iron Company, of the other part, it was agreed that W. W. Lewis should let, and the company should take, for ninety-nine years, the veins and seams of coal situate under a farm of two hundred and fifty acres, called Troed-y-rhiw, in Glamorganshire (with certain exceptions), and all mines, seams, or balls of iron ore under the said farm, at the rent or royalty of 8½*d.* per customary ton of coal worked or gotten; but in case the quantity of coal worked in any year should not amount at the aforesaid rate to the annual rent of £500, then instead thereof the annual rent or sum of £500 should be paid as fixed or dead rent, and a further royalty of 4*d.* a ton was to be paid on every ton of iron ore; the dead rent of £500 not to be charged for the first * three years, provided [* 104] that the necessary steps were *bonâ fide* taken with ordinary despatch to win and work the said coal, but the royalties were then to be charged only on such coal and minerals as should be worked. The lease when prepared was to contain power to work any other minerals, &c., over or under the said farm from any adjoining estate worked through this estate, on payment of 1*d.* per ton for wayleave. The agreement further specified covenants to be contained in the lease as to keeping accounts, and repairs, and a covenant "for working the said coal and mines in a proper and workmanlike manner." It was also agreed that the lessees might make any roads which might be necessary for conveying the minerals, sink pits, drive headings, and do all other acts and deeds necessary for working the same. Provisions were also made for determining the lease if the minerals were worked out, and for renting surface land if required, and for other matters relating to working the minerals.

The Plymouth Iron Company were working certain coal pits, called the South Duffryn Colliery, situated to the north of Troed-y-rhiw, and had commenced to work the coal under Troed-y-rhiw by "instroke" from that colliery, and had run headings from the colliery under Troed-y-rhiw.

The South Duffryn Colliery was "to the rise" of, or above, the seams of coal under Troed-y-rhiw, and W. W. Lewis, the lessor and plaintiff in this case, alleged that this was not the proper way of working the coal under his estate; that the proper way would be

to sink pits upon the estate towards the southern side, the expense of which pits was variously estimated at £30,000 to £50,000; that working by instroke was not proper or prudent unless a barrier was left at the boundary of the plaintiff's estate, and the headings were driven so that they could be stopped as a protection against water which might come down. The plaintiff further alleged that coal was not won unless adequate means of draining were provided; that any system of working the coal by dip headings would leave the Troed-y-rhiw estate without any provision for working the other seams, and render them of less value, and that the water would accumulate.; that the period of three years during which the dead rent was suspended was altogether unreasonable if [* 105] the coal was merely to be worked by dip headings * from the South Duffryn Colliery, and that the defendants could have sunk a pit within the time, and that under the circumstances the dead rent had become payable.

On the 29th of July, 1867, the plaintiff filed his bill against the lessees, the defendants, alleging as above stated, and praying that they might be restrained from working by headings or instroke, or otherwise than in a proper and workmanlike manner, and until an adequate means of draining the coal and minerals under the plaintiff's estate had been provided; that the defendants might be ordered to pay the dead rent for the three years; and that the articles of agreement might be specifically performed.

The defendants, by their answer, alleged that to work by dip headings was proper and customary, and that they had taken all proper precautions against the flow of water; that they would never have taken the lease if they had been obliged to sink a pit; that they were working the coal in a proper manner, and that they had been at all times ready to perform the agreement without suit. They also contended that coal was won when it was reached and could be worked.

Evidence was entered into on both sides as to the proper methods of working coal in general and this coal in particular, the effect of which appears from the judgments of the VICE-CHANCELLOR and the LORD CHANCELLOR. It appeared from the evidence of Mr. Overton, who was the plaintiff's agent at the time of the preparation of the agreement, but was no longer in his employment, that he and the defendants had discussed the mode of working, and that he was aware that they did not intend to sink a pit, and that he considered working by instroke not improper.

No. 28. — Lewis v. Fothergill, L. R. 5 Ch. 105, 106.

The suit came to a hearing upon motion for decree before the Vice-Chancellor JAMES, who, on the 21st of January, 1869, dismissed so much of the bill as prayed for an injunction; declared that the defendants had taken the necessary steps to win the coal *bonâ fide* and with ordinary despatch; directed a reference whether anything was due for dead rent and for other matters, and ordered specific performance of the articles of agreement, and a lease to be executed, and ordered the plaintiff to pay the costs up to the hearing.[1]

* The plaintiff appealed. [* 106]

Mr. Jessel, Q. C., Mr. Kay, Q. C., and Mr. Marten, for the plaintiff: —

This is a question of construction on the agreement. We do not say that the pit must be sunk upon the estate, but that there ought to be a pit sunk so as to provide an independent system of

[1] 1869. Jan. 21. Sir W. M. JAMES, V. C., said that the lease was a mere ordinary mining lease of the coal under a farm of considerable extent, and the plaintiff's contention was, that a covenant should be implied for working the coal by sinking a pit so as to provide an independent system of drainage for the estate, although it was perhaps not put quite so strongly as that on the evidence. His Honour could not see what power he had to introduce such a covenant as the plaintiff asked for into a precise instrument like this agreement, more than any other covenant which might be suggested. There seemed to be nothing to prevent the lessees from exercising their legal right, and getting the coal by any lawful means, or from working this colliery in conjunction with any other which they might hold; what they were doing had now become a very common method of working mines. The plaintiff contended that the defendants had no right to mine by sinking to the deep so as to expose the deep workings to be drowned out, and that they ought to provide independent means of pumping on the estate itself; but in discussing these questions the Court of Chancery was not a tribunal to determine what was the proper mode of working a coal pit. The Court had only to see whether the lessees were acting *bonâ fide*, and took a reasonable and sufficient amount of care. In this case their proceedings were sanctioned by very eminent engineers, and with that evidence it was impossible for the Court to say that the lessees were acting with *mala fides* or unskilfully. The owners of property of this kind know what they are letting, and it is for them to stipulate for any special provisions which they may think necessary. There was no evidence that any actual damage was done.

As to whether the defendants had proceeded *bonâ fide* to win the coal, a vast mass of evidence had been entered into. His Honour's view of the word "win" was nearly that of the defendants, that the coal was won when it was reached so as effectually to be worked. A great number of witnesses stated that the defendants had proceeded *bonâ fide*, and it was for the plaintiff to prove *mala fides*, which he had not done. As to the conduct of the plaintiff in instituting this suit, it was proved that his agent had agreed with the lessees that the proper mode of working this coal was by headings to the deep, and the plaintiff ought not to have continued this suit when that fact came to his knowledge, though his Honour could not use evidence to control the agreement. His Honour must therefore make declarations the reverse of what was prayed in the bill, but would declare that the agreement ought to be performed, and a lease granted, to be settled in Chambers, and the plaintiff must pay the costs up to the hearing.

drainage, for unless that is done the mine is always in danger. Power to sink a pit is expressly given by the agreement. [*107] They *are bound to work the coal in the best way, and not to damage the rest of the coal, and they ought to leave a barrier between their mine and the plaintiff's mine; at all events they are bound to work the coal so as not to expose the mine to the chance of being drowned out. What we require is a pit deep enough to drain this coal by gravitation. Even if they have been able to work the coal up to the present time, they may still be in danger of being drowned out. All this is so well understood, that no express provision in the agreement was necessary. The three years provided for show that a pit was contemplated. The defendants may work these mines so as to allow them to be drowned out, and then become insolvent, leaving the property useless.

Sir Roundell Palmer, Q. C., Mr. Amphlett, Q. C., and Mr. Freeling for the defendants, were not called upon.

Lord HATHERLEY, L. C.: —

This case seems to me to be one of the simplest description when we look at the agreement itself and at the evidence adduced, which is not conflicting upon the main points, namely, as to what ought to be the construction of the words "proper and workmanlike manner." Of course when we find words like those, they are open to evidence as to their meaning, because it is a matter, in some degree, of technical knowledge as to what is a proper and workmanlike manner; and in dealing with any special mode of working we must have the testimony of those who are experts as to the meaning of the words as applied to the particular subject-matter.

Now the bill is filed upon an agreement entered into in 1864 for the demise by the plaintiff to the defendants of certain valuable mining property. The circumstances of the case, as far as they were known to both parties, were these: that the defendants had other mines immediately to the rise of the property which was agreed to be demised, being separated only by an imaginary line. Of course, therefore, one mine could be worked from the other if it was right and proper so to do. But the plaintiff's contention is, that the proper mode of working would be to work his coal just as the defendants worked the South Duffryn pits; namely, to [*108] have a pit or series of pits sunk to the depth of the *particular vein which they were disposed to work, so that

whatever water accumulated in the process of working the mine could be carried off into the pit and pumped up, by which means the mine would be preserved from water; and possibly, or I may say probably, that may be most valuable to the lessor as being the best mode of having the mines on his land worked. But it is clear upon the evidence that this is not the only mode of working in a proper and workmanlike manner.

A proper and workmanlike manner may not mean the best possible mode of working for the lessor, but it means in such a manner as shall not be simply an attempt to get out of the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding.

That is the extreme contention on the one side, and the extreme contention on the side of the landlord is to say that those words "proper and workmanlike manner" mean that the lessees are to take means the most expensive possible, and the least likely to produce profit to themselves, for the express purpose of putting the lessor in the best possible position at the time when the lessees give up the mine. Either one or the other of those views is extreme, and we must look to see what the landlord has done with reference to protecting himself by the agreement.

The landlord must be supposed to have known through his agents what it was he was dealing with, and to have known what was the ordinary course of protecting himself if he wished to be protected. Now as to the two systems in question, the one of working by instroke, and the other of working by means of a pit, they occur continually in mining leases, and provisions are often made expressly upon that subject. It so happens that in this case there is no express provision one way or the other; but it appears from the evidence to be very common where working by instroke is intended, to insert a provision that proper barriers shall be kept to protect the mine from the very grievance which is now spoken of, and there is no such provision in this agreement.

But looking further at the agreement, we find a provision for paying a wayleave on minerals brought to surface from the adjoining estate, thus contemplating communication between the two mines, so that not only is there no provision against breaking * the barrier, but it is expressly contemplated that the [*109] barrier may be broken; and if the defendants are allowed to break the barrier, what is to prevent their working the coal?

The question of the instroke always has relation to the question of breaking the barrier. If a man has, by the demise, got the right of entry, you tell him that you do not prohibit his breaking the barrier; on the contrary, you tell him that he may pass the barrier, and carry coal and other minerals worked from one side to the other. So long as he works the mine properly there is nothing, as it appears to me, to prevent his using his right of entering through the barrier and working the coal in that way.

Now the lessees say that the pit would be a very serious matter to them. There is no witness who says that it would cost less than £30,000; and the proposition that there is an undertaking on the part of the lessees to expend £30,000, about which nothing is said in the agreement, could only be supported by showing that there was no other possible mode of working this mine in a proper and workmanlike manner than through the medium of a pit.

Then the plaintiff further claims £500 a year dead rent because the lessees have not, as he alleges, taken the necessary steps *bonâ fide* to win the coal with ordinary despatch; and he says, further that the lessees have begun to work the coal, though they were not bound to do so, but having begun to work it, they have done so in an improper and unworkmanlike manner, and that has occasioned a risk of irremediable injury; and the plaintiff asks that the lessees shall perform their agreement, and if they cannot perform their agreement, or from any circumstance it cannot be performed, then that there should be an injunction against their working the mine at all.

Now as regards the demand for rent, the ordinary course which this Court always takes with reference to an agreement for a lease of this kind is to say that the plaintiff shall have specific performance of the agreement, that the deed shall be executed, and shall be dated as on the day of the agreement, so that the lessor can have his action on the covenant as soon as the lease is completed.

I do not find that the defendants have ever refused to execute the deed, and at the present moment, under the decree of [*110] the * Court, they are ordered to execute a proper counterpart, which, when done, would really settle the whole matter with reference to the question whether or not *bonâ fide* steps were taken to win and work the coal. There would be a right to an injunction if, in working the coal, the defendants were

not doing it in a proper and workmanlike manner, and were doing it in such a manner as was most likely to produce irremediable injury. The only real question now is as to who shall pay the costs of the suit.

Then as regards the irremediable damage, and the working in an improper and unworkmanlike manner, we have first to consider whether the working by instroke instead of sinking from the surface is contrary to the provisions of the agreement; and, secondly, whether, if it be not contrary to the provisions of the agreement, the defendants, in working by instroke or dip headings, are working in such a mode as is likely to occasion irremediable damage.

If it were only unworkmanlike it might be left on the terms of the covenant, and damages might be recovered at law; but as far as regards any injunction on account of irremediable injury, we must consider that the bill was filed nearly two years ago, and a year and a half before the close of the evidence; and it appears from the evidence that in January last no injury had been done. The coal had been worked, and the mine had not been flooded.

Further as to the meaning of "a proper and workmanlike manner," we have the evidence of the agent who signed the agreement on behalf of the plaintiff, and he says that he never intended anything of the kind, but actually the reverse. It is said, very justly, that we cannot construe the agreement by parol evidence as to what the parties meant by the words; but the words "proper and workmanlike manner" admit of the evidence of experts, for no Court can be so informed upon the subject of mining as to know what is a proper and workmanlike manner. In that point of view nothing can be more satisfactory than to find that the two persons who framed the agreement contemplated the very thing being done that has been done, it being in their judgment proper and workmanlike. And it is a bold measure on the part of a plaintiff, in that state of circumstances, to come into a Court of equity to enforce that which is contrary to what his own agent intended and contemplated.

*The only answer to this given by the plaintiff is, that [*111] his agent told him a different thing, but that he does not succeed in showing.

The case, however, does not rest there, because there is a vast mass of evidence before me, which I cannot possibly disregard, to the effect that the mode of working by instroke is proper and

workmanlike. It is said that there is a conflict; and of course there is, and always is, on a matter of opinion, but I think the difference may be very easily explained by taking the two views together, the landlord's view and the tenant's view. It is distinctly stated that working by instroke is the system almost invariably practised, unless specifically provided against, in this and other districts when property such as this is worked in connection with large collieries; and many instances in the immediate district are given where larger properties than this are so worked.

There is also a dispute about what is the meaning of the word "winning." I conceive that the coal is won when it is put in a state in which continuous working can go forward in the ordinary way. It is not when you first dig down to a seam of coal and come to water immediately, but when you have got the coal in such a state that you can go on working it, and make provision, if provision is necessary, for sufficient drainage; and in this particular case they say they have got sufficient means of drainage; in fact, I have not heard any suggestion that the mines are being drowned out, and I presume that if it had been so the fact would in some way have been brought before the Court.

The decree of the VICE-CHANCELLOR seems to me to be perfectly correct. As to the £500 dead rent, it appears to me that that will be properly and entirely provided for by saying that the lease shall be dated as at the date of the agreement, but no alteration in the decree is required for that purpose. The appeal will therefore be dismissed, with costs.

ENGLISH NOTES.

The rule is confirmed by the subsequent decision of the same authority, Lord HATHERLEY, L. C., in *Jegon* v. *Vivian*, which is selected as a ruling case on another point, and will be found reported at length upon both points as No. 36, 843, *post*.

AMERICAN NOTES.

The doctrine of this case is found in *Tiley* v. *Moyers*, 25 Penn. State, 397, where it is said: "The entry or drift to a coal-bank is merely a means by which the bank is to be mined and the coal taken out; and when the bank is leased, the right to use the entry, platform, hoppers, and the private roads leading to it, would seem very naturally to go with it as appurtenances. But the principal thing granted in the lease of a coal-bank is the right to take coal out of it, and not the passage to the coal. The provision, therefore, that the

lessee shall be treated as having abandoned his lease, if he shall let the bank, by any fault of his, lie idle for a year, when it would yield coal, does not apply, if he be actually taking coal out of the bank by any entry. The purpose of the provision is to prevent the lessee from using the property so as to produce no profits to the lessor, and it is not broken in letter or spirit by the adoption of new ways of reaching the coal."

No. 29. — DOE d. HANLEY *v.* WOOD.

(K. B. 1819.)

No. 30. — DUKE OF SUTHERLAND *v.* HEATHCOTE.

(C. A. 1891.)

RULE.

THE grant by deed of liberty to search for, work, and dispose of minerals is, in effect, a license, and does not operate as a grant of the minerals; nor does it entitle the licensees who are working certain mines to bring ejectment against persons working another mine within the area covered by the license. And an exception of a similar liberty in a conveyance of land will not, without some other indication of the intention, operate as an exception of the minerals, or as an exclusive license.

Doe d. Hanley v. Wood.

2 Barn. & Ald. 724–743 (21 R. R. 469).

Mines and Minerals. — License as distinguished from Grant. — Re-entry.

The owner of the fee granted to A., his partners, fellow-adventurers, [724] &c., free liberty to dig for tin and all other metals, throughout certain lands therein described, and to raise, make merchantable, and dispose of the same to their own use; and to make adits, &c., necessary for the exercise of that liberty, together with the use of all waters and watercourses, excepting to the grantor liberty for driving any new adit within the lands thereby granted, and to convey any watercourse over the premises granted, *habendum* for twenty-one years; covenant by the grantee to pay one-eighth share of all ore to the grantor, and all rates, taxes, &c., and to work effectually the mines during the term; and then, in failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor. *Held*, that this deed did not amount to a lease, but contained a mere license to dig and search for minerals, and that the grantee

No. 29. — Doe d. Hanley v. Wood, 2 Barn. & Ald. 724, 725.

could not maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee.

The grantee commenced working the mines, but after some time discontinued, not being prevented by the want of water, or any other inevitable accident. The grantor, after some lapse of time, verbally authorised other persons to dig for ore throughout part of the land described in the deed, and met those persons on part of the land, and pointed out the boundaries within which they were to exercise the liberty; and himself subsequently entered into a mining adventure with other persons, which was carried on within the limits described in the indenture; and afterwards, in consideration of the surrender of the first grant, and of certain payments, demised the premises to a lessee for twenty-one years; and upon the execution of this lease, the original deed was delivered up; but there was no surrender in writing. *Held*, that these acts amounted to a re-entry by the grantor, inasmuch as, unless referred to the exercise of that right, they would be acts of trespass by him.

The special verdict set forth an indenture, dated March 1st, 1806, whereby Thomas Carlyon, being seised in fee of the premises, granted unto John Amler Hanley, his partners, fellow-adventurers, executors, administrators, and assigns, free liberty, [*725] license, power, *and authority to dig, work, mine, and search for tin, tin ore, &c., and all other metals and minerals whatsoever, throughout all that part of the lands of the said Thomas Carlyon, commonly called Crinnis, therein limited and described; and the tin, tin ore, &c., and other metals and minerals there found, to raise, and bring to grass, and there to stamp, spall, pick, dress, cleanse, and make merchantable, and dispose of, to their own use, at their pleasure, subject to certain reservations; and within the limits of the set thereby granted to dig, and make such adits, shafts, &c., and to erect such sheds, engines, and other buildings, as they should from time to time think necessary or convenient, for the more effectual exercise of the liberties thereby granted, together with the use of all such water and watercourses arising or running within the limits of the set thereby granted, as were not in grant to any other person at that time (except the pot-water belonging or running to the tenements of Crinnis and Merthen), with liberty to divert and turn such waters and watercourses, except as aforesaid, and to cut any channels for conveying the same over any part of the lands lying within the limits of the set, for the purpose of more effectually and beneficially exercising and enjoying the liberties thereby granted; except unto the said Thomas Carlyon, his heirs and assigns, and his and their work-

men, &c., free liberty of driving any new adit from any adit driven, or thereafter to be driven, within the lands thereby granted, and of quietly entering into and driving such new adits through the same, or any thereof, and of sinking any shaft therein necessary and proper for the driving of such adit, into any other lands of the said T. Carlyon, or into the lands * of any [* 726] other person, at his and their pleasure; and also except unto the said T. Carlyon, his heirs and assigns, full liberty to convey any watercourse over the premises granted, or any part thereof, in such manner as he or they respectively should think meet for any purpose whatsoever, doing no injury to the workings of J. A. H., his partners, &c.; to have, hold, use, exercise, and enjoy the said several liberties, licenses, &c., for the term of twenty-one years, fully to be complete and ended. The indenture contained covenants for the payment of an eighth share of all ore to T. Carlyon, and that J. A. H. and his partners would pay all rates and taxes, and would effectually work the premises, and support the adits, &c., and then contained a proviso, that in case of the neglect or failure in the performance of any of the covenants, it should be lawful for Thomas Carlyon, his heirs or assigns, upon the lands, or any part thereof, in the name of the whole to enter, and the same to have again, repossess, and enjoy. The special verdict then stated, that the surface of the lands was, during all the time, occupied by the said T. Carlyon, and his tenants of the surface, and that the said J. A. H., soon after the execution of the indenture, dug for tin, &c., and that about the month of July, 1806, the said J. A. H. made an excavation or adit within the limits horizontally into the earth, from the seashore, upon the level of the sea, about seven or eight fathoms, when it cut a vein, containing a small quantity of copper ore, and that the said J. A. H. then worked on the course of this vein towards the west, and got a small quantity of copper, but none of the copper was sold, and no profit was made, nor were any dues rendered to the said T. Carlyon in respect thereof; * and that J. A. H. afterwards pointed out a spot within [* 727] the limits where he intended to sink a shaft down to the adit, and four pins were sunk in the ground to mark out the spot, but no such shaft was ever made, nor any building erected, or other work done by J. A. H. within the limits aforesaid; and that J. A. H. did occasionally work within the limits, until about six weeks before he died, when, declaring that it was not worth

while to work, and that he would not work any more in any of the excavations or adits, he directed the materials to be removed, and that all the timber that was there should be knocked away and carried off. In pursuance of which direction the timber was knocked away and entirely removed, excepting one piece of timber of very small value, which the men refused to knock away on account of the danger to themselves in doing so; and the sea filled up the entrance of the excavation or adit. It then stated the death of J. A. H. intestate, and the grant of letters of administration to Nevel Norway, one of his creditors, on which a stamp duty had been paid, on the sum of £300 only, being considerably less than the value of the property sought to be recovered by the action. Nevel Norway having died, letters of administration *de bonis non* were granted on the 9th August, 1815, to George Hanley, the lessor of the plaintiff, the only child of J. A. H., which were stamped by the commissioners of his Majesty's stamp duties, with a stamp duty of £3000 upon security given, and without payment of the duty under the statute. Neither J. A. H. nor his administrators or assigns were in any manner prevented, either by water or any other inevitable impediment, from working [*728] within the limits. In October, 1809, no person having * in the interval dug for any ore, one William Brown, on behalf of Joshua Rowe, and other persons, entered into a negotiation with Thomas Carlyon for a set to be made and granted by the said T. C. to the said J. Rowe and the other persons, authorising them to dig for tin, &c., and all other metals and minerals throughout part of the lands described in the former indenture; which set T. Carlyon, about 11th October, 1809, verbally agreed to make, and settled with W. Brown as to the amount of the dues to be reserved on such set. In the month of November, 1809, T. Carlyon and W. Brown met J. Rowe and one J. Kroger on part of the land described in the former indenture; and T. Carlyon pointed out some of the boundaries of the set to be made to J. Rowe and the other persons, and wished them success in their undertaking; and shortly after this the said J. Rowe dug for copper, copper ore, &c., within the limits of the verbal agreement. On the 10th day of July, 1810, T. Carlyon became jointly concerned and interested with Oliver Woodcock, John Carne, and various other persons, in the mining and searching for tin and tin ore in certain other lands, part whereof lay within the limits of the indenture of the 1st of

March, 1806; and upon that occasion a memorandum of agreement was made and entered into by T. Carlyon and those persons under which the co-adventurers engaged therein dug for tin and tin ore, &c., within the limits of the first indenture, and raised and got a small quantity of tin and tin ore therefrom, and rendered the dues payable in respect thereof to T. Carlyon. On the 12th of January, 1811, another indenture was made, sealed with the seal of T. Carlyon, and by him delivered to J. Rowe, by which said last-mentioned *indenture it was, amongst other [*729] things, witnessed, that as well in consideration of the surrender of a certain grant or set bearing date the 1st day of March, 1806, made and granted by the said T. Carlyon to the said J. A. H., being the indenture of the 1st March, 1806, as in consideration of certain payments, the said T. Carlyon demised the premises in question to J. Rowe for twenty-one years. Upon the said T. Carlyon delivering this indenture, dated 12th January, 1811, to J. Rowe, the latter, who had previously got possession of the one bearing date 1st March, 1806, being the holder of a sixty-fourth share, as a fellow-adventurer with J. A. H. under it, delivered up that indenture to T. Carlyon, but no surrender in writing was ever made or executed thereof to the said T. Carlyon. The limits mentioned and described in this last indenture, dated January 12th, 1811, were not coextensive with the limits mentioned and described in the indenture dated March 1st, 1806, and the works constructed by the said J. Rowe were at a distance from and did not communicate with any part of the works done by the said J. A. H., nor were in any manner connected therewith. After the making of the indenture dated January 12th, 1811, J. Rowe continued to dig for copper and copper ore, and other metals and minerals within the limits specified, and dug and made a mine therein, and got quantities of copper and copper ore therefrom, and disposed of the same, and rendered the dues to T. Carlyon. And J. Rowe, for the purpose of more effectually prosecuting the works, erected a counting-house, stables, and other buildings within the limits. There never was any building within the same limits except those erected and built by J. Rowe since the *execution of the last indenture. The sur- [*730] face of the ground under which the workings of J. A. H. were made was waste land which was in possession of the said T. Carlyon, and since the execution of the indenture of the 12th

January, 1811, the persons claiming under the same have, by the permission of T. Carlyon, got stone on the waste ground, and used a road over it, and have paid money to T. Carlyon for the getting of such stone and the use of the road. The special verdict then set out the entry of the lessor of the plaintiff, the demise, and the ouster. The case having been argued, the Court took time for consideration.

[736] In the subsequent term, ABBOTT, Ch. J., delivered the opinion of the Court.

This case, which came before the Court upon a special verdict, was lately argued at Serjeants' Inn, before my Brothers BAYLEY, HOLROYD, and myself; my Brother BEST declining to attend, by reason of his having been formerly engaged as counsel in the cause.

Upon the argument, three principal questions were made: first, as to the sufficiency of the stamp upon the letters of administration under which the lessor of the plaintiff claimed; secondly, upon the legal effect and operation of the indenture of the first of March, 1806, viz. whether this indenture operated as a demise of the metals and minerals, so as to vest in the lessee a legal estate therein, during the term, upon the conditions mentioned in the deed, or only as a license to work, and get the metals and minerals that might be found within the limits described; and, supposing the indenture to operate as an actual demise of the metals and minerals, then, thirdly, whether the acts done by the grantor, and under his authority, amount to, and are to be considered as a re-entry under the proviso, so as to put an end to the term of years created by the deed.

[* 737] * Upon the question relating to the sufficiency of the stamp, our opinion was given at the time of the argument [to the effect that the stamp was sufficient under the 69th section of the Act 55 Geo. III., c. 184], and it is not necessary to say more on that subject. Upon the second question, it was argued, on the part of the lessor of the plaintiff, that the indenture of the first of March, 1806, operated as an actual demise of the metals and minerals, and conveyed the legal estate in them during the term, as a chattel real. This proposition is necessary to the maintenance of the present action, because if the deed operated as a license only, then, admitting that a party claiming under such a deed, and who should have actually opened and worked, and should

be in the actual possession of a mine, might, if ousted of such possession, maintain an ejectment, yet such a right, supposing its existence (and upon the question of its existence it is not necessary for us to decide), would not sustain the present action, inasmuch as the defendant was not shown to be in possession of any mine worked under the deed in question, but only of other mines and parts of the metals and minerals lying at a distance from the workings of the grantee; and which workings had even been long abandoned by him. It is our opinion that this deed operates as a license only.

The doubt has arisen from the inaccuracy of some of its expressions, which seem to import that the grantor supposed himself to have done that by the granting part of the deed which it is insisted on by the defendant the words of the granting part do not warrant. But this instrument, though inaccurate, is a regular formal deed, containing all the formal or orderly parts of a deed of conveyance, enumerated by Lord Coke (in * Co. Litt. 6 a) except the clause of warranty; viz., the parties between whom it is made of the one part and of the other part; a full description of the premises it purports to grant, with the exceptions or reservations thereout; the *habendum;* the *reddendum;* the covenants and proviso for re-entry; the *in cujus rei testimonium,* and the witnesses. One of the proper offices of the premises or granting part of a deed, as is there stated by Lord Coke, is, "to comprehend the certainty of the tenements" to be conveyed. This indenture, in its granting part, does not purport to demise the land, or the metals or minerals therein comprised. The usual technical words of demising such matters are well known and usually adopted in a formal deed, where the intent is to demise the land, or metals or minerals; but the purport of the granting part of this indenture is to grant, for the term therein mentioned, a liberty, license, power, and authority to dig, work, mine, and search for metals and minerals in and throughout the lands therein described, and to dispose of the ore, metals, and minerals only, that should within that term be there found, to the use of the grantee, his partners, &c.; and it gives also further powers for the more effectual exercise of the main liberty granted. Instead, therefore, of parting with, or granting, or demising all the several ores, metals, or minerals, that were then existing within the land, its words import a grant of such parts thereof

[* 738]

only as should, upon the license and power given to search and get, be found within the described limits, which is nothing more than the grant of a license to search and get (irrevocable, indeed, on account of its carrying an interest), with a grant of [* 739] such of the ore only as should be found and got, * the grantor parting with no estate or interest in the rest. If so, the grantee had no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, metals, or minerals ungot therein; but he had a right of property only, as to such part thereof as upon the liberties granted to him should be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, being very different from a grant or demise of the mines, or metals, or minerals, in the land; and is such a right only as, under the circumstances stated in this case, is not sufficient to support the present action of ejectment. This, we think, is the effect and operation of the deed, considering it with reference to its granting part only; and we are fortified in this opinion by the construction given to similar words of grant in *Lord Mountjoy's Case*, Godb. 18, 1 And. 307, and 4 Leo. 147; and in *Chetham* v. *Williamson*, 4 East, 469; even if the liberty granted be to be considered a liberty to get, exclusive of the grantor; and *à fortiori*, if it be, as in those cases, to be considered as not exclusive: that, however, is a point which it is unnecessary for us now to decide. It was contended that, in order to make a demise, or to pass such an interest in the soil as will support an ejectment, formal words of demise need not be used; and that words importing an intent in the grantor to divest himself of the possession for a time and vest it in another, operate in law as a lease, whatever may be their form; and further, that words showing such intent appear in different parts of this deed. The words alluded to are such as these, viz., "the land hereby granted," "the ground and premises hereby granted," and "the land or ground hereby [* 740] granted," which occur in some of * the clauses and covenants of the deed; and among others, in the clause of re-entry, upon which particular reliance was placed. A proviso for re-entry is in itself not less applicable to a license to dig, work, mine, and search for metals and minerals, than to a demise of metals and minerals, because, under such a license, works may be effected, and a corporal possession had, which it may be com-

petent for the grantor to resume; so that the argument rests upon the particular expressions used in the deed, and not upon the nature or quality of the clauses or provisions in which they are used. These expressions may probably be attributed to want of care and caution in the preparation of the deed; but supposing them not to be attributable to inadvertency, or supposing that we should not be justified in so attributing them, still they can, in our opinion, have no further effect than to show that the grantor who used them supposed that the soil or minerals, and not a mere liberty or privilege, passed by his deed; and if the words used in the granting part of the deed were of doubtful import, and would bear the construction for which the lessor of the plaintiff contends, such doubtful words of grant, aided by the others, showing the intent, might be sufficient to pass the land or soil, or minerals themselves, and to support an action of ejectment. But whatever doubts these expressions may cast, yet we think they are not sufficient to vary the construction that must be given to the words of the granting part of this deed, as those words are, in themselves alone, plain and not of doubtful import, and as the proper office of that part of the deed is, to denote what the premises or things are that are granted, and is the place where the intent of the grantor, and what he has actually done in that * respect, [* 741] is more particularly to be looked for, recourse must be had to the proper and efficient part of the deed, to see whether he has actually granted what it is urged his expressions denote that he supposed that he had granted; for the question properly is not what he supposed he had done, but what he really has done by his grant. For these incorrect expressions, the precise import of which he might not accurately attend to, are not sufficient to constitute a grant, or to operate so as to extend the grant, by converting the things granted from incorporeal to corporeal, and from chattels personal when gotten, into a chattel real, previously to their being gotten, which must be the case, if we were to adopt the reasoning on behalf of the lessor of the plaintiff, as to the effect and operation of the deed, and which would carry the rights of the grantee much further than the grant of a license or authority extends.

Upon the third question we are also of opinion in favour of the defendant, and think the acts mentioned in the special verdict as done by the grantor, and under his authority, amount to, and are

to be considered as, a re-entry under the proviso so as to put an end to the term created by the deed. It is clear that the grantor had, under the proviso, a right to re-enter by reason of the grantee's breach of covenant in not effectually working when not prevented by water or other inevitable impediment. The acts done either by the grantor himself, or under his authority, on part of the lands within the above limits, either in consequence of his negotiation and agreement with W. Brown, or of his agreement with Oliver Woolcock and others, or of his indenture made to J. Rowe,

[* 742] amount in law, we think, * to a re-entry and to a determination of the above grant of the 1st of March, 1806. Those acts, if done by a stranger, or other person having no right or authority to enter, would be wrongful, and so they would be in the present case though done by the grantor, or under his authority, if the above grant can be considered to have operated as a demise either of the soil or of all the ore, metals, and minerals within the described limits, unless those acts be deemed to be in law an entry by the grantor, and a remitter of him to his former estate by a determination of his grant; and the authorities show that those acts must be deemed to be in law such an entry and remitter. In Plowden, 92, it appears that if a person having a right of entry has done any act, so that the disseisee might have an action against him if he was a stranger, the law saith that rather than he shall be punished it shall be an entry and remitter to him. So in Co. Litt. 55, entry into land without the consent of the lessee, and cutting down a tree where the trees were not excepted out of the demise, are considered to be an implied ouster, and a determination of the will, for that it would otherwise be a wrong in him; and a lessor's putting in his beasts to use the common appendant is also considered as a determination of the will. And in Co. Litt. 245 b the mulier's coming upon the ground upon his own head, and cutting down a tree, and digging the soil, or taking any profit, are stated to be interruptions, for (the book says) "rather than the bastard shall punish him in an action of trespass, the act shall amount in law to an entry. So it is, if the mulier put any of his beasts into the ground, or command a stranger to put on his beasts, these do amount in law to an entry."

[* 743] * It was urged on the part of the lessor of the plaintiff that the words of the deed of the 12th of January, 1811, by which that deed is expressed to be made partly in consideration

of the surrender of the grant of 1806, together with the fact of the actual receipt of the deed of that date by Mr. Carlyon, from Mr. Rowe, into whose hands it had come, showed that none of the acts done by the grantor were or were intended to be a re-entry under the proviso contained in the deed of 1806. But we think such an effect cannot properly be given to those circumstances, and that they ought to be considered only as matters of caution, intended to preclude the question which, unfortunately, has since been raised. If, therefore, the grant in question can be considered to have been a demise of the land, or of all the ores, metals, and minerals within the limits described, yet it was determined by the above acts done by the grantor, or under his authority, amounting in law to a re-entry; in which case the present action of ejectment cannot be maintained. For these reasons, the judgment of the Court must be for the defendant. *Judgment for the defendant.*

Duke of Sutherland v. Heathcote.

1892, 1 Ch. 475–486 (s. c. 61 L. J. Ch. 248; 66 L. T. 210).

Deed. — Construction. — Reservation of Liberty to get Minerals. — No [475] *Exclusive Right.*

Earl G. and Viscount T., the plaintiff's predecessors in title, having a general power of revocation and new appointment over lands of which they were respectively tenant for life in possession and tenant for life in remainder, by a deed of exchange in 1783 appointed and granted the lands to the defendant's predecessor in title in fee, saving and reserving nevertheless to Earl G. and Viscount T., their heirs and assigns, full and free liberty to get the coal and minerals which should be found within the lands. The minerals were never worked under this reservation by the plaintiff or his predecessors in title. In 1865 the then owner of the lands demised the coal under part of them to persons whose interest became vested in the defendants B. & B.; and in 1877 the defendant H., who had succeeded to the ownership of the lands, demised the coal under another part to the plaintiff. Some years after this the plaintiff first became aware of the reservation in the deed of 1783, and brought his action to establish his right to the minerals, to restrain the defendants from working them, and to have the lease of 1877 rectified or set aside.

Held, that the reservation in the deed of 1783 did not operate as an exception of the minerals, but only as a grant by the defendants' predecessor in title of a right to work them; that there was nothing to show *that this right [*476] was to be exclusive; and that, therefore, it did not prevent the landowner from working them, provided he did not disturb the grantee in any working which the grantee was carrying on; and that the defendants, therefore, had not infringed the plaintiff's rights.

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Held, further, that the lease of 1877 could not be rectified, as there was no common mistake, and that it could not be set aside, as the plaintiff was not prepared to give up possession of the property comprised in it.

This was an appeal by the plaintiff from a judgment of Mr. Justice VAUGHAN WILLIAMS, dismissing the action.

In 1781 certain estates were settled on Earl Gower for life, with remainder to Viscount Trentham for life, with divers remainders over, subject to a joint power of revocation and new appointment given to them. In October, 1783, in order to effectuate an exchange with Mr. Heathcote, they, by a deed which recited that they were seised in fee of certain lands, and Mr. Heathcote of certain other lands, and that they had agreed to exchange them, and then recited the settlement of 1781, granted and appointed a part of the said lands to Mr. Heathcote, his heirs and assigns: "Saving and reserving nevertheless to the said G., Earl Gower, and G. G., Lord Viscount Trentham, and to their heirs and assigns, full and free liberty by all necessary ways and means to search for, get, dig, drain, and carry away the coal, ironstone, and minerals which may or shall be found within the several lands hereby granted and exchanged from them, the said Earl Gower and Lord Viscount Trentham, to the said J. E. Heathcote, his heirs and assigns, and also to drive any sough, level, or gutter through the same lands to any other lands or grounds of them the said Earl Gower and Lord Viscount Trentham, or either of them, making satisfaction for all damages to be done or occasioned by the use or exercise of any of the privileges aforesaid; to have and to hold all and singular the said messuage or tenement lands and premises (saving and except as aforesaid) unto the said J. E. Heathcote, his heirs and assigns, to the only proper use and behoof of the said J. E. Heathcote, his heirs and assigns, for ever."

[* 477] * The plaintiff was the successor in title of Earl Gower and Viscount Trentham. The defendant Heathcote was the successor in title of Mr. Heathcote, the party to the deed of 1783.

Neither the plaintiff nor his predecessors in title had ever worked the mines under the above reservation, the existence of which had been forgotten.

In 1865, the immediate predecessor in title of the defendant Heathcote granted a lease of part of the mines under this property

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to a lessee, whose interest was now vested in the defendants, Blair & Bird.

On the 4th of January, 1877, the defendant Heathcote granted to the plaintiff a lease for forty years of the mines under the rest of the property.

In 1890, the plaintiff brought his action against Heathcote and Blair & Bird, asking for a declaration that he was entitled to the mines under the lands which his predecessors in title had conveyed by the exchange deed of 1783; for an injunction to restrain the defendants from working them, and to have the lease of the 4th of January, 1877, set aside or rectified. Mr. Justice VAUGHAN WILLIAMS having dismissed the action, the plaintiff appealed. The arguments as to the Statute of Limitations are omitted, as the Court did not pronounce any judgment on that point.

Rigby, Q. C., Neville, Q. C., and Hadley, for the appellant, the Duke of Sutherland: —

The recital in the deed of exchange of the 30th of October, 1783, that the grantors, Earl Gower and Viscount Trentham, were seised in fee, operated as an appointment by them in their own favour, and gave them the fee in the lands comprised in that deed, including the minerals thereunder: *Poulson* v. *Wellington*, 2 P. Wms. 533; *Rowbotham* v. *Wilson*, 8 H. L. C. 348 [*ante*, p. 647]; and the deed then proceeded upon the footing that the grantors were absolute owners — using language appropriate to grantors in fee, and not to appointors. The minerals being thus vested in the Earl and the Viscount, the liberty of getting and working such minerals was by the same deed reserved to them, their heirs and assigns. The decision we appeal from is that this was only a license by Mr. John * E. Heathcote, with whom the [* 478] exchange was effected, to get such minerals under the lands as he did not himself take.

[FRY, L. J. — *Primâ facie* liberty to do a thing is not exclusive liberty.]

Even assuming that this is not an exception but a license, the liberty is not for a limited quantity or a limited time. It is not a liberty to get coal, but to get "the" coal. *Duke of Hamilton* v. *Dunlop*, 10 App. Cas. 813, where the owner of lands conveyed, reserving the "liberty of working the coal," is an authority which goes the whole length of our contention on this point, and on it we strongly rely. The "liberty" was in fact a grant, and a grant of minerals

involves that which is necessary to make the grant efficacious, — *i. e.*, the power for the grantee to get them. *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197 (26 R. R. 313).

[479] Treating the transaction as a whole, it was a putting of the fee in the Earl and the Viscount, in order that it might be partially, and partially only, taken out of them; for it is plain that they did not intend the minerals to go to J. E. Heathcote, and the intention governs everything. "Saving" means the same thing as "excepting" — that is, *præter* or *salvo*.

Lord Mountjoy's Case was relied on by counsel for the defendant in the Court below, and they cited it from the reports of Leonard (4 Leon. 147) and Godbolt (Godb. 17), as an authority that a grant in fee of a liberty to get coals cannot confer an exclusive right to such coals. But the only authentic report of the case is that in Anderson (1 And. 307). *Lord Mountjoy's Case* was decided in 1582. ANDERSON, Ch. J., the author of those reports, was himself one of the Judges who took part in its decision; and in his report of the case there is nothing to show that it can properly be used in support of any such proposition.

As to our never having worked the minerals, mere non-exercise of a right is not abandonment of it; and our claim is not barred by laches or delay, or by the Statute of Limitations. *Seaman* v. *Vaudrey*, 16 Ves. 390 (p. 585, *ante*); *Smith* v. *Lloyd*, 9 Ex. 562; *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135.

[480] Sir H. Davey, Q. C., Haldane, Q. C., and Decimus Sturges, for the defendant Heathcote: —

The recital that Earl Gower and Viscount Trentham were seised in fee did not act as an estoppel, because the true state of the title appears by the subsequent part of the deed. Nor did the recital operate as an informal appointment to themselves, for that would have been contrary to the intention of the parties as expressed in the deed. Therefore, the conveyance to J. E. Heathcote could not operate as a grant; it could only take effect as an appointment to him, and the saving of liberty to dig minerals was a regrant by him to the appointors of a license to dig. The appointee could not regrant the minerals themselves, for minerals did not lie in grant: he could only regrant a license which is incorporeal. The word "reserved" is an indication that the thing referred to was newly created out of the tenement conveyed, and not originally a part of it. Co. Litt., pages 47 a, 143 a. A license is never

exclusive, unless it is expressed to be so. It only makes lawful that which otherwise would have been a trespass. *Wickam* v. *Hawker*, 7 M. & W. 63. It has always been held that if a man grants to another license to cut timber or dig minerals on his land, the grantee may take all that he can, but the owner has also a right to cut and dig as he pleases. *Lord Mountjoy's Case*, 1 And. 307, 4 Leon. 147; *Chetham* v. *Williamson*, 4 East, 469; *Carr* v. *Benson*, L. R. 3 Ch. 524; *Newby* v. *Harrison*, 1 J. & H. 393; *Denison* v. *Holliday*, 1 H. & N. 631. *Duke of Hamilton* v. *Dunlop*, 10 App. Cas. 813, was decided according to Scotch law, and does not apply.

* There is nothing in this deed from which a covenant [*481] not to give licenses to any one else can be inferred. *Bailey* v. *Stephens*, 12 C. B. (N. S.) 91, does not support the plaintiff's case, and *Lee* v. *Stevenson*, E. B. & E. 512, has no bearing upon it. *Doe* v. *Wood* (p. 775, *ante*) has never been overruled, and is in our favour.

[BOWEN, L. J., referred to *Wilson* v. *Mackreth*, 3 Burr. 1824.]

That case turned upon the ground that the plaintiff had a right of property in the turf as if there had been a grant of it; and *Harker* v. *Birkbeck*, 3 Burr. 1556, is similarly explained. We say, then, that we were at perfect liberty to work the mines so long as we did not interfere with workings carried on by the plaintiff, and we have not interfered with the license given him by the deed.

[They further contended that the plaintiff was barred by acquiescence and the Statute of Limitations.]

Rashleigh, for Blair & Bird, relied on the plaintiff's acquiescence in the lease of 1865 and on the Statute of Limitations.

Rigby, in reply, cited Co. Litt. (page 270 b) upon the point that a release at common law will not operate to enlarge an estate; and Sheppard's Touchstone (page 298), as to an exchange operating as a grant.

1892, Jan. 27. The Lord Justice LINDLEY now delivered the judgment of the Court (LINDLEY, BOWEN, and FRY, L. JJ.):—

This is an appeal from the decision of Mr. Justice VAUGHAN WILLIAMS, reported in [1891] 3 Ch. 504. Many questions were argued on the appeal; but the main question, on which everything else turns, is the effect of the deed of 1783. That deed effected an exchange of lands between the then Earl Gower and his son, Viscount Trentham, on the one side, and Mr. Heathcote on the other.

The lands exchanged were in the county of Stafford, and in a mineral district. No mines were worked in or under them, but coal was got from mines in the neighbourhood.

[*482] * Mr. Heathcote was the owner in fee of the lands which he gave in exchange; but Earl Gower and his son were not owners in fee of the lands they gave in exchange. They had a joint power of appointing those lands in fee; but, subject to that power, the lands were settled by a deed of 1781 on Earl Gower for life, with remainder to Viscount Trentham for life, with remainder to his first and other sons in tail male, with diverse remainders over, and there were terms subsisting for purposes of raising money.

That being the position of affairs, the deed of 1783 was executed. Mr. Heathcote conveyed his lands to the Earl and Viscount as joint tenants in fee, and reserved no minerals nor any right to work them. The Earl and Viscount conveyed their lands to Mr. Heathcote in fee, and reserved to themselves and their heirs a right to work the minerals under them. By this deed, which recited the settlement of 1781, and the power of revocation and new appointment given by it to the Earl and Viscount, it was witnessed that the Earl and Viscount, "in order to enable them legally to make the said exchange to and with the said J. E. Heathcote as aforesaid, by virtue of the power reserved and given to them in and by the said recited proviso as aforesaid," revoked and determined the uses of the settlement, so far as they related to the property intended to be given in exchange to Mr. Heathcote. And it was further witnessed that the Earl and Viscount, in consideration and pursuance of the said exchange, and for divers other good and valuable considerations, exchanged, granted, bargained, sold, aliened, transferred, limited, appointed, and confirmed to Mr. Heathcote, his heirs and assigns, the property therein described, and all the estate, right, title, interest, claim, and demand whatsoever of the said Earl Gower and Viscount Trentham, or either of them, in and to the said lands and premises, "Saving and reserving, nevertheless, to the said Granville, Earl Gower and George Granville, Lord Viscount Trentham, and to their heirs and assigns, full and free liberty, by all necessary and convenient ways and means, to search for, get, dig, drain, and carry away the coal, ironstone, and other minerals which may or shall be found within the said several lands hereby granted and exchanged from them, the said Earl Gower and Lord Viscount Trentham, to the said J. E. Heathcote, his heirs

[* 483] and assigns, and also to drive * any sough, level, or gutter through the same lands to any other lands or grounds of them the said Earl Gower and Lord Viscount Trentham, or either of them, making satisfaction for all damages to be done or occasioned by the use or exercise of any of the privileges aforesaid, to have and to hold all and singular the said messuage or tenement lands and premises (saving and except as aforesaid) unto the said J. E. Heathcote, his heirs and assigns, to the only proper use and behoof of the said J. E. Heathcote, his heirs and assigns, for ever."

In order to understand the effect of this deed, it is necessary to carry our minds back to 1783, and construe it as such instruments were construed at that date. We must not forget that in those days a grant did not pass lands, mines, or minerals, although it might confer a right to work them.

A right to work mines is something more than a mere license: it is a *profit à prendre*, an incorporeal hereditament lying in grant. The distinction between a license and a *profit à prendre* was pointed out in *Wickham* v. *Hawker*, 7 M. & W. 78, a leading case on rights of sporting.

Counsel for the appellant contended that the reservation clause ought to be construed as an exception of the mines and minerals. But this, we think, would be to violate well-settled rules of conveyancing. The words used are not apt for the purpose. No conveyancer intending to except mines and minerals from a conveyance of lands would express his intention by reserving a liberty to get minerals. If, indeed, it were plain from recitals or other clauses in the deed that an exception was intended, possibly effect might be given to it. But here there is nothing *aliunde* to show what was intended, and the intention can only be inferred from the wording of the clause in question. This observation is also the answer to the argument based upon the Scotch case of *Duke of Hamilton* v. *Dunlop*, 10 App. Cas. 813. Unless a clear intention to except the minerals can be established, that case is of no assistance. The fact that the parties to the deed of 1783 were effecting an exchange does not make their intention as to the minerals plainer than the words in which they have expressed it. That Mr. Heathcote did not intend to except the * minerals from the land which he conveyed, nor [* 484] to reserve any right to get minerals under it, is plain; but there is nothing to warrant the inference that he intended to exchange his lands for the surface only of the lands conveyed to him.

An exception of the mines, moreover, would leave them out of the property conveyed by Earl Gower and his son, and would leave them subject to the uses of the settlement of 1781, which clearly was not the intention of any one. Mr. Rigby's answer to this was that the clause might be read as a revocation of those uses, and a new appointment of the mines to the Earl and his son as joint tenants in fee. But this, again, raises the question whether they intended anything of the sort. Having no guide to what they intended except the words of the reservation itself, we cannot force those words to the extent necessary in order to make them amount to an exception or reservation or valid regrant of the mines and minerals in the sense of so much land.

We come, therefore, to the conclusion that what was reserved to the Earl and his son was full and free liberty to work the mines under the lands conveyed by them. They reserved a *profit à prendre*, an incorporeal hereditament, not a mere personal revocable license. But then the question arises whether this right so reserved to them was an exclusive right. The persons who claim under the Earl and Viscount have never attempted to exercise this right; the defendants have never denied the plaintiff's right to work the mines, nor obstructed him in any way. The plaintiff, however, says that, whether he wants to work the mines or not, the defendants have no right to work them, and that by working them the defendants have infringed the plaintiff's rights. Now, putting all legal subtleties and technicalities aside, this is in substance a claim by the plaintiff to the mines in question; and if his right to the mines as his property is negatived, it is not easy to see how he can establish a right, not only to work the mines, but to prevent the owners of them from doing so, when the plaintiff is not himself working them. A *profit à prendre* is a right to take something off another person's land; such a right does not prevent the owner from taking the same sort of thing from off his own land; the first right [* 485] may limit, but does not exclude, * the second. An exclusive right to all the profit of a particular kind can, no doubt, be granted; but such a right cannot be inferred from language which is not clear and explicit. This is plain from the many cases referred to in the argument, viz.: *Lord Mountjoy's Case*, 1 And. 307, 4 Leon. 147; *Chetham* v. *Williamson*, 4 East, 469; *Doe* v. *Wood*, 2 B. & Ald. 724 (p. 775, *ante*); and *Carr* v. *Benson*, L. R. 3 Ch. 524.

No. 30. — Duke of Sutherland v. Heathcote, 1892, 1 Ch. 485, 486.

In *Lord Mountjoy's Case* property was conveyed to two persons, John and Charles, in fee, and they covenanted and granted with and to their grantor as follows: "That it shall be lawful for Lord Mountjoy, his heirs and assigns, at all times hereafter to have, take, and dig in and upon the heath-ground of the premises from time to time, sufficient ores, heath, turves, and other necessaries for the making, &c., of allom or copperas . . . . without let or interruption of the said John and Charles (*i. e.*, the grantees of the land), their heirs or assigns, or either of them." In Anderson's report it is said to have been resolved (*inter alia*) "(3) that the Lord Mountjoy might dig ore and other things for making of allom and copperas, &c., as he should think good." This report leaves it uncertain whether the Lord Mountjoy had an exclusive license or not. But it appears from the report in Leonard that it was held that there was a new grant of an interest to dig to Lord Mountjoy and his heirs in the land, and not a mere covenant, and that Brown (*i. e.*, the grantee of the lands) and his heirs and assigns might dig there notwithstanding the said grant to the said Lord. Now, Leonard is well known to have been a very accurate reporter, and *Lord Mountjoy's Case* has always been regarded as a leading authority for the proposition that a grant in fee of liberty to dig ores does not confer on the grantee an exclusive right to dig them, even if the grant is in terms without any interruption by the grantor. This was the view taken of the case in *Chetham* v. *Williamson* and in *Doe* v. *Wood*, and has never been judicially questioned.

In the present case, however, the reservation is not of liberty to take coal, but of full and free liberty to take "the" coal; but, inasmuch as the grantee could take all the coal if he wanted it, even if the word "the" were omitted, we cannot think that the * introduction of that word can have the effect of [*486] so enlarging the operation of the grant or reservation as to exclude the owners of the soil and their assigns from working the coal, which the grantees of the liberty to work the coal were not themselves in a position to get. There is nothing to warrant the inference that any particular stress or emphasis was put, or ought to be put, on the word "the" in the clause in question. The words used in this reservation are certainly not such as any conveyancer in 1783 would have used in order to reserve an exclusive right to work the mines; there is not enough, in our opinion, to

show that anything more was reserved than a right to work the mines when desired; such a right does not exclude the right of the owner to work them, provided he does not disturb the grantee in his working operations when and where he is carrying them on.

We concur, therefore, with the learned Judge whose decision is appealed from, and hold that the defendants have not infringed, and are not infringing, the plaintiff's rights.

This conclusion renders it unnecessary to consider any of the other questions discussed, except the right of the plaintiff to have the lease of 1877 to him rectified on the ground of mistake. During the course of the argument it was pointed out that no mistake common to both parties was proved; that there were no materials for rectifying the lease and making it conform to the intention of both parties; and that, under these circumstances, the only possible right which the plaintiff could have would be to have the lease set aside on equitable terms, one of which would be giving up possession of the property leased. The plaintiff was not prepared to do this, and it is plain, therefore, that he is not entitled to have that lease either rectified or set aside. The appeal must be dismissed with costs.

ENGLISH NOTES.

Roads v. *Overseers of Trumpington* (1870), L. R. 6 Q. B. 56, was a rating case, in which the effect of an agreement for permission to dig coprolites was discussed. The agreement, made between the landowner and a contractor, was (in brief) 1. That the landowner should permit the contractor to enter upon and to dig, excavate, search for, carry away, and dispose of the coprolites in and out of such part as is now and shall from time to time hereafter be allotted by the agents of the landowner of and in all that piece of land, &c., containing seventeen acres; (2) That the contractor shall forthwith enter upon such portion of the land as is now set out and allotted containing two acres or thereabouts, and within the first four months of the term dig and carry away the coprolites in and under the same, and afterwards in every successive four months enter upon such other portion (being not less than two acres) as shall be allotted, &c. There were clauses that the contractor should from time to time reinstate the surface where the coprolites had been dug; and should effectually fence all land in course of excavation. It was further agreed (12) that the contractor should pay £2630 13*s.* for the coprolites under the seventeen acres, the sum to be payable per acre

before entering upon the land. The landowner was to be at liberty at any time to enter upon the land to inspect the works. A rate had been made upon the contractor (appellant in the case) in respect of his occupation of five acres of the land. It appeared that the coprolites formed a stratum of nine to twelve inches in thickness at a depth of about twelve feet below the surface. The *modus operandi* was by working down from the surface, after first removing the top soil, which was ultimately replaced on the surface in the process of reinstatement. At the time the rate was made the contractor had already worked through about ten acres of the ground, of which about five acres still remained to be reinstated; and had entered upon an allotment of two more acres under clause (2) of the agreement, and commenced working the coprolites there.

The Judges of the Queen's Bench (BLACKBURN, J., and MELLOR, J.) held that the rate was properly made; for the appellant was in the occupation of at least five acres, and his occupation of the ground which was being worked, and of that which remained to be reinstated, was, in effect, exclusive according to the agreement. BLACKBURN, J., observed: "In *Doe d. Hanley* v. *Wood* (*supra*) the grantee might, perhaps, have had a right to bring ejectment for mines within the limits of his workings. So here I should think that after entry and before yielding up the land, the appellant might have maintained ejectment and recovered possession from one in occupation of the land."

Where the intention is clear that a license is exclusive, the intention will receive effect so as to enable the licensee who has entered, to maintain trespass against a person who enters unlawfully. So in *Low Moor Co.* v. *Stanley Coal Co.* (1875, 1876), 33 L. T. 436, 34 L. T. 186, the owner by deed, dated 12th July, 1834, had "granted, bargained, and sold" the coal and minerals, &c., lying under certain land to H. This deed had not been enrolled as a bargain and sale, and there was no livery of seisin to make it operate as a feoffment. The grantee had, however, entered on and partly worked one of the seams of coal. It was held in effect that the possession so taken by H. under the deed, whether the deed was considered as a lease of or an irrevocable license to get the coal, being a possession intended and lawfully intended to be an exclusive possession of all that was expressed to be comprised in the grant, was sufficient to support an action for trespass by H.'s assignees against a person who unlawfully entered upon an unworked seam of coal under the land.

A case of *Stanley* v. *Riky* (1892), 31 L. R. Ir. 196, arose upon a contract for getting "bog ore" in Ireland. The contractors, in a letter to the landowner (Mr. R.), proposed and agreed "to take from you the bog ore in, under, or upon the estates of the late Mr. R., with full

power of entering upon the said estates, and raising, getting, and removing the said ore, for a period of three years at a certain yearly royalty of £50 . . . and we agree to pay a further royalty of 2*s.* for every ton over and above three thousand tons that we may raise within the said period of three years to take away, provided that if after the said period of three years we, or either of us, should desire to continue to raise, get, and take away the said ore, we or either of us so desiring should be entitled to do so on payment to the person for the time being entitled to the said estates, of a royalty equal to one-fifth of the net profit," &c. This proposal was accepted, and a considerable amount of ore carried away in accordance with it. Some time after the expiry of the three years the landowner claimed abruptly to terminate the agreement and to work the ore himself. The contractor brought the action for an injunction to restrain the landowner (1) from raising and carrying away any of the ore, and (2) from interfering with his working. It appeared that the "bog ore" is a substance not contained in any definite vein, but scattered about the land at no great depth; and that the work of raising and carrying it away required no fixed plant, nor did it require any exclusive occupation of any part of the land beyond that upon which the immediate work of the moment was being done. The Chancery Division held that, upon the true construction of the agreement, after the expiration of the term of three years the agreement operates as an irrevocable but not exclusive license to work the ore during the lifetime of (Mr. R.) upon the terms in the agreement set out. And they refused the injunction (1) moved for as above, and granted the injunction (2) above moved for. This decision was confirmed by the Court of Appeal.

AMERICAN NOTES.

A license to mine is a mere incorporeal hereditament. *United States* v. *Gratiot*, 14 Peters (U. S. Sup. Ct.), 526; *Gartside* v. *Outley*, 58 Illinois, 210; 11 Am. Rep. 59; *Boone* v. *Stover*, 66 Missouri, 430 (citing *Doe* v. *Wood*); *East J. I. Co.* v. *Wright*, 32 New Jersey Equity, 248; *Scioto F. B. Co.* v. *Pond*, 38 Ohio State, 65; *Offerman* v. *Starr*, 2 Penn. State, 394; 44 Am. Dec. 211; *Massott* v. *Moses*, 3 South Carolina, 168; 16 Am. Rep. 697; *Cowan* v. *Radford Iron Co.*, 83 Virginia, 547; *Gauter* v. *Atkinson*, 35 Wisconsin, 48. *Doe* v. *Wood* is cited in Washburn on Easements, p. 18.

A grant of a right to dig coal and carry it away is an incorporeal hereditament, and does not interfere with the right of the grantor to mine in the same land. *Gloninger* v. *Franklin Coal Co.*, 55 Penn. State, 9.

In *Massot* v. *Moses*, *supra*, is an extremely learned opinion, citing *Lord Mountjoy's Case* and *Doe* v. *Wood*, distinguishing the former on the ground that here the license contained the expression, "that may be found by any person or persons, or contained in any part" of the land, and holding that the privilege of mining for ten years was exclusive and assignable.

Doe v. *Wood* and *Mountjoy's Case* are examined in *Grubb* v. *Bayard*, 2 Wallace, Jr. (U. S. Circ. Ct.), 90, and it was held that when one granted part of a tract, and covenanted for himself, his heirs, executors, and administrators, with the grantee, his heirs and assigns, that he and they might dig, take, and carry away all iron ore to be found in the ungranted part, at so much a ton, this was not a grant of the ore, but a mere privilege to mine. No property accrued in the ore until the privilege was exercised, and the privilege was not exclusive of the grantor of the land.

But a parol license to mine, for a share of the product, for an indefinite period, partly executed at expense by the licensee, gives him a valid subsisting interest in the land, entitling him to compensation for his expenditures, and to maintain ejectment against the licensor or his subsequent licensees with notice. *Beatty* v. *Gregory*, 17 Iowa, 109; 85 Am. Dec. 546, citing *Bush* v. *Sullivan*, 3 G. Greene (Iowa), 314; 54 Am. Dec. 506, *Doe* v. *Wood*, and *Mountjoy's Case*, but drawing a distinction between opened and unopened mines.

No. 31. — WAKE *v.* HALL.

(H. L. 1883.)

RULE.

WHERE, by the custom of a particular district, a miner has a right as against the landowner to enter and work a mine, fixtures put up by the miner for the purposes of the working do not become the property of the landowner; and the miner, on abandoning the working, is entitled, and perhaps bound, to remove such fixtures.

Wake v. Hall and others.

8 App. Cas. 195–216 (s. c. 52 L. J. Q. B. 494; 48 L. T. 834; 31 W. R. 585).

Mine. — High Peak Mining Customs. — Fixtures. [195]

Miners working under customs established by the High Peak Mining Customs and Mineral Courts Act, 1851 (14 & 15 Vict., c. xciv.), lawfully erected machinery and buildings accessory thereto on surface land, of which the miners were entitled to the exclusive use for mining purposes, but the freehold of which belonged to others. The buildings were attached so as to be part of the soil, and so that they could not be removed without some disturbance, which would not amount to a destruction, of the soil. The buildings were from the first intended to be accessory to the mining, and there was nothing to show that the property in them was intended to be irrevocably annexed to the soil.

No. 31. — Wake v. Hall, 8 App. Cas. 195–198.

Held, **that the maxim *quicquid plantatur solo solo cedit* was not applicable, and that the miners were entitled to pull down and remove the buildings while their interest in the mine continued, and were not liable to the surface owners for so doing.**

Appeal from so much of a judgment of the Court of Appeal as dismissed the appellants' appeal.

The action was brought by the appellants to recover damages from the respondents in respect of alleged trespasses upon the appellants' land, and for the wrongful destruction and removal by the respondents of buildings on the land, and for other trespasses not now in question. [The nature of the questions argued and considered on the appeal, sufficiently appears from the opinions of the learned lords, which, after argument and consideration, were given as follows]:—

[198] Lord BLACKBURN:—

My Lords, the question to be decided in this case is whether the respondents (defendants below), who were miners, working a lead mine in the King's Field, part of the possessions of the Duchy of Lancaster, and who had erected some buildings on land the property of the appellants (plaintiffs below), were justified as against the plaintiffs in pulling down those buildings and removing the materials at the time and in the manner in which they did remove them. I think it convenient first to say what the question really raised is, and what appear to me to be the facts.

There were ancient mining customs in this district, but by the 14 & 15 Vict., c. xciv., after reciting that the "mineral laws and customs of the King's Field are uncertain and undefined, and are in many respects inapplicable to the present mining operations within the King's Field," and that it was advisable "that the said mineral laws and customs should be revised, altered, and amended, so as to be made applicable to the present state of mining operations within the said hundred," it is enacted by the 16th section that the mineral laws and customs of a part of the hundred of High Peak, including the King's Field, "shall be such as are mentioned and comprised in this Act, and no other alleged custom or practice shall be valid."

Power is given by the 56th section to make new and additional customs, but that does not appear to have been yet exercised. The articles and customs by this Act established are contained in the first schedule to it, and whether the customs there mentioned

were really ancient or not, and whether they were such as would before the passing of this Act have been held reasonable or not, I think that, since the passing of that Act, August, 1851, they have the force of statute law.

The first custom allows any one to search for veins of lead ore upon any lands, except those occupied for certain specified purposes, and if a vein is found, to follow it under such excepted places. No compensation is given to the owner of the land in which the vein is found and worked, though compensation is * given to the owner of the excepted places for any [* 199] damage to the excepted places by following it under them.

The 4th, 5th, and 19th customs, set out in the schedule, seem to me material, and I will now read them: "4. The barmaster, together with two of the grand jury, shall provide the miners a way, either for foot passengers or carts, as may be required, from the nearest highway to the mine, and also from the mine to the nearest running stream, spring, or natural pond of water, such ways to be set out in as short a course as may be practicable and reasonable. No compensation is to be claimed by the occupier or landowner for such ways, but such ways are not to be considered public, and the use thereof is to be limited to persons and purposes connected with the mine, and all rights of way are to cease when the mine shall be no longer worked. The parties entitled to use the way may make sufficient ways for use, and keep the same in repair, and may also use for mining purposes the water from the nearest running stream, spring, or natural pond. 5. Every miner shall, so long as his mine shall be worked, be entitled, without making any payment for the same, to the exclusive use of so much surface land as shall be thought necessary by the barmaster and two of the grand jury, and be set out by them, for the purpose of laying rubbish, dressing his ore, briddling, making meers or ponds, and conveying water thereto, and any other mining purposes. The miner shall in all cases, before he commences any search or uses any land, make fences sufficient for the protection of cattle from any injury which might arise from his operations, and keep such fences in sufficient repair. 19. The barmaster, if he finds any mine or vein neglected and not wrought, and not hindered by water or for want of air, shall, if required so to do by any person or persons, send to the owner or reputed owner, where known to him, and if not known to him, then put up in some conspicuous place within

the liberty in which the mine or vein is situate, a notice that such mine or vein will, at the expiration of three weeks, if not duly and reasonably worked to the satisfaction of the barmaster and grand jury, and no other sufficient reason assigned to them, be forfeited; and if at the expiration of the said three weeks the mine or vein is not so worked, the barmaster, in the presence of two of [* 200] the * grand jury, may give such mine or vein to any person or persons willing to work the same; provided that nothing herein contained shall authorise the barmaster to give away such mine or vein if the owner thereof be unable to work the same by reason of such mine or vein being under water, or for want of air, so long as the owner thereof is using efficient and diligent means to the satisfaction of the barmaster and grand jury to relieve such mine or vein."

I do not think any others of the customs material. Admissions between the parties were made, of which some are material as showing what is the question which is now to be decided. I will read those which I think material. "1. Admit that the land in question is within the King's Field. 2. Admit that the defendants have got the mining rights given by the statute and scheduled customs and new and additional customs, articles, rules and orders (if binding on the landowners). 3. Admit that up to June, 1872, all buildings on the land in question were erected and used for mining purposes. 4. Admit that in June, 1872, the defendants suspended working the mine (except the working of the hillocks in 1878, as hereinafter mentioned), and that the mine in question has remained in the possession of the defendants and registered in their or some of their names in the barmaster's books. 5. Admit that the defendants in 1873 and 1874 pulled down the engine-house, boiler-house, and some other of the buildings in the particulars mentioned, and that they sold the building materials and fixed and unfixed machinery. . . . 12 and 13. Admit that part of the hereinbefore-mentioned buildings were built on some part of the hillocks above described, there being some feet of these mineral substances between the foundations and the natural surface of the land, but that part of the said buildings (the chimney and pumping engine-house and bed) were on foundations which were below the natural surface. 14. Admit that the mine in question has been worked for two hundred years and upwards, during all which period the defendants or their predecessors in

title have been in possession as miners. 15. Admit that the materials of which the hillocks were composed have been raised partly by the defendants and partly by their predecessors. 16. Admit that the before-mentioned buildings, other than the * buildings now converted into stables, were erected in and [* 201] before 1854. 18. Admit that the land in question was allotted to the plaintiffs or their predecessors in title under the award, dated 1807, made under the Great Hucklow Inclosure Act of 1803 (Act and award to be put in). . . . 19. Admit that it has been the practice in the district for miners to erect buildings and fix machinery similar to the buildings and machinery of the defendants for mining purposes, and from time to time to alter and vary the description and character of the buildings and machinery as improvements have been discovered and introduced, and to remove and sell removable machinery without objection by the owners of the soil. 20. Admit that it has been a common practice in the district for work in the mines to be suspended for many years (during which the mine remains the property of the miner and registered in his name in the barmaster's books until dispossessed under the miner's customs), and for the miners afterwards to resume the working of the mine. 21. Admit that the mines and hillocks in question have not been exhausted and are still a valuable property. 22. Admit that the working of the mine was suspended by the defendants in consequence of its being unremunerative, and that it would cost a considerable sum to put up machinery equivalent to what was removed by the defendants in 1873 and 1874."

There can, I think be no doubt that the buildings mentioned in the 12th and 13th admissions, at least the chimney, pumping-engine house and bed, were so attached to the soil which belonged to the plaintiffs as to be, whilst they so continued attached, part of that soil; and if the defendants can make out that, notwithstanding this annexation, they retained such a property, or at least an interest in the materials of which these buildings were formed, as to be entitled to remove them when they did, the plaintiffs cannot make any case as to anything else. If the defendants fail as to these, there might come to be a question whether they necessarily failed as to other things. But I think, therein agreeing with the Court below, that the defendants have succeeded in showing that they had such a property, or at least interest in these materials.

The plaintiffs' counsel contended at your Lordships' bar — [* 202] though * the LORD CHANCELLOR seems to have understood them not to dispute it below (7 Q. B. D. 298, 299) — that the defendants were not justified in erecting buildings of such a nature. And this, if it could have been made out, would have been of great importance to them. For there is a great difference between the position of a person who wrongfully annexes his materials to the soil of another, and that of a person who does so rightfully. But I think the plaintiffs' counsel failed in establishing this contention. I do not doubt that no such buildings were used for mining purposes in the reign of Henry II., when the ancient custom originated; and before the Act of 1851 it might have admitted of an argument whether the custom which, *tempore* Henry II., applied to the erections then necessary or proper, applied now to those which became afterwards necessary or proper. But I do not think it admits of doubt that the Act of 1851 makes the custom apply to the present state of mining operations in the King's Field; and after the 19th admission, it is impossible to doubt that, in the present state of mining, such buildings are necessary or at least proper for mining operations.

It was also contended that, whether the miner could or could not remove the materials whilst his interest continued, that, interest terminated in 1872. But that, I think, fails in fact, for I think, as was indeed decided in the cross appeal which has not been brought before this House, that the miner's interest did not cease merely by the suspension of working in 1872 (though that might have justified the barmaster, under the 19th custom, in declaring the miner's interest forfeited), and that the miner's interest in the portion of the surface of which he had exclusive possession continued till, by the pulling down of the buildings in 1874, he unequivocally showed that he had abandoned the mine. There is, therefore, no occasion to decide whether or not the right to remove materials, when a person has that right during his interest, continues a reasonable time after the termination of his interest or not.

The question, therefore, which has to be decided is whether when the defendants erected buildings so no doubt as to annex them to the soil of the plaintiffs, but, in the language of [* 203] the third * admission, "for mining purposes," and that at a time when the defendants had a right to erect such build-

ings on the plaintiffs' soil, they, whatever their intention might be, made the materials the property of the owners of the soil in such a sense that the defendants could not at any time remove them. No case, it is admitted, has ever been decided on this particular kind of interest. The plaintiffs' counsel relied on what is said in a work no doubt of very high authority, the notes to *Elwes* v. *Mawe*, 2 Sm. L. C., 7th ed., 185 [12 R. C. 193], that the general rule is, "that whatever is annexed to the realty becomes part of it," which I think is perfectly accurate, "and the person who was the owner of it when a chattel loses his property in it, which immediately vests in the owner of the soil. *Quicquid plantatur solo, solo cedit*," which I venture to think is much too broadly stated even as the general rule. The maxim cited is to be found in the works of Gaius, and probably he was quoting an older maxim. And the passage in which he uses it is incorporated in the Digest, book 41, title I., *De acquirendo rerum dominio*. In the 7th section of that title there is a great deal of very able reasoning as to what should be the law as to property where one person has changed the nature of the thing belonging to another by bestowing his labour on it, as for instance where one has turned the silver of another into a vase, his block of marble into a statue, or his grapes into wine. That question is not material here; and then in the 10th law of that 7th section it is said (I translate the Latin), "If one on his own land has erected a building with materials belonging to another, he is the owner (*dominus*) of the building, for all that is built into the soil becomes part of it, *quia omne quod inædificatur solo cedit*. But this is not so that he who was the owner of the materials ceases to be the owner thereof; but, nevertheless, he (the owner of the materials) cannot bring an action to recover them in specie, nor take them away himself (*nec vindicare eam potest neque ad exhibendum de ea agere*), because of that law of the Twelve Tables, which provides *ne quis tignum alienum ædibus suis junctum eximere cogatur sed duplum pro eo præstet*. Therefore if by any cause the building is cast down, the owner of the materials can *nunc eam vindicare et ad exhibendum agere*." So far from * meaning by the maxim that the property which [* 204] had existed in the materials whilst chattels was lost, and vested in the owner of the soil, the maxim is used when Gaius, and the framers of the Digest who adopted his opinion, thought that the property in the materials remained in the person who was

owner of them whilst chattels, and did not vest in the owner of the building, though by the annexation the materials had become part of the soil, and though by the positive law of the Twelve Tables he was obliged to leave the building untouched on being paid double the value of his materials. And I do not think that the general rule of English law goes so far as is stated in the passage just read from Smith's Leading Cases, or that the authorities cited bear it out. Even where a person, himself the owner of the fee, has annexed any chattels of his own to his own land, he does not always cause the property in the chattels to cease to be personalty; he generally intends to make them part of the inheritance, and when he does so intend, there can be no question that on his death before severance the heir takes, and not the executor.

Whenever the chattels have been annexed to the land for the purpose of the better enjoying the land itself, the intention must clearly be persumed to be to annex the property in the chattels to the property in the land, but the nature of the annexation may be such as to show that the intention was to annex them only temporarily; and there are cases deciding that some chattels so annexed to the land as to be, whilst not severed from it, part of the land, are removable by the executor as between him and the heir. Lord ELLENBOROUGH, in *Elwes* v. *Mawe*, 2 Sm. L. C., 7th ed., 178 [12 R. C. 193], says that those cases "may be considered as decided mainly on the ground that where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle) was an accessory to a matter of a personal nature, that it should be itself considered as personalty." Even in such a case the degree and nature of the annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land; and, as Lord HARDWICKE said, [* 205] in *Lawton* v. *Lawton*, 3 Atk. 15, "You shall * not destroy the principal thing by taking away the accessory to it;" and therefore, as I think, even if the property in the chattel was not intended to be attached to the property in the land, the amount of damage that would be done to the land by removing it may be so great as to prevent the removal. But in the case now before the House there can be no doubt on the admissions that the machinery and the buildings were from the first intended

to be accessory to the mining, and that there was not at any time an intention to make them accessory to the soil; and though the foundations being, as is stated in the 12th and 13th admissions, below the natural surface, they cannot be removed without some disturbance to the soil, it is, I think, impossible to hold that the amount of this disturbance is so great as to amount to a destruction of the land, or to show that the property in the materials must have been intended to be irrevocably annexed to the soil.

For these reasons I think that the decision below was right. I therefore move that the judgment below be affirmed, and the appeal dismissed, with costs.

Lord WATSON: —

My Lords, I also have come to the conclusion that the judgment of the Court of Appeal ought not to be disturbed.

I am of opinion that, in sinking into the soil the foundations of a house, chimney, and boiler seat connected with an engine for pumping water from the mine, the respondents were acting within the limits of their customary right. The practice set forth in the 19th article of the admissions made by the parties, on the trial of the cause before Lord COLERIDGE, must be taken as explanatory of the custom, and is good evidence to show that the use of the "surface land" for such erections as those in question has, ever since steam power has been employed in pumping, been regarded as a use "for mining purposes," within the meaning of the fifth custom scheduled to the Act of 1851. That is confirmed by the terms of the 26th custom, which obliges the owner of a mine, the working of which is impeded by water, to remunerate any stranger who relieves the mine by means of the old-fashioned steam engine.

I am also of opinion that at the time when the erections in *dispute were taken down and removed the interest of the respondents in the mine had not come to an end. [*206]

It is, therefore, unnecessary to consider what the relative rights of the parties would have been if the erection of these buildings had been in excess of the powers conferred on the respondents by the mineral customs, and if the interest of the respondents in the mine itself had terminated before their removal.

In the Act of 1851, and in the scheduled customs, which are therewith incorporated, and are therefore of statutory authority, the interest of the miner is expressly described and recognised as that of ownership. He has not an absolute right in perpetuity,

but his right remains that of an owner until he gives up possession of the mine, or is dispossessed by competent authority. In other words, his is a proprietary right derived from the mineral customs of the district, and subject to the limitations imposed by these customs.

Accordingly the position of these parties at the time when the erections in question were made, and also at the time when they were removed, was this: The appellants were owners of the surface land to which the buildings were affixed; the respondents were the owners of the mine under an independent customary title, having as an incident of that title the right to erect the buildings for the purposes of their mine. I do not think that between persons so situated the maxim *Quod solo inædificatur solo cedit* has any application.

According to my understanding of the Roman law, from which it is derived, the maxim applied exclusively to two classes of persons: either to those who built in *alieno solo* with their own materials but without title and in *malâ fide*, or to those who so built in *bonâ fide* under some misconception as to their right to do so. The *malâ fide* builder forfeited his structure to the owner of the soil, but, on the other hand, the *bonâ fide* builder had a right to remove his materials unless the owner of the soil gave him full compensation. I can find nothing in the law of Rome to suggest that the maxim contemplated a case like the present, which involves no question of *bona* or *mala fides*, and relates to persons building in *alieno solo* by virtue of a proprietary right superior to and independent of the title of the landowner.

[*207] *There is, so far as I am aware, no English authority tending to establish that the maxim has ever been regarded in this country as of universal application. The authorities merely show that the doctrine which it is understood to embody, which is not the same as the doctrine of the Roman jurists, has been given effect to, with certain differences, in the three classes of cases specified by Lord ELLENBOROUGH in his judgment in the case of *Elwes* v. *Mawe*, 2 Sm. L. C., 7th ed., 178. I assume that the doctrine would receive a similar application in cases analogous to these, but I can perceive no analogy between the case of independent owners like the appellants and respondents and the cases of a tenant who has no title except a lease from his landlord, or of the division of the estate of a deceased into heritable and movable for

the purposes of succession, or of the division of settled estate between the personal representatives of tenants for life or in tail, and the remainder-man or reversioner. For these reasons I am of opinion that the appellants must fail; but, apart from them, I am disposed to think that the terms of the statute and customs are conclusive against their claim.

In my opinion all erections made upon or affixed to the *solum* of the surface land, in virtue of the powers conferred upon the miner by the fifth custom, constitute "mineral property" as defined in the 2nd section of the Act, and as such may be taken in execution and sold, in order to pay debts recovered or penalties awarded against the miner under a judgment of the Barmote Court. These and other provisions of the statute in my opinion plainly recognise the fact that works such as those the appellants claim are, after their erection, owned by the miner — are, in other words, his property, subject to his disposal and liable to be taken in execution for his debts. That fact is, I venture to think, of itself sufficient to prevent the application of the maxim to the present case. It appears to me that in all cases arising between the owner of the land in fee and a third party making the erection, the maxim *Quod solo inædificatur solo cedit*, if applicable at all, must come into operation at once. An agricultural tenant who builds a barn with its foundations sunk in the soil, ceases the moment the structure is completed to be owner of the * materials composing it, [* 208] and his sole interest is thenceforth to occupy as tenant, the building itself having become the property of his landlord.

I have only in conclusion to say that even on the assumption that the appellants had a right to buildings annexed to and accessory to the soil as in a question with the respondents, I agree with the reasoning by which the noble and learned Lord on the woolsack has demonstrated that the buildings in dispute must be regarded as personalty.

Lord BRAMWELL: —

My Lords, in this case the plaintiffs complain that the defendants have taken down buildings fixed to the soil and freehold of the plaintiffs, and have removed the materials. The defendants admit that the buildings were so fixed that they would have been part of the freehold and would have gone with it if, for example, they had been for dwelling purposes and had been erected by a tenant for life. They admit that they pulled down the buildings

and removed the materials, contending that they had a right to do so, as the buildings were erected by them or their predecessors in title with their own materials, the property in which, say the defendants, has never passed from them. In answer to this the plaintiffs rely on the rule *quicquid solo plantatur solo cedit.* The defendants deny that it applies. It undoubtedly applies where such buildings have been erected by a trespasser, a wrongdoer, whether innocently or knowingly so; why, it is not necessary to determine. The defendants say they were not wrongdoers. Mr. Mellor faintly contended that they were. This does not seem to have been argued in the Court below, and I think reasonably. For it is impossible to say that the miners might not sink a shaft as they had done, might not have an engine to work the mine, and might not have a building to cover the engine. It seems to me clear that this action cannot be maintained on the ground that the buildings were wrongful.

But the rule *quicquid solo plantatur solo cedit* prevails in another class of cases, viz., that where the builder is not a trespasser; and where the tenant for life or years builds a build-
[*209] ing *permanently fixed to the soil, he cannot lawfully pull it down as against the reversioner or remainder-man. Here again it is not necessary to consider why the law is so nor whether it is reasonable. If it is because the building is a wrong and waste, as has been held, it does not apply to the present case. But further, the relation between such a tenant and the reversioner or remainder-man is altogether different to that between the plaintiffs and defendants, if indeed there can be said to be any relation between them. The defendants are tenants or workers of the mine with an easement on the plaintiffs' land. The mine owner, the Duchy of Lancaster, is more in the same relation to the defendants as a reversioner to a tenant than are the plaintiffs. There is no privity between the plaintiffs and the defendants. That the maxim applies where there is, does not show that it applies where there is not. I know of no other case where it does apply. Without saying that there is no other case, I cannot see why the maxim applies in this. The defendants are not wrongdoers like the trespasser I have supposed. They are not persons who had any estate or term in the land of which the plaintiffs are seised. No doubt the maxim is expressed in general terms and without qualification; but it must be taken with reference to what one

would have said were the only cases in which there could be a fixing to the freehold, viz., by a trespasser or by a tenant.

But if no reason can be given why the maxim should apply to this case, plenty of reasons can be given why it should not. The defendants are lawfully in possession of the premises. They or their predecessors lawfully built these buildings, which are essential to the working of the mine, being accessorial to the engine and works; and it would be most unreasonable that they should have to leave them on the premises — as unreasonable as that they should leave the engine. On this ground alone I should advise your Lordships to affirm the judgment.

It is perhaps dangerous, as leading to litigation, to add what I am about to say, but it appears to me that the defendants' case may be made out in another way. I think, if the plaintiffs chose to insist on it, that the defendants were bound to remove these buildings. They have a right to use the surface of the land for mining purposes. But when those purposes are fulfilled, I think * the miners must restore the surface in a natural [* 210] state; and it cannot be that the plaintiffs have an option either to have these buildings removed or left, at their pleasure.

Further, I am of opinion, if it were necessary to decide it, that the principle on which a tenant may remove trade fixtures would, if the defendants were tenants, justify the removal of these buildings; and that the defendants cannot be in a worse position than such tenants. The claim, if made by any one, should in reason be made by the mine owner, not by the plaintiffs. Suppose the mine is again worked, are new engines and a new house to be put up?

Lastly, it was contended that if the defendants might remove these buildings it must be during the mining. But I am clear that they had a reasonable time afterwards in which to do it; and as I read Lord COLERIDGE'S judgment he has found that it was done within such reasonable time.

I agree, therefore, that this judgment should be affirmed.

LORD FITZGERALD: —

My Lords, this case was most carefully considered in the primary Court, and again in the Court of Appeal, and was fully and ably argued at the bar of your Lordships' House. Your Lordships probably reserved judgment not by reason of any inherent difficulty which the case presented, but on account of

its novelty. On mature consideration I had arrived at the same conclusion as that which has been announced by the noble and learned Lord (Lord BLACKBURN).

The case is one unaffected by authority, and is completely *sui generis*. I assume that the hard maxim of our law, *quicquid plantatur solo, solo cedit*, represents a rigid rule of general application to all cases coming within its ambit, but it seems to me to be obvious that the parties to this litigation, both plaintiffs and defendants, stand outside its limits, and that their rights are not to be determined by its application. They do not come within any of the classes defined by the LORD CHIEF JUSTICE in *Elwes* v. *Mawe*, 2 Sm. L. C., 8th ed., 185, or deduced by the learned editors of the Leading Cases * from the numerous authorities referred to in the notes to that case.

[* 211]

I do not know that much advantage can be derived from a minute examination of those authorities, or any further endeavour to trace the origin of the maxim to its foundation in the Roman law, or its adoption into the law of England in a more stringent form at a time when little heed was paid to rights other than those of the owners of land. Like all other rules it has received from time to time judicial modifications to suit the exigencies of modern life and modern progress, and numerous exceptions and qualifications have been grafted on it in favour of trade, manufacture, and agriculture, and in furtherance of the rights of creditors. It seems to me that what we have first to do is to ascertain as nearly and as accurately as we can the true relation of the plaintiffs and of the defendants to each other.

The interest which the plaintiffs or their predecessors took in the land allotted to them under the Inclosure Act of 1803 and the award of 1807 was subject to the rights of the Crown as lord of the manor of High Peak, within which the liberty of Great Hucklow is situate, and to the seigniories and royalties incident to such manor, and was also subservient to the customary rights of miners existing from time immemorial and subsequently defined expressly by "The High Peak Mining Customs and Mineral Courts Act, 1851." These customs had probably their origin at a period when the whole ownership of the soil was in the Crown, and were established for the public interests in order to encourage the extraction by mining operations of the greatest quantity of lead from an otherwise unproductive soil, and to add to the revenue of the duchy by increasing the royalties.

Whatever their original foundation may have been, their intrinsic validity cannot now be questioned. It is observable that the waste lands to be divided under the Inclosure Act of 1803 are to be allotted to the parties interested in proportion to their respective properties, rights of common, and other interests in the same, but saving to the Crown and all other persons "all such rights, titles, and interests as they or any of them had in the lands to be allotted before the passing of the Act, or could or might have had in case the same had not been made."

* The mine of the defendants in the place in question [* 212] had been in possession of and worked by the defendants and their predecessors in title for two hundred years prior to and down to 1872, and the plaintiffs took their allotment under the Inclosure Act subject to the rights and interests of the predecessors of the defendants, whatever those rights and interests were.

It does not appear when the buildings in question were erected save that they had been erected prior to 1854. The erection may have been, and probably was, at a much earlier period, and in substitution for some previously existing buildings, but all were erected for mining purposes, and were similar to those which it has been the practice of the district for miners to erect, and from time to time to vary and alter, "as improvements were discovered and introduced."

I cannot doubt for a moment but that the custom would authorise the miner to use all modern appliances, and that he was not confined to the use of such as existed at the time of the presumed grant of these mining rights.

I now turn to the Act of 1851, but before criticising its provisions I desire to observe that in the course of the arguments on the part of the plaintiffs too narrow a character was given to that Act as one providing only for the interests of miners *inter se.* The Act goes much further. It declares in its preamble that the Queen, in right of her Duchy of Lancaster, is seised of the hundred of High Peak, within which there is a district "called the King's Field, otherwise the King's Fee," within which "all the subjects of the realm have from time immemorial had or claimed to have a right to search for, sink, and dig mines or veins of lead ore, subject to certain ancient mineral laws and customs and upon paying certain duties to her Majesty," &c. It recites that the mineral laws and customs of the King's Field are uncertain

and undefined, and in many respects "inapplicable to the present mining operations within the King's Field," and that "it is advisable that the said mineral laws and customs should be revised, altered, and amended so as to be made applicable to the present state of mining operations within the said hundred, and that the jurisdiction of the Great and Small Barmote Courts should be more clearly defined and settled.

[*213] *The statute then proceeds to provide for the constitution, jurisdiction, and procedure of the High Peak Barmote Courts, and for the appointment of a Steward and other Judges of these Courts, and fixes their duties. The Courts are to be Courts of Record, and have jurisdiction (amongst others) in trial of actions of title, trespass, and debt, and the mineral laws and customs of that part of the hundred over which these Courts have jurisdiction are those mentioned in the Act.

The noble Lord (Lord BLACKBURN) has referred to many of the articles and customs contained in the schedule to the Act, and I will confine myself to additional observations on them.

The second custom, which authorises "the landowner to sell and remove from his land the calk, feagh, spar, and other minerals (except lead ore)," limits that right by adding, "when not required for the use of the mine, but not so as to destroy or injure any mineral property."

The sixth scheduled custom provides for the transfer of the miner's interest in his mine by an entry in the barmaster's book. Custom 10 settles the right of the first finder of a vein and the ascertainment of its limits; and from that to the 19th various provisions are made for the settlement of rights and enforcement of them if disputed.

Returning again for a moment to the statute, it will be found that in its definitions, sect. 2, the words "mineral property" shall include mines and veins of lead, "and the works, rights, and appurtenances connected therewith, and also lead ore and all tools, materials, goods, chattels, and effects used in searching for, getting, cleansing, or preparing lead ore, whether such tools, &c., be found in or upon any mine or works or elsewhere;" and by sect. 32, when the amount of any judgment recovered in the Barmote Court or any penalty imposed by the Steward shall be unpaid, the Steward shall issue his warrant, and, thereunder, the barmaster is required to take possession of any "mineral property"

belonging to the debtor, and shall sell the same by ticket or by public auction to raise the sum mentioned in the warrant.

It will be observed thus that the mineral property liable to be taken in execution for the miner's debt includes not only tools, materials, goods, chattels, and effects, but also the mine itself, * with its works, rights, and appurtenances. The [*214] whole is thus treated as in the nature of personal estate liable to be sold for the miner's debts, and it would not require any strained interpretation to come to the conclusion that under the term "works" would be included machinery and buildings erected for mining purposes and necessary for the working of the mines, and which, according to admission No. 19, it has been the the practice in the district for miners to erect, and from time to time to alter and vary as improvements were discovered and introduced.

In endeavouring to trace the relations of the parties to each other, it will be observed that the title of the landowner seems to be largely ignored, and as if subordinated to that of the miner. The landowner is but twice mentioned in the schedule of customs, viz., in the 1st, in giving him a right to the expenses of levelling the land after an unsuccessful search for minerals, and in the 2nd giving him a limited right to remove from his land stuff brought up in the course of mining operation. But, on the other hand, the miner's title seems to be dealt with as superior and predominating; he is entitled to search for, sink, and dig mines in or under all manner of lands of whose inheritance soever they may be; if a mine is found, he is at liberty to work, and makes no manner of compensation or payment to the landowner. So long as his mine shall be worked he shall be entitled without any payment "to the exclusive use of so much surface land as shall be thought necessary," &c., for, amongst other purposes, "dressing his ore, making meers or ponds, and conveying water thereto, and any other mining purposes." The "exclusive use of the surface land" seems larger than a mere easement over the surface of the land.

The concluding words of custom 5 are very comprehensive, and it seems difficult to hold that the erection of suitable machinery for working the mines, and the necessary buildings for the protection and due use of such machinery, would not come within these words. When once the mine has been found, and so long as it continues to be worked, the title of the miner, not only to the

mine, but also to the necessary "surface land," with rights of way and water, seems to be complete and independent of the landowners. He has full power of sale and transfer, or other [* 215] disposition, * as he may think fit, and until the miner shall cease to work his mine, the landowner's interest in the mine and in the surface land necessary for its working is in abeyance.

On a review of the position of the parties to each other, it will thus be perceived that the defendants did not derive from or under the plaintiffs, and, on the contrary, the plaintiffs took subject to all the customary rights of the defendants, and, amongst others, to the possession and use of the "surface land" for the purposes defined by the statute, and to which the 19th admission is applicable.

The defendants were not tenants or trespassers, and the plaintiffs were not landlords or lessors. There was no manner of contract between them. The defendants had rights, not derived from the plaintiffs' ownership of the surface, but in superiority to it, and to which that ownership was servient; and amongst others the right to erect buildings for mining purposes, and to alter or take them down as might be expedient, and, in my opinion, also to remove the materials.

This is not the case of a novel claim arising out of a new state of circumstances, but is the assertion of an alleged ancient right, springing from unquestioned immemorial customs, declared and established by a modern statute. It does not appear to have ever, before the present occasion, been the subject of controversy or litigation, and when it now comes before us we apply to it the principles of common right and of common justice.

The right of the defendants to remove the fixed machinery, though questioned in argument, has not been raised before us by appeal, and I can see no ground whatever on which so far to doubt or question the decision in the Courts below. Mr. Mellor, however, argued for the plaintiffs that even in that case, and treating the machinery as personalty, and therefore removable, yet that the same rule did not apply to the "building," which being fixed into the land became, by an inexorable rule of law, a part of the land. If the rule was applicable to the present case, there would probably arise the question of intention, whether the erections in question were made for the purpose of benefiting the

inheritance in the land or for the more complete use and protection of the machinery as chattels. If such a question could arise * in the present case, the ordinary presumption [* 216] would be clearly rebutted. The buildings in question, if not by the statute and customs personalty, were but accessory to the machinery and built to cover and protect it, and the one was as much removable as the other.

In my humble opinion, the machinery and buildings never ceased to be the property of the miners and removable by them; both are treated together as forming mineral property — property of the miners in the nature of personalty, and there seems no pretence for the contention that the right to remove them had been abandoned.

For these reasons I adopt the decision of the Court below, and concur in the opinion that this appeal should be dismissed.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 19th March, 1883.

ENGLISH NOTES.

The decision in *Wake* v. *Hall* was followed and applied by CHITTY, J., in *Ward* v. *Countess of Dudley* (1887), 57 L. T. 20. There was a question between executors (representing the personal estate) of the late Earl of Dudley, who was tenant for life of a large mining estate, and persons succeeding by way of remainder to the real estate and residuary personalty under the settlement of a former Earl of Dudley. There were besides the ordinary mining plant, various works, such as blast furnaces, boilers and engines erected and used upon the estate, for the purpose of working up the ore got from the mines into a merchantable state. Some of these works had been erected by the settlor, and as to these it appeared clear that they formed part of the settled estate. There were others erected by the tenant for life; and these, so far as they could be removed without such disturbance "as to amount to a destruction of the land" (employing the expression of Lord BLACKBURN, p. 805, *supra*), Mr. Justice CHITTY considered the executors of the tenant for life entitled to remove, as belonging to his personal estate. The learned Judge, therefore, held to be removable the following things (all erected by the tenant for life): (1) Certain blast furnaces; (2) a steam engine and a building erected merely for the purpose of covering it; (3) calcining kilns; (4) boilers (not being boilers put in to replace boilers forming part of an engine existing in the settlor's time); (5) gas

pipes which could be removed without injury to the machinery existing on the premises in the settlor's time; (6) machinery, including what is described as fixed power machinery (driving power), as well as, of course, movable machinery, such as lathes and the like, — but not substantially built workshops, within which such machinery was placed; (7) the permanent way of a railway (consisting of the rails and sleepers) which had been laid down for the convenient carriage of coal, &c., to and from the collieries; (8) fixed engines used for hauling on steep gradients and the brick sheds erected merely for the purpose of protecting such engines; (9) weighing-machines. The learned Judge then, on the invitation of the counsel for the parties, proceeded to deal with a point which he could not have dealt with unless a compromise had been proposed, — as to the measure of value to be allowed on the assumption of these things being left *in situ* for the carrying on of the business for the benefit of the infants entitled to the land. The question lay between the value of the things considered as part of a going concern, and the breaking up price, which was all that could be realised if parties stood on their extreme rights. He thought it a fair compromise as an arrangement to be sanctioned by the Court that the price should be assessed on the basis of an intermediate value between these extremes.

The decision of Mr. Justice CHITTY, as to the railway, was followed by the Queen's Bench Division in Ireland in *Antrim* v. *Dobbs* (1891), 30 L. R. Ir. 424, where rails laid down by a lessee of mines under a reservation were held liable to be taken in execution under a *fi. fa.* against the lessee.

SECTION VII. — *Special Rules as to Remedies.*

No. 32. — HAYWOOD *v.* COPE.

(1858.)

RULE.

AN agreement for a lease of a mine will not be denied specific performance on the ground of uncertainty, in the sense that the existence of minerals which can be profitably worked is merely speculative.

The mere taking possession is not an acceptance of title.

Haywood v. Cope.

25 Beav. 140–154 (s. c. 27 L. J. Ch. 468; 4 Jur. (N. S.) 227).

Minerals. — Agreement for Lease. — Specific Performance. — Acceptance of Title.

A., by contract in writing, agreed with B. to take a lease of "those two [140] seams of coal known as 'the two-feet coal' and the 'three-feet coal' lying under lands hereafter to be defined in the Bank End estate," and B. agreed to let to A. "the before-mentioned seams of coal." *Held*, that the contract was sufficiently definite to enforce, and that the true construction of it was, that the boundaries of the estate, which consisted of about twenty-seven acres, were to be thereafter defined.

A draft lease was prepared by the lessor, in pursuance of a written contract, which was not objected to by the lessee, who afterwards refused to complete. *Held*, that the draft lease could not be used for the purpose of controlling or explaining the contract itself.

The plaintiff had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterwards, the defendant cleared the pit and examined the coal in the shaft with other persons, and subsequently contracted for a lease. The colliery turned out to be worthless. *Held*, that the defendant could not resist a specific performance, on the ground of the plaintiff not having communicated the fact of his having worked the mine and found it unprofitable.

A person contracting for the lease of a mine cannot resist its performance, on the ground of his ignorance of mining matters, and of the mine turning out worthless.

Specific performance is a matter of discretion, to be exercised, however, according to fixed and settled rules, and the mere inadequacy of consideration is not a ground for exercising such discretion by refusing a specific performance.

Taking possession of a mine by intended lessee held not to be an acceptance of the title.

The plaintiff was seised of a farm called the Bank End farm, situate in the parish of Norton in the Moors, in Staffordshire, and of the coals and minerals under it, and for working which shafts had been previously sunk, which had been visibly abandoned. The farm consisted of about twenty-seven acres, two roods, and two perches.

The defendant applied to the plaintiff for a lease of the coal mines, and after some negotiations, and after the defendant, accompanied by some friends, had examined the shaft, as far as was possible (see *post*, p. 821), the plaintiff and defendant, on the 15th of January, 1855, signed the following agreement: "Mr. Charles Cope agrees with Howard Haywood, Esq., for those two seams of

coals, known as the two-feet coal and three-feet coal, lying under lands to be hereafter defined, in the Bank End estate, near Norton, in the county of Stafford, at the rate of nine pence per ton [* 141] for all coals and * slack going over a weighing machine, 112 lbs. to cwt., or 2240 lbs. per ton, minimum rent £100 per annum, on lease of fourteen years. Mr. Cope to pay for all surface trespass, at the rate of £5 per acre, to commence paying minimum rent within eighteen months from date of agreement, all coals and slack sold or raised in the intermediate time to be paid for, at the rate of 9*d* per ton. Howard Haywood, Esq., agrees to let to Mr. Charles Cope the before-mentioned two seams of coals at the price before mentioned."

Shortly after the agreement had been signed the defendant entered into possession. He commenced working the coal mines, and he continued to work them regularly until July, 1855, and off and on until October, 1856.

On the 26th of May, 1855, the plaintiff's solicitor forwarded to the defendant, for his approval, a draft lease, in which the particulars of the land under which the mines lay were defined and scheduled. The defendant made no objection to the draft, and retained it, notwithstanding various applications made to him to return it. At Christmas, 1856, the defendant first objected that the coals had not turned out so well as he expected, and in January, 1857, he declined to accept a lease, "on the ground that the mines were not (as he alleged) what they were represented to be, either as to thickness or quality; and that his surveyor had stated that the coal was absolutely not worth getting." The defendant afterwards returned the draft lease.

On the 26th of March, 1857, the plaintiff filed this bill, [* 142] for a specific performance of the contract; for an * account of the coal worked, and for payment by the defendant of the royalty and rent.

The defendant resisted the specific performance on the ground of the uncertainty of the contract, of the misrepresentation and concealment of the plaintiff, of the delay which had occurred, and of the hardship of being obliged to pay £100 a year during the remainder of the time, without receiving any benefit from the mines.

Mr. Selwyn, Mr. Hadden, and Mr. Jessel for the plaintiff. The defendant examined the mine and acted on his own judg-

ment; he cannot now repudiate the contract, merely because the collieries have turned out less profitable than he anticipated.

Mining operations are always of a doubtful and specula- [143] tive character; the defendant had the same sources of information open to him as the plaintiff, and he availed himself of them; he cannot, therefore, complain; *Jennings* v. *Broughton*, 17 Beav. 234, 5 De G. M. & G. 126; *Clapham* v. *Shillito*, 7 Beav. 146.

Mr. R. Palmer and Mr. Southgate for the defendant [144] argued (*inter alia*) that the contract was too vague and uncertain in its terms. They also suggested misrepresentation, and other usual grounds for resisting specific performance.

Mr. Selwyn, being called on to reply as to the uncer- [145] tainty of the agreement, argued, that there was sufficient certainty in the agreement as to the subject to be leased; it was the two seams of coal under the plaintiff's estate; and that which was "to be hereafter defined" was the boundary of the estate. He referred to *Owen* v. *Thomas*, 3 Myl. & K. 353; in which there was a contract to sell "the house in Newport," without any further description, except that the contract referred to the deeds being in the possession of Mr. D.: it was held that the subject of the contract was sufficiently defined.

Sir JOHN ROMILLY, M. R. [146]

I am of opinion that the plaintiff is entitled to a decree for specific performance.

The first objection is upon the terms of the contract, which are said to be too vague to be carried into effect.

The words are these: — Cope agrees with Haywood "for those two seams of coal known as the 'two-feet coal' and the 'three-feet coal,'" lying under lands to be hereafter defined in the Bank End estate, near Norton; and Mr. Haywood agrees to let to Cope the before-mentioned two seams, at the price before mentioned. It is said that this is an agreement to lease an uncertain quantity of land, and therefore that it is too vague to be enforced. It is so if this be the right construction of the contract. But, on the other hand, it is said, the proper way to read it is this, — as an agreement to lease two seams of coal, lying under the lands of the Bank End estate, the boundaries of which are to be hereafter described and defined.

I think this is the correct meaning of the contract, and this

appears to have been the meaning of the contract attached to it by the parties themselves on both sides.

I find, from the evidence, that the Bank End estate is not an indefinite or large tract, but is a name given to a small farm belonging to the plaintiff, containing between twenty-seven [*147] and twenty-eight acres of land. *I find that though contests have arisen between the plaintiff and defendant on the subject of the contract, yet that it was never suggested, until the papers came before the professional advisers, that the subject matter of the contract was in doubt, or that the extent of the land under which the coal was intended to be demised was a matter of doubt, and one to be afterwards settled and agreed on; on the contrary, when the draft lease was prepared and sent to the defendant, in May, 1855, no observation was made with respect to the description or extent of the parcels as contained in that document.

It is quite clear, as has been observed, that this document cannot be used for the purpose of controlling or explaining the contents of the contract itself; but it does show what was the intention, and that no doubt existed in the mind of the parties themselves with reference to the meaning of that contract. I think the construction I have put on this document, which is the plain and natural one, is that which the parties themselves put upon it, and that it never entered into the heads of either of them, until the suit was instituted, that the whole of the two seams of coal under the Bank End estate was not to be demised, but only some portion of it, which was afterwards to be agreed on. I believe that the defendant considered himself entitled to work any part of the coal under the farm, and that the words "to be afterwards defined" merely meant this: — that there was to be an accurate description of the farm under which the coal was to be taken.

The objection therefore which was primarily put forward on the construction of the contract, in my opinion, fails.

The next objection is the misrepresentation, or rather [*148] *a suppression, of the truth. It is shown that twenty years before the contract, the plaintiff worked these seams of coal, and then abandoned the work because it was not profitable. I think this objection also fails. There were two pits on the ground; before entering into the arrangement with the

plaintiff, the defendant applied for leave to have these pits, or one of them, at least, cleared, that he might be at liberty to examine the coal in the shaft. This was done. He went down himself, and took with him three other persons, for the purpose of examining and ascertaining the value and nature of the seams of coal. It was not till after this had been done that he entered into this agreement with the plaintiff. He says, that he had no knowledge of mines and coal, and that he was wholly ignorant of these matters. He ought, then, to have employed some person who had a proper knowledge for that purpose, which, I believe, he did. It would be no excuse for a man, who had himself personally inspected a house, for the purpose of seeing whether it was in a proper state of repair, afterwards to contradict his own judgment, on the ground that he was not a surveyor, and was unable to say whether the house was in a sufficient state of repair or not. Here he did not trust to his own judgment, but, as I have already observed, three other persons accompanied him, some of whom seem to have given him their opinion.

With reference to Mr. Brindley, I think it very immaterial whether he did or did not state the words which are imputed to him. I see no reason to doubt that what he said (if he said anything) was *bonâ fide*, and that he *bonâ fide* believed it was the real value of the land, and the evidence satisfies me, that the defendant took the lease, not on the faith of the representations of Brindley, *if he made any, but on his own [*149] opinion and that of others, as to the value of the mine to be worked.

The next question is, was the plaintiff bound to say that he had worked the mine and that he had found it unprofitable? That some one had worked and abandoned it was obvious, for there were the shafts and the abandoned workings which the defendant examined. Was it incumbent on the plaintiff to inform him that he was the person who had worked it some twenty years before, and found it to be not worth working? It is to be observed, that the subject matter of this contract is a mine, that is to say, seams of coal, which may turn out better or worse, and is always, in some degree, a speculation. It may turn out better, or it may turn out worse, and it is well known that leases and sales are always made with reference to this circumstance. With

the exception of knowing that the plaintiff had worked it, the defendant knew as much as anybody could know by his own examination; but whether the seams were to improve or to deteriorate was a matter which could only be ascertained by the future working. They have turned out ill, but the consequence of that is not, in my opinion, that the defendant can reject the contract, any more than the plaintiff could have rejected it, or have demanded higher terms, if the seams had turned out profitable.

Another objection is the length of time that has elapsed before the bill was filed. This also appears to me to fail. The defendant received the proposed draft of the lease in May, 1855, he continued working it till July, 1855, he then complained of the mine, and said it must be abandoned; but it appears from the evidence that he worked the mine, on and off, down to October, 1856.

[* 150] * The solicitor of the plaintiff, who sent the draft of the lease on the 26th of May, 1855, also says, that he received no communication of any sort from the defendant or his solicitor, in answer, till the month of January, 1857, when the defendant's solicitor came to him and stated that the defendant was desirous of abandoning the agreement, upon which the plaintiff's solicitor said, "You must put that proposal in writing," and, accordingly, he sends in a proposal to that effect in writing, which was declined on the 2nd day of February, 1857, and the bill was filed on the 26th of March following.

In order to have entitled the defendant to make time an element in this matter, he ought to have given the plaintiff a formal notice that he repudiated the agreement, that he had abandoned the mine, and would have nothing more to do with the transaction. If this had been done, and the plaintiff had not after a considerable length of time proceeded with due diligence, then undoubtedly the Court would not have allowed him to have enforced the contract; but here I find that the defendant worked regularly until July, 1855. He went on trying it more or less until October, 1856, and in January, 1857, he makes a written proposal as to the abandonment of it, and the bill is filed in March, 1857. The real fact is, that the speculation has turned out extremely bad, and this is shown by the evidence. The seam dwindled down from three feet to twenty inches, but if instead of diminishing it had increased to that extent, the Court would probably have heard nothing about it.

Then it is said, that this is an extremely hard case, that, in point of fact, the plaintiff is insisting upon the defendant paying him £1,400 for a thing that has turned out to be literally worth nothing, and that * according to the discretion which [* 151] the Court exercises in such cases, it cannot compel specific performance of the contract. Upon this subject, which is one upon which I have before made several observations, I will refer again to a passage which I have always considered binding upon me, for it is most important that the profession, and those who have to advise in reference to this subject, should understand the rule which is adopted in this and the other Courts, which is, that the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. Lord ELDON observes in the case of *White* v. *Damon*, 7 Ves. 30, 35 (6 R. R. 71), "I agree with Lord ROSSELYN, that giving specific performance is matter of discretion; but that is not an arbitrary capricious discretion. It must be regulated upon grounds that will make it judicial." I also refer, as I believe I have upon former occasions, to a passage in the celebrated argument of the MASTER OF THE ROLLS in *Burgess* v. *Wheate*, 1 Eden, p. 214, where, at the conclusion, he cites a well-known passage from Sir JOSEPH JEKYLL'S judgment, in *Cowper* v. *Earl Cowper*, 2 P. Wm. 752, 753, upon the subject of the discretion of the Court, and gives his own opinion. He says, "And though proceedings in equity are said to be *Secundum discretionem boni viri*, yet, when it is asked *vir bonus est quis*, the answer is, *qui consulta patrum, qui leges juraque servat.* And as it is said in *Rooke's Case*, 5 Co. Rep. 99 b, that discretion is a science, not to act arbitrarily according to men's wills and private affections, * so the discretion [* 152] which is to be exercised here is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other. This discretion in some cases follows the law implicitly; in others assists it and advances the remedy; in others, again, it relieves against the abuse or allays the rigour of it; but in no case does it contradict or overturn the grounds and principles thereof, as have been sometimes igno-

rantly imputed to this Court. That is a discretionary power which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with. This description is full and judicious, and what ought to be imprinted upon the mind of every Judge." (1 Eden, p. 214.)

If, therefore, in a case of this description, I were to say, that according to my discretion I ought to leave these persons to their action at law, upon what principle or ground could I do it, except that in a matter of speculation it has turned out very favourable to one party, and very unfavourable to the other. It is obvious that in the case of a sale by auction, if the property is sold for an extremely inadequate value, it is impossible for the person to repudiate the contract. The mere principle of what might have been fair, or what might have been a right thing to do between the parties, had all the elements of value been known which have since transpired, cannot be a ground for exercising or regulating the discretion of the Court when all the facts which were then in existence were known to both parties. I can understand that the Court will exercise a discretion, and will not enforce the specific performance of a contract, where to decree the performance of the contract will be to compel a person who has entered inadvertently into it to commit a breach of duty, such as [* 153] where * trustees have entered into a contract, the performance of which would be a breach of trust. Those are cases where, by a fixed and settled rule, the Court is enabled to exercise its discretion; but the mere inadequacy or excess of value is not in my opinion a ground for exercising any such discretion as that which is suggested in this case. That this is a very hard case there is no doubt, and it may be extremely proper for the plaintiff to make an abatement in respect of it, but that is a totally different matter, one which is in the *forum* of his own conscience, but not one which I can notice judicially. In my opinion, this is a contract which was fairly entered into between the parties; there is nothing to invalidate it, and the usual decree must therefore be made for the specific performance of the contract, with costs to the present time. A reference must be directed to Chambers to settle the lease in case the parties differ.

A question was then raised whether the defendant had waived his right of objecting to the title.

The MASTER OF THE ROLLS: the draft lease was sent in May,

1855, and the mine turned out unprofitable in the July following. If the defendant in May, 1855, had required to see the plaintiff's title, I should have allowed him, and I should not have thought that the possession of the mine was an acceptance of the title. It is so necessary that immediate possession should be given of mining property under a term which is running out. I think I cannot hold that the defendant has accepted the title; and if he asks for a reference on that point he must have it. It is not necessary to inquire * when it was first shown, [* 154] because that would not affect my making the defendant pay the costs down to the present time; for in my opinion, there was no reason for resisting the contract. There will be a reference to Chambers to settle the terms of the lease in case the parties differ, and whether the plaintiff can make a good title.

ENGLISH NOTES.

The case of *Jennings* v. *Broughton* (1854), 5 De G. M. & G. 126, referred to in the argument, was decided on an analogous principle. That was an action for rescission of a contract on the ground of misrepresentation, and the point taken in the judgment was that the representation complained of was a statement of a merely speculative character, understood by the plaintiff (who had examined the mine) to be of that character; so that the plaintiff could not have been deceived by it. On the other side of the line is the case of *Higgins* v. *Samels* (1862), 2 J. & H. 460, where specific performance of an agreement for a lease of a limestone quarry was successfully resisted on the ground of misrepresentation by the plaintiff, who had made a positive, and in fact erroneous, statement as to the quality of the lime, of which he was ignorant.

It is a different question whether the Court can order specific performance of a contract to work a mine. The argument that the Court cannot undertake the superintendence of the work would probably be unanswerable. See *Pollard* v. *Clayton* (1855), 1 Kay & J. 462. The judgment of Lord HARDWICKE, in the case of *Buxton* v. *Lister* (3 Atk. 383) there cited, shows the distinction between the performance of a contract by executing a more formal instrument, and the performance (which, as a rule, the Court will not order) by doing the work undertaken to be done. See also No. 33, p. 827, *post*.

The case of *Gowan* v. *Christie* (1873), L. R. 2 H. L. Sc. 273, was a Scotch Appeal, in an action for reduction of (setting aside) a lease of minerals under certain lands on the ground, as averred in the conde-

scendance, that there was "no freestone, or other minerals, or material in the land, capable of being worked to profit." The lease in question had been granted in 1866 "of the freestone and minerals, and all materials and substances of what nature soever lying in and under" certain lands, "with power to search for, work, win, and carry away the said materials and substances" at a rent of £200 per annum; the lease being for twenty-one years; but with a stipulation that no rent should be exacted for the first year, and with power to the lessee at the end of the third, seventh, and fourteenth years, to determine the lease. The Court in Scotland had held that the averment that there were no minerals in the land capable of being worked for profit was wholly insufficient to support the prayer for reduction contained in the summons, and dismissed the action accordingly. The appellants in the House of Lords argued to the effect that, by the Scotch law (following the civil law) there is in a lease an implied warranty of possession of a subject capable of producing profit. All the Lords present repudiated the suggestion that there was any such warranty. The Lord Chancellor (Lord Selborne) pointed out that the text of the civil law (Dig. 19, 2, 15, 1.) and the authorities of Scotch law referred to, pointed to the case of entire failure or exhaustion of the subject matter, but could not apply to a lease of "all the minerals," nor could any inference from the authorities be stretched so as to apply to the case where the minerals demised were unworkable so as to produce profit; especially where the lessee had guarded himself against such a contingency by relieving himself from rent for the first year and stipulating for breaks at the end of three and seven years. All the other Lords present, Lords Chelmsford, Colonsay, and Cairns, concurred, substantially upon the same grounds. The judgment of the Scotch Court was accordingly affirmed.

In *Jefferys* v. *Fairs* (1876), 4 Ch. D. 448, 46 L. J. Ch. 113, 36 L. T. 10, 25 W. R. 227, there was an agreement for a lease, in consideration of a dead rent, of a vein or seam of coal called the S vein, "about two feet thick, with the overlying and underlying beds of clay on and under the farm called X." This was construed by Vice-Chancellor Bacon as an agreement in consideration of the dead rent for a right to enter and search for the coal, but not a warranty that the vein was to be found under the farm; and he decreed specific performance accordingly.

AMERICAN NOTES.

This case is frequently cited in Pomeroy on Specific Performance (see p. 352), and in the same author's Equity Jurisprudence.

No. 33. — WHEATLEY *v.* WESTMINSTER BRYMBO COAL COMPANY.

(1869.)

RULE.

A COURT of Equity will not enforce specific performance of a covenant to work a mine, or to work it in a particular way.

The proper way to secure efficient working is to exact a sufficient dead rent.

Wheatley v. Westminster Brymbo Coal Company.

L. R. 9 Eq. 538–554 (s. c. 39 L. J. Ch. 175; 22 L. T. 7).

[538] *Coal Mines. — Minimum Rent. — Covenant to work uninterruptedly, efficiently, and regularly. — Claim for Specific Performance dismissed.*

The plaintiffs granted a lease of a coal mine to the defendants, reserving a minimum rent of £720, to be increased to £1000 in case there should be pits sunk upon the estate, with a royalty upon all coal gotten beyond a certain quantity; and the lessees covenanted to work the mine uninterruptedly, efficiently, and regularly, according to the usual or most improved practice. The lessees paid the minimum rent, but only raised a small quantity of coal by working through an adjoining mine without sinking pits on the plaintiff's property. The plaintiffs being desirous of enforcing a larger amount of working, whereby an increased rent would be payable, filed a bill for specific performance of the covenant in the lease.

Held, that there was no obligation upon the defendants to sink pits, although that might be the most efficient mode of working; and that, so long as the minimum rent was paid, the defendants could not be compelled to work the mines at all; that the lessees had committed no breach of contract; but if they had done so, the remedy was at law and not in equity; and that this Court could not, by a reference to Chambers, give effect to the covenant by directions as to the management of a coal mine.

Bill dismissed with costs.

This bill was filed by Thomas Randall Wheatley and Moreton John Wheatley against the Westminster Brymbo Coal and Coke Company, Limited, for a declaration that the defendant company was bound to work the Gwersylt coal and ironstone mine, of which the plaintiffs were the owners, uninterruptedly, efficiently, regularly, and according to the usual and most approved practice

adopted in working mines of coal and ironstone, according to the provision of the lease under which the company held the mines, and also that the company was bound to work the "Two-yard," "Brassey," and "Main" seams in such a manner as not to get one and leave the others ungotten.

On the 12th of February, 1859, the plaintiffs, being seised in fee of the Gwersylt estate in Denbighshire, entered into an agreement with the company to grant them the lease in question. By this contract the lessees were to have two years for proving [* 539] the coal, * paying for all that should be gotten during that time; and at the expiration of the two years the lease dated the 7th day of July, 1862, was made between the plaintiffs of the one part, and the defendants of the other part, by which the plaintiffs granted, demised, and leased unto the defendants, their successors and assigns, the mines, seams, veins and beds of coal, and balls and bands of ironstone under the Gwersylt estate, containing 465 acres, with full power and license to the lessees to enter upon the estate, and to erect or remove buildings and machinery necessary for setting the coal and ironworks afoot, and to bore and search for coal, and to drive, sink, and use any pit, shaft, or tunnels, or, if necessary, subterraneous work, and to do all other acts, matters, and things within, through, over, or on the estate for working the mines, and manufacturing ironstone, pig, or wrought iron, and selling and disposing of the same; and also generally into and out of the said Gwersylt estate, to work and drive by outstroke, instroke, and substroke, getting and carrying away the produce of the Gwersylt mines, as well as any other mines, and to connect the works with the Brymbo mineral branch of the Great Western Railway. The lease was for twenty-one years from the 29th of September, 1866, renewable for a further term of twenty-one years, and determinable as after mentioned, the lessees paying as follows: For the first year, the fixed minimum rent of £500; for the second year, £600; for the third year, £700; and for the fourth, and every following year, £720, and so in proportion for less than a year. But in case at any time during the term the lessees or their successors should sink a pit or shaft, then from and after the expiration of two years they should pay a minimum fixed rent of £1000, all the minimum rents so fixed to be paid half-yearly. There were also provisions for payment of a royalty of £30 per acre for workable and saleable coal of one foot thick of the several

seams called "Two-yard," "Brassy," and "Main" coal, and £20 per acre for coal of inferior quality; and £20 per acre for all other seams; with the usual clause, that if in any one year they should not work up to the fixed rents, the deficiency might be made up in subsequent years; and there were provisions for royalties on the ironstone. The lease also contained a covenant on the part of the lessees that they would at all times during the * continuance [* 540] of the terms thereby granted work and carry on the said mines of coal and ironstone thereby demised, uninterruptedly, efficiently, and regularly (except in the event of strikes of workmen or other casualties), according to the usual or most approved practice adopted and used in the working of mines of coal and ironstone; and should and would get and raise the said seams and beds of coal thereby demised clearly out in regular course, and should work the upper of the said seams or beds, respectively called the "Brassey," the "Two-yard," and the "Main" coal, each seam in advance of the seam next before it respectively, so as not to endanger the other seams by undermining. Power was reserved to the lessees to give up possession at the end of five years, or at any time afterwards, on twelve calendar months' notice, with a clause giving power to refer all differences to arbitration. The bill alleged that the three seams of coal contained altogether about 9,000,000 tons; that the defendant company were lessees of the Brymbo mines, adjoining the mines now leased and held under the Marquis of Westminster, and they had sunk pits on the adjoining estate, and by means of an inclined plane or downbrow driven into the "Brassey" seam they had worked that seam without the others, but only to a small extent.

The case came on in January, 1865, upon motions for an injunction and to stay proceedings in the suit, before Vice-Chancellor KINDERSLEY (2 Dr. & Sm. 347), who refused both motions.

The cause coming on for hearing before Vice-Chancellor Sir RICHARD MALINS, His Honor, after hearing argument, gave judgment as follows: —

This case has been very elaborately and carefully argued, [544] and it will not, therefore, be for want of the most complete assistance on the part of counsel that I shall err, if I do err, in the judgment I am about to give.

The case raises points of great importance, not only to the

parties concerned, but also to that large portion of the community engaged in mining operations. The rights of the parties must depend, however, on the legal contract existing between them, which is constituted by the lease of the 1st of July, 1862, and which is fully set out in the bill.

[His Honor, having adverted at some length to the evidence as to the circumstances relating to the position of the parties at the time of the execution of the lease, and the mode of working which had been adopted, continued.]

[549] It was urged by the plaintiffs' counsel that the covenant to work efficiently and regularly necessarily implied that pits should be sunk, and that the only mode of efficiently and regularly working the mines was by sinking a pit. I have already said that in that view of the case I entirely concur; but that does not settle the question before me, which is, What are the rights of the parties under this lease of the 1st of July, 1862? And although the plaintiffs and their agents now know much more about this mineral property than they did then, it does not follow, because subsequent experience shows that it would be more desirable that pits should be sunk and that the collieries should be worked upon a larger scale, that the plaintiffs have the right to require them to be so worked.

That brings me to the question, What is the meaning of this contract? I have already shown that this lease does not throw upon the defendants, the lessees, the obligation of sinking pits, but it does throw upon them the obligation to work and carry on the mines uninterruptedly, efficiently, and regularly. It has been contended that they do not work "uninterruptedly, efficiently, and regularly," and that that is proved by the small quantity of coal which is raised. No doubt, if the sleeping rent had been fixed at a sufficient amount — for instance, instead of being £720 it had been fixed at £3000 — the interest of the lessors would have been * that no working should take place, because if they got payment without the working taking place they would have had their royalty and preserved their coal at the same time. It therefore resolves itself into this question, What is the amount of working which this lease throws an obligation on the lessees to perform? It has been argued that they do not work continuously and that they do not work efficiently, because they do not work a sufficient quantity. Upon that subject I take this view, though I do not intend to conclude the parties by anything that I say. The

[* 550]

only question before me is, whether a case is made out for the interference of this Court: because, if the parties are of opinion that there is an insufficient or an ineffectual working, I apprehend that the remedy is not in this Court but in a Court of Law. But as, I must, for the purpose of determining the questions raised before me, put my interpretation upon this covenant, I have invited the learned counsel for the plaintiffs to tell me of any instance in which this Court has ever decided that the lessee of a mine is bound to work beyond the amount of his sleeping rent. No such case has been cited, and *Green* v. *Sparrow*, 3 Sw. 408, n. (19 R. R. 248), does not go to the point in the slightest degree. That was a case of this nature: the agreement was, that a rent should be paid in respect of the colliery from the first quarter-day after 1000 sacks of coal should have been dug. There was no rent to be paid until a certain thing was done; and the point of the case was, that the lessee, who had nearly raised 1000 sacks of coal before a particular quarter-day, refrained from completing the quantity expressly for the fraudulent purpose of depriving the lessor of this rent. The Lord Chancellor there decided that the refraining to complete the 1000 sacks of coal was a fraudulent act on the part of the lessees, and he therefore ordered that the rent should commence as if the 1000 sacks of coal had been dug and raised before the particular quarter-day. But that case does not in the slightest degree tend to show that when the sleeping rent of £1000 or £720 had been paid there is any obligation on the part of the lessee to go beyond that amount. The difficulty upon this part of the case arises thus: I have asked the learned counsel for the plaintiffs if ninety tons a day, which is the quantity I have taken as being the amount which will cover * the sleeping [* 551] rent, is not a compliance with the covenant to work uninterruptedly, efficiently, and regularly, what is enough? If the case had been a covenant that they would work a mine to the extent of, say, 200 tons a day, that would be a covenant to pay 200 sixpences, or £5, a day, and that would be a sum, in effect, covering the sleeping rent. If, therefore, the object was to secure a large revenue from this mine by this working, it is most unfortunate that the plaintiffs should not have been differently advised, and that they should not have had a lease in a different form. However, I can only determine the rights of the parties as they arise out of the contract they have entered into, and there is no contract or provi-

sion on which I can interfere; there is nothing to enable me to say how much coal shall be worked, whether it should be 100 tons, 300 tons, or as Mr. Cadwaladr says, 500 tons a day, or 150,000 tons a year. Suppose I were to accede to the proposition of Mr. Glasse, and refer it to Chambers to inquire what would be an uninterrupted, efficient, and regular working of the colliery, the consequence would be that I should have as many opinions upon the subject as mining agents could be found to give evidence. Every man would differ as to the proper quantity. It is impossible, therefore, that the Court could have the means of carrying such a contract into execution. I am unable to see that there has been any breach of the contract; but if the plaintiffs think there has been a breach, I am clearly of opinion that this is not the tribunal to determine that question. What would be the result if I acceded to the prayer of the bill, and I were to direct a reference to Chambers to inquire what ought to be done, and how it ought to be done? Should I not be directing the management of this colliery? Would not the affairs of this colliery be conducted under the direction of this Court? And would not this Court, undertaking to work the colliery, have to give every direction as to how all things were to be done in connection with it — how the wages were to be paid, and, in short, what should be done in every respect.

Mr. Glasse, in his argument for the plaintiffs, cited many authorities, in the principle of every one of which I entirely agree, as to the doctrine of this Court where it will or will not interfere by way of injunction. In this particular case, for instance, [*552] there is a contract that the defendants will * not sink a pit except in particular parts of the estate. If they had proceeded, in contravention of that contract, to sink a pit in another portion of the estate, it is perfectly clear that this Court would have restrained them by injunction from so doing, If the lessor had covenanted that he would not do a certain thing and had proceeded to do it, this Court would prevent him doing it. If it is a thing to be done under the direction of the Court, and he refuses to do that certain thing, the Court would oblige him to do it; but I take it that nothing is more clear than this: that this Court will not undertake either the construction of a railway, the management of a brewery, or the management of a colliery, or anything of the kind. It will appoint a receiver or manager in certain cases; but for this Court to undertake the working of a colliery, for this

Court to superintend workings of this description, is entirely out of the question, and it would, in my opinion, be a violation of all the principles of the Court if I were to make a declaration in this case that they have not uninterruptedly, efficiently, and regularly worked this colliery, or if I were to refer it to Chambers, as I am asked to do, to report what is an uninterrupted, efficient, and regular working of the colliery. As to the difficulty of this Court interfering in the working of this colliery, or matters of that description, what is stated by Lord HARDWICKE in the anonymous case in Ambler, page 209, and cited by Lord ELDON in the *Birmingham Canal Company* v. *Lloyd*, 18 Ves. 515 (11 R. R. 245), is applicable. It was the rule of the Court then, and it is the rule of the Court now. That was on motion for an injunction to stay lessees from working a coal pit irregularly and detrimentally to the plaintiffs, the lessors. Lord HARDWICKE said: "The Court grants injunctions to stay working of a colliery with great reluctance, from the great inconvenience it occasions, and never will do it but where there is a breach of an express covenant or an uncontroverted mischief. The present case did not come within either of those reasons, and therefore the injunction is refused."

Now it is a fact that the defendants are not working up to the sleeping rent, and it is perfectly clear that it is not the interest of the plaintiffs to oblige them to work up to the sleeping rent, if they cannot oblige them to work beyond it; because the less coal *they work the more there will be left in the [*553] mine, and provided the plaintiffs are paid their sleeping rent that is all they can possibly require. But the question has been distinctly raised before me, whether in this case, which obliges the lessees to pay a sleeping rent, and to work the colliery "efficiently" — because that is the meaning of it — is there any obligation on the part of the lessees to work at all, or if they do work at all, to work beyond the amount of the sleeping rent? As no authorities have been cited I suppose that none exist. Certainly, I have heard of none myself; and as the point is brought before me, I think I am bound to state my opinion that in all cases of mining leases, if the lessors desire to secure the working of their mines beyond the amount of the sleeping rent, they must in the lease insert covenants which throw that obligation on the lessee.

My own opinion is, that, provided the sleeping rent is paid, and

there is nothing more than a covenant to work efficiently, that covenant means that if they do work they shall work efficiently and regularly; in other words, they shall work in a miner-like manner; but that it is in the power of the lessee to keep the mines unworked as long as it suits his convenience, and that there is no obligation on him to work if he does not choose, so long as he pays his sleeping rent. Therefore I come to the conclusion, in the absence of express stipulation in this case that they shall work, that there is no obligation on them to do anything more than to pay the sleeping rent.

I come, therefore, to the conclusion, first, that there is no obligation on the part of the company to sink any pits; that the plaintiffs have entirely failed to show any breach of the contract on the part of the defendants; and I come farther to the conclusion that, even if they had shown a breach in the clause of the contract to work the colliery efficiently, their remedy would have been at law, and not in this Court.

With regard to the minor point, as to working the different seams of coal at the same time, that was the subject of a motion made in 1865, before Sir RICHARD KINDERSLEY, immediately after the filing of the bill. The substance was, that they were working improperly, and not according to the stipulation contained in the lease. Sir RICHARD KINDERSLEY, after full argument, dis-
[*554] missed that *motion and made the defendants' costs costs in the cause, but he refused the plaintiffs their costs.

Therefore there is the adjudication of Sir R. KINDERSLEY upon the point that there is no improper working; and I make the same observation as regards that, that if they are working the mines contrary to the stipulations in the covenant, unless indeed they are doing something so unwarranted that the Court can interfere by injunction, the remedy is not in this Court but in a Court of Law.

My opinion is, that the remedy of the plaintiffs by this bill is misconceived, the bill fails in its object, the sole object being to compel a more extended working by the defendants; and upon all these grounds, being of opinion that the bill fails, it necessarily follows that it must be dismissed. . .

ENGLISH NOTES.

It is to be observed that the above case has been selected, not for the learned VICE-CHANCELLOR'S opinion upon the construction of the contract, which has been questioned by the MASTER OF THE ROLLS (Sir G. JESSEL) in *Kinsman* v. *Jackson* (1880), 42 L. T. 80, 28 W. R. 337 (affirmed C. A. 42 L. T. 558, 28 W. R. 601), but for his exposition of the proposition that it is contrary to the practice of a Court of equity, — and the reasons apply equally to the Courts as constituted by the Judicature Acts, — to undertake and superintend the working of a colliery. The covenant to work beyond the dead rent, if the contract is to be so construed, may be enforced by a claim of damages, or if the instrument so prescribes, as in the case of *Kinsman* v. *Jackson* (*supra*), by forfeiture; but not by a judgment in the nature of a decree for specific performance.

AMERICAN NOTES.

This doctrine is found in *Koch's Appeal*, 93 Penn. State, 434, where specific performance was denied on the ground that an adequate remedy existed at law in an action for damages. The decree was denied also in *Marble Co.* v. *Ripley*, 10 Wallace (U. S. Sup. Ct.), 358, the case of a contract to work a quarry and deliver marble of a certain kind and size.

No. 34. — JEFFERYS *v.* SMITH.

(1820.)

RULE.

WHERE a mine belonging to tenants in common is being worked for the common benefit, there is a trade or business carried on *quasi* in partnership; and the Court will, where the circumstances make it convenient, appoint a receiver and manager.

Jefferys v. Smith.

1 Jacob & Walker, 298–303 (21 R. R. 175).

Mines. — Tenants in Common. — Receiver and Manager.

Receiver appointed of mines, in which several persons were interested, [298] the concern, from the nature of the subject, being a species of trade, and not a mere tenancy in common in land.

No. 34. — Jefferys v. Smith, 1 J. & W. 298, 299.

In moving for an injunction after answer, affidavits filed after the answer may be read in support of allegations in the bill, which are not noticed by the answer.

In the year 1800, John Read, being entitled to a lease for forty years of a coal mine called the Mees mine, at Coseley in the county of Stafford, entered into an agreement with T. Smith, who was the owner of the contiguous lands, and of the mines and minerals under them, to form a partnership, for the purpose of working these mines together: they were to be equally interested, and the Mees mine, and an equal quantity of the mines under Smith's land, were to be applied to the purposes of the partnership. The business was carried on under the name of the Coseley New Colliery, but no articles of partnership were ever executed. In 1803, Read sold his lease of the Mees mine to the firm of Pemberton, Stokes, and Co., who continued the partnership with Smith as before. The partnership was subsequently kept up on the same footing, various alterations taking place in the parties constituting it, by sales and assignments of shares. At the commencement of the suit, and for some time previously, the plaintiff Jefferys was entitled to a fourth share in the partnership, which he derived by several mesne assignments from Read; the defendant David Smith (a son of T. Smith, who was dead), was entitled to two sixteenth, and two twentieth shares, by purchase from his father; the other shares were held by several other persons, who were also defendants in the suit. It was not stated whether regular assignments had been made of the lease, under which the Mees mine was held; nor did the pleadings mention, what estate T. Smith had in the mines brought by him into the partnership, or in whom that estate had become vested.

[* 299] * From the year 1808, the defendant David Smith had, with the concurrence of his partners, been the sole manager of the partnership business; but the plaintiff becoming dissatisfied with his conduct, filed the bill in the present suit against him, making the other partners parties; alleging various acts of mismanagement and misapplication of the funds by Smith; and praying for a dissolution of the partnership; that the accounts might be taken; that in the mean time a receiver and manager might be appointed, and that D. Smith might be restrained from interfering. The defendant, D. Smith, by his answer said, that by

the original agreement for the partnership, it was to continue during the residue of the lease of the Mees mine, as long as there should remain in the mines any thick coal to be worked; he denied the different acts of misconduct imputed to him, and insisted that he ought to be allowed to continue manager, or, at least, ought to have the management of his own share in the mine.

A motion was now made on the part of the plaintiff for an injunction to restrain the defendant Smith from interfering in the partnership business, and for the appointment of a receiver and manager.

Mr. Hart and Mr. Farrer for the motion.

Mr. Benyon and Mr. Phillimore against it.

In support of the motion, affidavits filed subsequently to the answer, to prove the mismanagement and misconduct of the defendant, were proposed to be read. This was objected to by the defendant's counsel, on the authority of *Smythe* v. *Smythe*, 1 Swan. 251 (19 R. R. 72). It was contended, * in reply, [* 300] that the rule in that case, which was between a tenant for life and remainder-man, should not be applied, without qualification, to a case where a person, employed as agent or manager for others, was charged with breach of duty. It was also stated, that the affidavits were introduced to support some charges not met by the answer.

The Lord Chancellor (Lord Eldon).

That case, and those that I see mentioned in the note, admit of this view: that the affidavit, though filed subsequently to the answer, may be received to substantiate a particular fact alleged in the bill, and not noticed by the answer. The rule is, that where the injunction is not obtained on affidavits filed with the bill, but is moved for after the answer has come in, you cannot read the affidavits in contradiction to the answer; but you may, in support of a particular allegation not noticed in the answer, if it be material. If you do not choose, in your bill, to charge the particular facts, you do not give the defendant an opportunity of denying them in his answer.

After some discussion, the Lord Chancellor directed the plaintiff's counsel to proceed, and try, in the first instance, if they could succeed without the affidavits.

For the plaintiff.

These persons are partners in a trade, without any stipulation as to the duration of their connection; and the defendant Smith has hitherto, by the consent of the others, had the chief direction of the concern. But they have a right to revoke his appointment as manager: he was not appointed by original contract between the parties.

[* 301] * For the defendant.

This, if it is to be considered as a partnership, was not one at will, but for the term originally agreed upon; and, as no case has been made out upon the answer against the defendant, a receiver ought not to be appointed.

The LORD CHANCELLOR.

If persons, as partners, become the purchasers of a lease for forty years, that is not an agreement for a partnership for that term.

For the defendant.

But this defendant is more properly to be looked upon as a purchaser of an undivided interest in real property, which may be sold from time to time, as the owner pleases. Then, can it be a partnership, when this can be done, without the consent of the other parties?

The LORD CHANCELLOR.

Might it not be a partnership, with liberty to each partner to introduce any other person into the partnership?

For the defendant.

We cannot contend that the defendant has a right to continue manager of the whole mine against the consent of the other owners; they may act for themselves, but they have no right to oust him of his own share, because they cannot agree with him. Persons who are tenants in common of land, cannot ask that a manager should be put in possession for all parties.

[* 302] * The LORD CHANCELLOR.

The question is, whether mines have not been always considered, not altogether, but in some sort, as a species of trade. How it may be in Wales, I don't know; but in my country, where there are frequently twenty owners of the same mine, if each is to have a set of miners going down the shaft to work his twentieth part it would be impossible to continue working the mine: must not a contract be implied, that it was to be carried on in a practicable and feasible way? I believe I have a note of a case before Lord HARDWICKE which confirms me in the idea, that where there are

part-owners of a mine, and they cannot by contract agree to appoint a manager, this Court will manage it for them.

The LORD CHANCELLOR.

The case I alluded to yesterday was one before Lord HARDWICKE in 1737; and it probably did not occur to Lord THURLOW when he expressed his doubt as to the interference of this Court in the case of trespass. Lord HARDWICKE, in that case, says, that a colliery is to be considered in the nature of a trade (*Vide Story* v. *Lord Windsor*, 2 Atk. 630, and cases there cited; Amb. 56; *Sayer* v. *Pierce*, 1 Ves. Sen. 232; Belt's Suppl. 127; and 1 Swan. 518 (18 R. R. 132)); and where persons have different interests in it, it is to be regarded as a partnership; and that the difficulty of knowing what is to be paid for wages, and the expenses of management, gives the Court a jurisdiction as to the mesne profits, which it would not assume with respect to other lands. On this ground, and on account of the peculiarity of this species of produce, the Court gives an injunction against trespass, and allows a party to maintain a suit for the profits, which, in other cases, it * would not do. Here there are twenty shares; and if each [* 303] owner may employ a manager and a set of workmen, you destroy the subject altogether; it renders it impossible to carry it on. It appears to me, therefore, upon general principles, without reference to the particular circumstances of any case, that where persons are concerned in such an interest in lands as a mining concern is, this Court will appoint a receiver, although they are tenants in common of it. Take the order for a receiver, and let every owner be at liberty to propose himself as manager before the Master.

ENGLISH NOTES.

The Court will not, however, appoint a receiver at the instance of the managing part-owner and partner in a mine, where there has been no interference on the part of the other; although it is alleged that the latter refuses to assist in providing funds for necessary expenses. *Roberts* v. *Eberhardt* (1854), Kay, 148, 23 L. J. Ch. 201. The best solution, if matters have come to a deadlock, may be to order a sale of the property with liberty to bid, as was done in *Rowlands* v. *Evans* (1862), 30 Beav. 302, 31 L. J. Ch. 265. That would now be competent under the Partition Act of 1868, in the case of tenants in common, even if there were not a partnership.

On the same principle as that applied in the above ruling case, the

mortgagee of a leasehold mining property has been held entitled to have a receiver and manager appointed by the Court. *Gloucester Banking Co.* v. *Rudry Merthyr Coal Colliery Co.* (C. A.) 1895, 1 Ch. 629, 64 L. J. Ch. 451, 72 L. T. 375, 43 W. R. 486.

AMERICAN NOTES.

This doctrine is found or implied in *Santa Clara M. Ass.* v. *Quicksilver M. Co.*, 17 Federal Reporter, 657; *Dougherty* v. *Creary*, 30 California, 290; *Manville* v. *Parks*, 7 Colorado, 128; *Judge* v. *Braswell*, 13 Bush (Kentucky), 67; 26 Am. Rep. 185; *Burgan* v. *Lyell*, 2 Michigan, 102; *Nolan* v. *Lovelock*, 1 Montana, 224; *Babcock* v. *Stewart*, 58 Penn. State, 179; *Adam* v. *Briggs Iron Co.*, 7 Cushing (Mass.), 361; *Graham* v. *Pierce*, 19 Grattan (Virginia), 28; *Skillman* v. *Lachman*, 23 California, 198; 83 Am. Dec. 96 (see notes, id. 104); *Snyder* v. *Burnham*, 77 Missouri, 52. These cases with the principal case are cited in 15 Am. & Eng. Enc. of Law, p. 609, and the principal case is cited in Freeman on Co-Tenancy, sect. 327, with *Hill* v. *Taylor*, 22 California, 191.

No. 35. — MARTIN *v.* PORTER.
(1839.)

No. 36. — JEGON *v.* VIVIAN.
(1871.)

No. 37. — JOB *v.* POTTON.
(1875.)

RULE.

A TRESPASSER who works coal beyond the limits of his property is liable in damages to the value of the coal when first converted into a chattel, without allowing for the expense of getting it out of the seam; but under special circumstances of working under a *bonâ fide* claim, a trespasser will be allowed the expense of hewing the coal as well as the expenses of carrying it to the pit's mouth or elsewhere on the way to a market.

A tenant in common in accounting to the other tenants in common for the proceeds received by him (in excess of his own share) of coal worked by him, is entitled to all just allowances.

Martin v. Porter.

5 M. & W. 352-354 (s. c. 2 Horn & Hurl. 70).

Mines. — Trespass. — Measure of Damages.

Where the defendant, in working his coal mine, broke through the [352] barrier, and worked the coal under the land adjoining, belonging to the plaintiff, and raised it for purposes of sale, — *Held*, in trespass for such working, that the proper estimate of damages was the value of coal so raised, without deducting the expense of getting it.

Trespass for breaking and entering the plaintiff's close, situate at Darfield, in the county of York, and breaking and entering a certain coal mine, &c., under the said close, and taking and carrying away the coal, and converting and disposing thereof to the use of the defendant.

Plea, payment into Court of the sum of £133, and no damages *ultra*. Replication, damages *ultra*.

At the trial before PARKE, B., at the York Spring Assizes, it appeared that the plaintiff was a lessee of coal mines under the Duke of Leeds, and that the defendant was the owner of the adjoining estate. In the year 1838, in consequence of inquiries having been instituted, it was discovered that the defendant had worked the coal under the plaintiff's land, to an extent exceeding a rood. The defendant, by paying money into Court, admitted the trespass; and the only question at the trial was, upon what principle the damages were to be assessed; the plaintiff contending that the defendant's liability was to the value of the coal when raised on the pit bank, and without any deduction for the expense of its working; that he ought also to pay for the under-ground wayleave; and that damages were also recoverable for his breaking through the barrier. The learned Judge was of opinion that the plaintiff was entitled to the value of the coal at the pit's mouth, as chattels to which he would have been entitled upon demand; and that he was also entitled to compensation for the defendant's passing through his land and using the wayleave, which, in the neighbourhood of Leeds, was proved to be 2*d.* per ton. The jury adopted the above principle, and found the value of the coals, when got, to be £251 9*s.* 6*d.*; and they also gave £50 for the * use of the wayleave, making together £301 9*s.* 6*d.* [* 353] The learned Judge gave the defendant leave to move to re-

duce the damages, if this Court should be of opinion that the expense of getting and raising the coal ought to be deducted.

Alexander now moved accordingly. The damages in this case ought to be estimated by the average value of the coal as lying undisturbed within its native bed. The plaintiff had incurred no expense or risk in the necessary preparations for its working. As far as he was concerned, it might still have lain undisturbed, and probably would have done so, as the evidence showed that the expense to him of working out so small and detached a bed of coal as the one in question (altogether containing little more than two acres and a half) would be double its saleable price. Had he contracted to sell it ungotten, the average price of coal per acre in that neighbourhood being (as proved) only £300, the price for the coal in question would have been much below the sum paid into Court. To allow of any other estimate of damages, would be to confer on the plaintiff a large profit, in the absence of anything either done or suffered by him upon the occasion. That he should not lose anything by the unauthorised act of the defendant, is just; and the proposed reduction of the damages would be consistent with that view: but if he retain the amount given, on the principle laid down by the learned Judge at the trial, he is paid, not merely the value of his coal, but a double value, to which he has in no respect, by any acts of his own, entitled himself, and which cannot be created by any tortious act of another. Whether the defendant approached the coals without or with the sanction of the plaintiff, cannot alter their intrinsic worth; and what that worth was when the defendant commenced his workings, ought to be the proper test of this part of the damages. It must not be [* 354] forgotten, that the sum claimed * by the plaintiff, as the additional price of the coals, is precisely the amount actually paid by the defendant himself to the workmen before the coals were brought from their original situation to the bottom of the pit; and which must equally have been paid by the plaintiff, had he been working with the same object. Upon what principle can the plaintiff claim it?

Lord ABINGER, C. B. — I am of opinion that there ought to be no rule in this case. If the plaintiff had demanded the coals from the defendant, no lien could have been set up in respect of the expense of getting them. How, then, can he now claim to deduct it? He cannot set up his own wrong. The plaintiff had a right

to treat these coals as a chattel interest to which he was entitled. He did so, and the only question then was their value. That the jury have found. It may seem a hardship that the plaintiff should make this extra profit of the coal, but still the rule of law must prevail.

PARKE, B. — I remain of the same opinion as I entertained at the trial. The plaintiff is entitled to be placed in the same situation as if these coals had been chattels which had been carried away. He had a right to them, without being subject to the expense of conveying them to the pit's month.

ALDERSON, B. — I am of opinion that the plaintiff is entitled to damages, as for a trespass to his goods, the same as he would to any other description of goods belonging to him. The proper estimate is the value of them when brought to the pit bank.

MAULE, B. — I concur with the rest of the Court, and think the plaintiff had his claims assessed in a manner which he was entitled to. *Rule refused.*

Jegon v. Vivian.

L. R. 6 Ch. 742–763 (s. c. 40 L. J. Ch. 369; 19 W. R. 365).

Mining Lease. — Instroke. — Trespass under bonâ fide *Claim. — Measure of Damages. — Wayleave.* [742]

A tenant for life, with certain powers of leasing, demised the seams and veins of coal under a piece of land for twenty-one years, and for sixty years if the tenant for life had power so to do; with liberty for the lessee to search for, dig, raise, and sell the coal, and to make any pits or works, and to take surface land, paying for the damage; and the lessee covenanted to work the mines in a proper and workmanlike manner, and to deliver up at the end of the term the works, seams, and veins of coal in good repair and condition, so that the said coal works might be continued. The lessees worked the demised coal by instroke from an adjoining colliery, situate to the rise of the coal in the demised land, and did not sink a pit so as to work the demised coal from the deep.

They kept no barrier between the two collieries, so that water and air passed from their other colliery through the demised colliery into a lower colliery.

They also continued to work the demised coal after the expiration of the lease for twenty-one years, claiming to be entitled for sixty years; which claim was, after much litigation, decided to be invalid as against the reversioner.

Held, that, under the circumstances, working by instroke was working in a proper and workmanlike manner, and that the lessees were not bound to sink a separate pit for the demised coal;

That the value of the coal raised by the lessees, after the expiration of the twenty-one years' lease, was to be paid for by them at its fair market value, as if they were purchasers, all expenses of hewing and raising being allowed;

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That, under the terms of the lease, the lessees were not liable to damages for not working the coal continuously;

That the lessees were not bound to keep up a barrier so as to prevent air and water from flowing through the lessor's mine, and were not liable to pay for wayleave or air-leave;

That the lessees were liable for any damage done beyond the removal of coal by working the mines since the determination of the twenty-one years' lease, and must also pay for wayleave or for the passage of coal through the lessor's mine since the determination of the lease.

L. G. Gwyn, who died in 1798, by his will devised the residue of his real estates, which included the Cadley estate, in the county of Glamorgan, unto his daughter Catherine M. Gwyn for her life, without impeachment of waste, otherwise than that by his will mentioned, with remainder to trustees, with remainder to [* 743] the sons * and daughters of his daughter and their issue in tail; and in default of such issue to several persons named in the will as the daughter should by will appoint; and in default of such appointment, to the testator's nephew Thomas Powell and the heirs of his body. And the testator empowered his daughter, and all other persons who might be seised of the estates, to grant leases thereof for the term of twenty-one years and no more, taking and reserving therein the best rent that could be reasonably gotten for the same, and so that such leases should commence in possession and not in reversion, and so that the tenants be restricted from waste and from assigning without consent, and also that a special reservation might be made in every such lease empowering the successive tenants for life and their assigns to dig and take away coal, iron ore, and other minerals and to cut down wood. And the testator further directed that it should be lawful for his said daughter to work or contract for, lease, or set out to be worked, all coal, iron ore, and minerals under the said estates, and that all the issues and net proceeds, and profits thereof, should be paid by his said daughter to the trustees of the will, and be by them applied in payment of debts or in the purchase of land as therein mentioned.

In 1828, Catherine M. Gwyn, the daughter of the testator, married the Count de Wuits.

On the 2nd of May, 1840, the Count and Countess de Wuits executed an indenture of lease, whereby, in execution of the powers given her by the will of her father, and of all other powers, the

No. 36. — Jegon v. Vivian, L. R. 6 Ch. 742, 744.

Countess de Wuits appointed and demised, and the Count de Wuits confirmed, unto Joseph Martin all the mines and beds of coal under three farms which formed the Cadley estate, with full power for Martin, his executors, administrators, and assigns, to open, search, dig, delve, bore, raise, and use all lawful means whatsoever for the finding and discovering of all or any mines and minerals of coal and culm not already known under the said farms, and to use and work the same, as well as the mines, veins, and seams of coal already known, and to raise and land "all the coal and culm which shall be found therein respectively, and for his and their own use and benefit, to take, carry away, and dispose of all the coal and culm so to be raised and landed, and also free liberty, power, and authority to and for the said Joseph Martin, his *executors, administrators, and assigns, and his and their [*744] agents, colliers, workmen, labourers, and servants, and others lawfully authorised to dig, sink, drive, run, and make any pits, shafts, levels, soughs, sluices, watercourses, railroads, and other roads, works, and contrivances in, over, under, or upon the said several farms and lands hereinbefore described, and to maintain and use the same. And also the free liberty, license, power, and authority to have and use a sufficient part of the said several farms and lands for laying and placing the coal and culm so to be raised and landed in the course of working the said mines, veins, and seams of coal and culm hereby demised, and for laying and placing any other coal and culm, and also to erect, build, set up, and maintain on any convenient part or parts of the same several farms and lands, any engines, erections, and machines for the better and more effectually working the said mines, or any other mines. And also such houses, hovels, and other buildings as may be found necessary or expedient for the use and accommodation of colliers, workmen, and labourers, and for the standing and placing of the horses, carriages, implements, and utensils which shall be found or deemed necessary, or be used in or about the working of the said mines, veins, and seams of coal and culm hereby demised, or of or belonging to any other person. And also the like full and free liberty, power, and authority for that purpose to raise, dig, take, carry, and use all or any of such coal and culm as may be in or upon the said several farms and lands, or any part thereof, and also to use, sell, and dispose thereof, for the benefit of him the said Joseph Martin, his executors, administrators, and assigns. And

also to bring, lay, and place on the same several farms and lands all such timber, wood, iron, stone, brick, lime, and other materials as he the said Joseph Martin, his executors, administrators, and assigns, or his or their agents, servants, or workmen, shall or may want or have occasion to use or require in or about the erecting, building, or repairing of such engines, erections, and buildings, as aforesaid, and also to do all and every such other acts, matters, and things whatsoever in, under, or upon the said several farms and lands, or any part thereof, as shall or may be deemed necessary or expedient in or about, or for the pursuing or working of the said mines, veins, and seams of coal and culm hereby demised, [*745] or of or *belonging to any other person, and raising, and landing the same thereupon, and taking, converting, using, carrying away, and disposing of the same to and for the proper use and benefit of him the said Joseph Martin, his executors, administrators, and assigns. And likewise full and free ingress, egress, and regress to and for the said Joseph Martin, his executors, administrators, and assigns, his and their agents, labourers, servants, and workmen, customers and dealers in and upon the said several farms and lands, with horses, carts, and other carriages, to and for the getting, taking, and carrying away the said coal and culm, or of or belonging to any other person as aforesaid, making such reasonable satisfaction as hereinafter mentioned to the tenants or occupiers for the time being for the same several farms and lands for such trespass or damage as shall be occasioned therein respectively by reason of the liberties and privileges hereby granted, and using and pursuing the same respectively. To have and to hold, use, exercise, and enjoy the said mines, veins, and seams of coal and culm, and all and singular the liberties, licenses, powers, and authorities, and premises hereinbefore expressed and intended to be hereby appointed, granted, and demised unto the said Joseph Martin, his executors, administrators, and assigns, from the 25th day of March last, for and during and unto the full end and term of twenty-one years (and if the said Catherine M. Gwyn, Countess de Wuits, has power or authority to appoint or demise the same by the said power of leasing contained in the said will of the said L. B. Gwyn for the term of sixty years, to be commenced or be computed from the said 25th day of March last). And to have and to hold, use and enjoy, all and every the coal and culm that shall be found, gotten, or raised during the said term of twenty-one

years (or the said term of sixty years, as the case may be) in or under all or any part of the said several farms and lands unto and by the said Joseph Martin, his executors, administrators, and assigns, to his and their own use and benefit, and as and for his and their own proper goods and chattels, yielding and paying therefor, yearly and every year during the said term hereby appointed, the clear and net rent or sum of £40 of lawful British money, by equal half-yearly payments, on the days and times and in manner hereinafter mentioned. And also yielding and paying during the said term hereby *appointed the fol- [*746] lowing rents and royalties (that is to say) the rent or royalty of 4s. of like lawful money for each and every wey of coal and culm over and above and beyond the first two hundred weys to be raised."

The indenture contained covenants by Martin for payment of the rent, the royalties, and the rates and taxes, "and also that he the said Joseph Martin, his executors, administrators, and assigns, shall work and carry on the said mines, veins, and seams of coal and culm thereby demised in a proper and workmanlike manner;" and for payment to the occupiers of the three farms of satisfaction for the trespass or actual damage done by working the mines aforesaid, or carrying the produce away, or carrying any materials, or done in any other manner by means of the premises or of the liberties or privileges incident thereto. Provision was also made as to compensation for land taken by the lessees. The lessees were bound to keep accounts. The lessees might, by twelve months' notice, determine the lease, and might at all times during the term remove from the several farms, lands, and grounds any machinery, railways, or works which they had erected or laid down in, under, or upon any part of the estate. Also, the lessees might use any water flowing in, under, or over the said estate, and convey and divert any other water from other lands in, under, or over the same, rendering therefore satisfaction for any damage; and make, maintain, and use as well such railways, roads, and watercourses in, under, and through, upon, or over the farms and lands demised as the lessees should think necessary for carrying the coal and culm which should be raised out of the seams and veins demised. And Joseph Martin further covenanted "that he, the said Joseph Martin, his executors, administrators, and assigns, shall, at the end, expiration, or other sooner deter-

mination of the term hereby appointed or granted, peaceably and quietly surrender and yield up unto the said C. M. G., Countess de Wuits, or her assigns, or to such person or persons so for the time being entitled or actually possessed of the said estate expectant as aforesaid, or to whomsoever the said C. M. G., Countess de Wuits, or her assigns, or such other person or persons may direct, all and singular the coal works and mines, seams and veins of coal and culm, quarries of stone and other the [* 747] premises hereby appointed and granted, and * all the pillars made or left for supporting the ground, and also all pits and shafts which shall be then open, adits, levels, drains, and watercourses, and all roads and ways in, upon, or under the same lands or grounds, or any part thereof (save and except the engines, machinery, tramroads, railroads, and ironwork and woodwork of every description hereinbefore mentioned), in good repair, order, and condition, so as that the said coal works may be continued, and the pillars worked and raised by the said C. M. G., Countess de Wuits, or her assigns, or such other person or persons as aforesaid, in case she or they shall think proper so to do, and shall and will in case the said Countess de Wuits or her assigns, or such other person or persons as aforesaid, shall by any writing under her, his, or their hand or hands request the same (but not otherwise), fill up and level all and every and such and so many of the said pits or shafts as she, he, or they may be required to fill up, level, and restore the said lands and hereditaments into a state proper for cultivation as far as circumstances will permit." And the lease contained many other provisions as to working the coal.

The Countess de Wuits died in December, 1840, without issue, and without having executed the power of appointment given her by the will, whereupon T. G. L. C. Powell, a grandson of Thomas Powell, became entitled to the Cadley estate as tenant in tail under the will of L. B. Gwyn, and took the name of Gwyn. T. G. L. C. Gwyn barred the entail, and in 1855 agreed to sell to the plaintiff Henry Ernest all the rents, royalties, and money due under the lease of 1840 up to the 2nd of August, 1856. In 1855 T. G. L. C. Gwyn sold the Cadley estate, subject to the last-mentioned agreement, to one Edgar, whose devisees sold it to Henry Ernest, who thus became possessed of the whole estate. Henry Ernest afterwards mortgaged the estate to the other plaintiff, Trew Jegon.

Martin, soon after the date of the lease, assigned it to a company called the Swansea Coal Company, and by various assignments the interest of Martin and of the Swansea Coal Company became vested in the defendants, H. H. Vivian and J. V. Williams.

On the 31st of December, 1860, Henry Ernest filed a bill against Vivian, Williams, and others, alleging that the lease of the 2nd of May, 1840, was obtained from the Countess de Wuits by fraud, *and also that it was invalid at law [*748] beyond her life estate, and praying an account and payment for the coal and minerals taken by the defendants, and for damage done by working the mines improperly, and that possession might be delivered to the plaintiff. This suit of *Ernest* v. *Vivian* was heard before the Vice-Chancellor KINDERSLEY, who, on the 22nd of December, 1863, dismissed the bill with costs on the ground of the plaintiff's laches or acquiescence, and without prejudice to any right at law or to any bill he might file admitting the validity of the lease (33 L. J. Ch. 513).

The term of twenty-one years granted by the lease of 1840 expired on the 24th of March, 1861. Ernest gave frequent notices to the defendants that they were trespassers, and on the 14th of February, 1865, the plaintiff in this suit brought an action of ejectment in the Court of Common Pleas, in the name of Jegon, against Vivian for the recovery of the mines and hereditaments demised by the lease, the question being whether the demise for sixty years was valid.

The action was tried at Swansea, when a verdict was entered for the defendant, with leave to move to enter a verdict for the plaintiff. The Court of Common Pleas was moved accordingly and a rule granted, which was argued and discharged on the 25th of November, 1865, as reported (L. R. 1 C. P. 9). A case was then stated by way of appeal, and on the 6th of February, 1867, the Court of Exchequer Chamber directed that the rule should be made absolute and a verdict entered for the plaintiff, which was accordingly done (L. R. 2 C. P. 422). The defendant appealed to the House of Lords, who, on the 29th of June, 1868, dismissed the appeal (L. R. 3 H. L. 285).

Before the appeal to the House of Lords was decided, the plaintiffs had filed the bill in this suit (last amended on the 1st of May, 1868) stating as above stated, and admitting for the purposes of this suit that the lease of 1840 was in equity a valid

demise for the term of twenty-one years; and claiming damages and an injunction under the circumstances before and hereinafter stated.

The Cadley estate is of about 289 acres. The Swansea Coal Company had, at the date of the lease, obtained agreements for leases of adjoining collieries, called Mynydd Newydd and [* 749] Pantymaes, * and the plaintiffs alleged, but the defendants denied, that Martin took the lease of the Cadley estate for the purpose of assigning it to the Swansea Coal Company. That part of the Cadley estate which contained the more valuable minerals abutted towards the south upon the Mynydd Newydd colliery, in which the Swansea Coal Company, in or about the year 1843, sank a pair of shafts or pumping and winding pits, and on which they constructed a railway and other works for the conveyance of coal. The dip of the coal-measures under the Cadley estate was to the deep of or slopes down from the coal in the Mynydd Newydd colliery, so that the water from that colliery flowed through the ways and channels cut by the lessees into the Cadley estate, and, as the plaintiffs alleged, would, if not drawn off and pumped up, drown the mines therein; but the defendants maintained that it merely flowed through the Cadley estate into another colliery belonging to the defendants, and was pumped back again and returned to the Mynydd Newydd pit. The Swansea Coal Company worked the coal under the Cadley estate by means of a slant driven from the Mynydd Newydd pit, and took large quantities of coal therefrom. The plaintiffs contended that this mode of working was improper, and that pits and shafts ought to have been sunk upon the Cadley estate so as to drain and ventilate independently of the adjoining colliery, in which case proper barriers would have been kept to prevent the workings on the Cadley estate from being flooded by water from the collieries to the rise of that estate, and from being rendered dangerous by gases produced in the adjoining collieries. And the plaintiffs stated that some of the workings in the Cadley estate had in consequence been drowned out and abandoned, as to which, however, there was a dispute. The defendants contended that the coal on the Cadley estate was of small value, and could only be worked to advantage from another colliery, and that the cost of a shaft would be £27,000 at least. On these points much evidence was entered into, the effect of which is stated in the judgment of the LORD CHANCELLOR.

The plaintiffs further raised a question whether the £40 dead rent was to be allowed for in the payment of the royalties. They also claimed damages, because the defendants had not worked the coal continuously, and had not raised so much as they might
* have raised. The defendants admitted that from 1844 [* 750]
to 1847 they did not work the coal on the Cadley estate,
and did not contend that they had raised all the coal they might have raised.

The plaintiffs also claimed the value of the coal raised since the determination of the lease, allowing for the cost of haulage, but not for the cost of getting and hewing.

The defendants had worked some coal in estates called Pantymaes and Blaenymaes by means of headings driven through the Cadley estate into the Mynydd Newydd pit, and had carried the coal and ventilated their pits through the Cadley estate; and the plaintiffs further claimed payment as for way-leaves and royalties on this account.

The plaintiffs further claimed damages from the defendants for breaking the barrier between the mines, and asked for an injunction to restrain the defendants from allowing the mines to remain so as to be flooded, and from using the mines for the drainage and ventilation of other mines. The defendants said that the barriers had been broken by those who were working the Cadley colliery before the Swansea Coal Company came into existence, and that when the Cadley coal was worked, the water would have made its way from the adjoining mines to the rise. They admitted that they did not preserve barriers between the mines under the Cadley estate and the Mynydd Newydd colliery, and said that they were under no obligation to do so.

Lord ROMILLY, M. R., before whom the cause was heard, was of opinion that, as to the coal raised since the expiration of the lease for twenty-one years, the defendants must be treated as having taken it by mistake; that the defendants were not obliged to sink a pit, and had worked the mine in a proper and workmanlike manner; that they were entitled to use the passages through the Cadley estate during the lease; that they were not bound to work more coal than they had worked. And his lordship directed: 1. An account of what was due for royalties under the lease; 2. An account of all coal and minerals got from the mines since the expiration of the lease, and of the value thereof, the defendants being

charged only with the fair value of such coals and minerals at a fair rate as if the mines had been purchased from the plaintiffs;

3. An account of what was to be paid for the passage
[*751] * of coal through the estate since the 25th of March, 1861.

That part of the bill which prayed an account of the damage done by working the mines in an improper manner, and by not leaving barriers, and by not sinking proper shafts, was dismissed, and no costs were given.

From this decree the plaintiffs appealed. They asked — first, an injunction to restrain the defendants from draining or ventilating through the plaintiffs' mine; secondly £40 a year as an absolute rent; thirdly, damages for not sinking the pit, and for not keeping up the barriers; fourthly, that the coal taken might be valued, allowing for haulage to the pit's mouth, but not for hewing or other expenses; and fifthly, damages for not working the pit continuously.

Mr. Jessel, Q. C., Mr. Swanston, Q. C., and Mr. Jackson, for the plaintiffs: —

[753] At the conclusion of their argument, the Lord Chancellor expressed his opinion that the defendants were not bound to work continuously.

Sir Roundell Palmer, Q. C., Mr. Southgate, Q. C., and Mr. Speed for the defendants: —

Mr. Jessel, in reply: —

[754] Lord HATHERLEY, L. C.: —

One main question in this case is, whether the defendants were by the terms of the lease bound to sink a pit on the Cadley estate, so that when the reversioners, who are represented by the plaintiffs, came into possession, they should be able to continue working the mines.

The argument with which I have been chiefly pressed in support of the claim made by the plaintiffs was founded on the provision in the lease that the estate shall, at the expiration of the lease, be delivered up, so that the works may be continued. I think a great part of the fallacy of the argument for amplifying that covenant arises from considering it to mean that which might possibly have been anticipated, on the part of the lessors as well as on the part of the lessees, when the lease was entered into, as likely to take place; and this was urged before me as an argument to induce the Court to introduce an implied covenant, which the

parties nowhere expressed, because it was said that, unless an implied covenant were introduced, that intention which was present to the minds of both parties could not be carried into effect.

Now, the first observation that arises with reference to this clause, which is very often to be found in leases of this description, is, that this lease must have been prepared and entered into with due consideration. I am bound to consider that each party understood what suited his own purpose best in entering into such a bargain. In some cases a question has arisen as to the effect of the word "intention." That question was raised in the case of *Rigby* v. *Great Western Railway Company*, 10 Jur. 488, 531. There a doubt arose as to whether the company were bound to stop all their trains at Swindon, and the Court of Common Law (14 M. & W. 811) held that * the expression [*755] of that intention was on the face of it equivalent to a covenant. But it is entirely unnecessary to enter into that question here, for no intention is referred to, and a covenant cannot be implied which the parties have not thought fit anywhere to express. That would, in my opinion, be a monstrous stretch of the doctrine applicable to such cases.

It has further been argued, that giving the lessees power to do certain acts implies a covenant on their part to do them; but that is a complete inversion. The lessee has secured to himself certain advantages, without introducing any corresponding obligation.

The demise is simply of the coal, not of the surface: [His Lordship then read the demise.] The argument upon that is, that there is the fullest possible power to work the mine, and to take any lawful means of raising the coal, and this, according to the decided authorities, includes the very power of working from other mines if the lessee has them. There is the power of making roads in, over, and under, to carry not only those coals which may be gotten out of this particular mine, but also the coal from other mines. Then there is the power to raise the coal to the surface. Then comes the power of pursuing the veins underground, and of working the veins demised in connection with other veins, for the purpose of pursuing, raising, or bringing the same on the lands demised.

Power is given to dig pits, to bring coal to the surface, to make roads, and carry coal on the surface, because the surface is not demised, and the lessee would be unable to carry his coals over the estate without this power; but I cannot infer from that a negative,

and that the lessee is not to work the coal by any other method. If he is owner of the neighbouring mine, he may do what he pleases, and no power was needed in the lease to enable him to do so; but in order to do anything on the surface which belongs to the lessor he must take a power. That power he accordingly takes, and I am asked to infer that he is under an obligation not to use the larger power which is given him by this lease to work by all lawful means. He was able to work the adjoining mine, and he took care to secure to himself powers to carry the coal he raised from that mine, as well as the coal he might raise from the demised mine, over the surface of the Cadley estate; but he has entered into no obligation to work by means of that surface only.

[* 756] * There is nothing else in the lease which appears to concern the sinking of a pit, except the covenant to work the coal in a proper and workmanlike manner. It cannot be said that working from your own mine, if you have power to do it, is not working in a proper and workmanlike manner. No one can say that working by instroke is improper *per se;* and the foundation of much of the evidence on that subject was that an intention must be implied that the mines were not to be worked from the adjoining pit, and were only to be worked from the lessor's estate.

I was much pressed with the clause which provides that the lessee shall give up the pits and other works, so that the coals may be continued to be worked by the lessor. This is said to show that it is implied throughout the lease that pits shall be sunk, and here I make the same remark which I made at the beginning, that both sides most probably thought that pits would be sunk, but that does not amount in my mind to a covenant to make them. The words are, "All pits and shafts which shall be then open." That implies that they may or may not be open. What was there to prevent the closing of the pits before the expiration of the lease? — and if they are not open at the expiration of the lease, they are to be handed over in that state. Then, further, there is this, that they are to be given up in such a condition as that the works may be continued. Now, how can it possibly be said that the works cannot be continued, when the lessor has got his own surface land, and may, by sinking a pit, go down and work the coal at any time he pleases.

The whole contest is, whether the lessee or the lessor is to pay

this sum of £27,000 for a pit. The lessor can sink his pit, and he has a right when he has sunk his pit to find all the works in such a state as will enable him to go on in the same manner as the previous lessees did. Other people may have their means of access, and he may have his means of access. But whatever they do to his property, they are to leave his property so that whenever he takes possession of it he may be able to work and to sink pits for himself, and not find the whole colliery flooded with water and pillars not left, but find it in a proper condition, so that he may go on with the works.

Then it is said that he cannot go on with the working of this * mine if he has first to sink the pit, and that [* 757] carrying on the works must mean that they are to be carried on just as unremittingly as they were before. I should not be inclined to give much weight to that observation as an inference for importing a covenant of this extremely onerous nature. I find that there is a power to the lessee to remove all the machinery, railroads, tramroads, ironwork, and woodwork; and if that was done, I apprehend that the lessors would have to build an engine and lay down railroads and tramroads, even if the covenant extended to saying that there was to be a pit. However, I think the best answer to that is, that if the parties meant such a covenant they have not expressed it. And if there had been such an obligation in the deed, I apprehend the lessors would not have gone on from the year 1841 down to the present time without attempting to enforce their rights. It ought to have been insisted upon at first, but nothing of the kind has been suggested, and no attempt has been made to force the lessees to work the mines by outstroke instead of instroke; this is a mere afterthought, in order to compel the defendants to spend £27,000 upon this mine.

Then as to the continuous working: It must be remembered that the subject-matter is a coal mine, and there are various provisions about working coal. An obvious remark upon that would be that where one person is taking a mine and another person is letting a mine, they both think the mine will be worked; and in numerous leases which have come before the Court, there is a covenant on the part of the lessee to work the mines continuously, and there are other provisions of that kind. But when that is intended it is stated. A lessee entering into such a covenant

cannot complain if he is unable to fulfil his engagement, but here there is nothing of the sort. It is said, that because the lessee covenants that he will do the work in a workmanlike manner, he has covenanted to be always working. But there are various approved modes of effecting such a purpose. One is to take so heavy a dead rent as to make the lessee find it to his own benefit to work, because the rent must be paid whether he works the mine or not. Another mode is to have an express covenant that he shall continuously work. Another mode is to say that so much coal shall be raised per annum; but to say that this is to [* 758] be implied * from a covenant to work in a workmanlike manner would be a very great stretch of the terms actually employed. If the parties meant the lessee to work continuously, they ought to have said so. It is true that there is no dead rent reserved of such an amount as to compel him to work; but I cannot say there is anything on the face of the lease to justify me in saying that this mine was intended to be continuously worked, and I cannot strain the words so far as to say that the lessor has secured it by any covenant or engagement in the lease.

[His Lordship then expressed his opinion as to the mode in which the £40 rent was to be calculated.]

I come now to another question, which is the question of the way-leaves. The MASTER OF THE ROLLS gave them, and there has been a question raised about the water-leaves and the air-leaves, as they are called. It is said that something should be paid, either in respect of damages, or in the way of rent, in respect of those way-leaves or air-leaves. It must be after the expiration of the lease; there is nothing at all said about any such leaves in the lease. But there is another question raised; and that is, about the damage done; and the argument is put thus: You have had the benefit of water-leaves and air-leaves since the expiration of this lease, and for those privileges you must compensate us, and the damage done to the pit can be best measured in that way. Now, I apprehend, as to all that was done during the lease, there is no question at all. During the continuance of the lease, the lessee had a right to make any conduits he pleased for the conveyance of water over the demised premises. After the lease he would not be bound to put any barrier between his own mine and those mines which were demised to him, in order to prevent the water running by the action of gravitation from his own mine into

his neighbour's mine; and there is no doubt the waters would find their way into this channel which he has made, and which it was perfectly lawful for him to make. I do not find he made any channel in his mine during the term of the demise, in order that the water might pass through it. What he did was — he cut drifts and ways; and the only evidence that I have before me on the subject, as far as there is any evidence at all, is, that by the simple force of gravitation the water in these drifts has found its way down. If the plaintiffs * are so minded, [* 759] they may stop up those channels, or do anything they please with them. They can prevent their being in any way used; but the defendants, not being obliged to use them, are not to pay, because those channels, so long as they exist, bring the water down to other mines of the defendants lying to the deep, whence they pump the water back.

[His Lordship then expressed his opinion that the pumping by the defendants did not increase the flow of water, and that the passage of air was like that of water.]

If the plaintiffs are so minded, they can at any time deprive the defendants of all benefit from the passage of air and water. They can build a wall as a barrier between their mine and the defendants' mine; but the defendants are not bound to build any wall at all; they are simply enjoying that which is given them by the mere circumstances of a series of lawful acts which have been done, and which (the lease now being over) the plaintiffs can put an end to if they like. It gives no right to the plaintiffs to recover compensation.

On the other points I reserve my judgment.

Jan. 25. Lord HATHERLEY, L. C., said that, under the circumstances of the case, he should not interfere with the decree of the MASTER OF THE ROLLS as to the costs, and that he thought that as no special damage was shown to have been caused by the flowing of water through the Cadley pit occasioned by improper working during the continuance of the lease, but only such as would occur from the ordinary working, nothing was to be paid on that account. He then said: But I think the question is different as to what may have taken place in the workings since the 25th of March, 1861, because from that time the defendants were not entitled to work the mine at all. There is some evidence of damage from the mode of working the mine since that time, though

not very strong, yet sufficient for me to say that there ought to be an inquiry what is proper to be allowed to the plaintiffs as compensation for such damage. [His Lordship then gave [*760] directions as to *the £40 rent, and continued:] Now I approach the question of the allowance to be made for the coal worked wrongfully after the expiration of the lease, the value of which is to be accounted for, subject to deductions — one deduction being, according to all the authorities, for the haulage and bringing the coal from the bottom of the pit up to the pit's mouth. But the question now is, whether or not there is also to be allowed to the defendants that which the MASTER OF THE ROLLS has allowed, the cost of winning and getting — that is to say, detaching the coal from the solid rock, and converting it into what is by the authorities held to be a chattel.

I must say that the doctrine of the Courts of Law on this subject does not seem to me, if I may venture to say so, to be in a very satisfactory state. The Courts of Law seem clearly to have decided, in *Martin* v. *Porter*, 5 M. & W. 351 (p. 841, *ante*); that the hewing was not to be allowed for: on this principle, that the defendant being a trespasser, and having converted into a chattel that which was part of the freehold, the freeholder or reversioner was entitled to the chattel so converted at the moment it became a chattel; and as it became a chattel at the bottom of the pit, the Courts of Law did not allow for the process which converted it into a chattel, but they did allow for the expense of afterwards bringing it up from the pit, that being the value which they thought to be the measure of the damages to which the plaintiff was entitled.

A part of the reasoning in that case and in some of the other cases was, that the owner may claim a chattel wherever he finds it. If that were so, he might claim the coal at the top of the pit without making any allowance at all. But that does not seem to be the principle which has been acted upon. Then there was another principle suggested by Mr. Justice COLERIDGE (3 Q. B. 279); that the proper value was what the owner had lost, which was the value of the thing as it existed unhewn in the pit, because it was in that state when he lost it, and that was what he was deprived of. However, the learned Judge deferred to the decision in *Martin* v. *Porter*, and submitted to that rule. Now it strikes me as a strong measure to give a man, instead of the value of his coal, the great advantage of having it worked without any ex-

pense for * getting and hewing. Suppose the mine worked [*761] out, then what he has lost is the coal, but this rule would give him besides all the cost of getting and hewing. It seems a rough-and-ready mode of doing justice, though the remark that a wilful trepasser ought to be punished is worthy of observation; and further, as was said by one of the Judges, when you deprive a man of his property in this way, you deprive him of the management and control of his own property, and he might have made a better bargain. All that, however, is of course speculative, and it seems to me that the Judges have founded their decisions upon the ground of wilful trespass, as in *Martin* v. *Porter*, 5 M. & W. 351 (p. 841, *ante*); where Mr. Baron PARKE expresses himself pleased with the rule as laid down. But the same learned Baron, in *Wood* v. *Morewood*, 3 Q. B. 440, n, held that, where there was a *bonâ fide* claim of title, the trespasser would be allowed for hewing as well as for the other expenses. That was, no doubt, a *nisi prius* decision, but it was adhered to by the learned Judge. I cannot, however, say that this doctrine is very satisfactory; and, no doubt, it is open to Mr. Jessel's remark, that we cannot dive into a man's mind and know whether he thinks the title to be good or bad; and I doubt if we can say that the other Judges agreed in all these views.

In that position of the legal authorities I do not feel disposed to introduce in equity a mode of assessing damages according to a stricter rule of damages than that which has been applied at law. This Court never allows a man to make profit by a wrong, but by Lord Cairns' Act the Court has the power of assessing damages, and therefore it is fairly argued here that this is a case in which damages ought to be reckoned according to the rule in *Martin* v. *Porter*. Now, no doubt, these defendants were told over and over again that the plaintiffs disputed their title, but they held under a lease which professed to give a title if the lessors had power so to do. The working went on on that assumption, *bonâ fide*, as it seems to me, and after long litigation the House of Lords held that the lease was not valid, and therefore the defendants were wrongdoers *ab initio*. [His Lordship then commented on the proceedings in *Ernest* v. *Vivian*, and on the proceedings at law, as showing that the case of the defendants was not flimsy, but that they were acting *bonâ fide*.]

* I think, looking to what has been determined at law, [*762]

and looking to what the course of this Court was until Lord Cairns' Act was passed, I do not feel called upon to give, in the nature of damages, that which in accordance with the decisions would apparently not have been given at law by way of damages. I think that the milder rule of law is certainly that which ought to guide this Court, subject to any case made of a special character which would induce the Court to swerve from it: otherwise, on the one hand, a trespass might be committed with impunity if the rule *in poenam* were not insisted upon; so, on the other hand, persons might stand by and see their coal worked, being spared the expense of winning and getting it.

These plaintiffs are clearly entitled to be recompensed for any damage done beyond the actual value of the coal in the course of their working, and I ought to observe that there is a good deal of difficulty in knowing how exact justice can be done in such a case, as the prevention of the plaintiffs from themselves letting their coal is in itself a serious inconvenience and injury; and the only remark I have to make on that point is, that the plaintiffs have themselves been dilatory in their legal proceedings, though they have given abundance of notices to the defendants. The plaintiffs now get the whole value of the coal dug, and the coal not dug remains for them, subject, of course, to the question how far it has been damaged.

His Lordship then said that the variations in the decree did not make any serious difference in the matter of the costs of the suit, as to which he agreed with the MASTER OF THE ROLLS, the plaintiffs having been partly right and partly wrong. He gave no costs of the appeal.

Minutes: — Vary decree of the MASTER OF THE ROLLS.

Direct an account of what is payable for rent and royalties under the lease, and in taking that account the 4*s*. per wey, payable after the first two hundred weys, be calculated in each year, subject to deduction of the said two hundred weys. An account of coal and mineral got from the mines since the 25th of March, 1861, and of the value thereof, the defendants to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the defendants at the fair market value of the district. An inquiry as to damages beyond the removal of the coal occasioned by working the mines since the 25th of March, 1861, and what should be allowed as compensation.

An inquiry of what ought * to be paid by way of way- [* 763]
leave for the passage of coal through the mines since the 25th of March, 1861. Dismiss so much of the bill as asks for damages for not sinking a pit. No costs of the appeal.

Job v. Potton.

L. R. 20 Eq. 84–99 (s. c. 44 L. J. Ch. 262; 32 L. T. 110; 23 W. R. 588).

Coal Mine. — Tenants in Common. — License by two only out of three Co- [84]
tenants. — Rights of third Co-tenant. — Acquiescence. — Costs.

It is not destructive waste for a tenant in common of a coal mine to get, or to license another to get, the coals, he, the working tenant, not appropriating to himself more than his share of the proceeds.

The plaintiff, a tenant in common of a coal mine, had notice of a negotiation, which was followed by a lease for three years (in which he did not join) by his two co-tenants, dated in December, 1865, of two undivided thirds of the coal with license to work the coal. Under this license some coal, but considerably less than two-thirds of the whole, was raised, and one-third of the royalty was kept by the licensee for the plaintiff. A negotiation for a further license was on foot, when, in October, 1872, the plaintiff filed the bill against his co-tenants and the licensee, praying for an inquiry as to the value of the coals raised; and an account against all the defendants as trespassers; for an injunction and receiver; and for damages.

Held, that the working was not a trespass; and the plaintiff electing to dismiss the bill with costs against his co-tenants, decree, without costs, against the licensee for an account of the value at the pit's mouth of the coal raised, less costs of getting and raising, and for payment of one-third to plaintiff.

Cause.

In the year 1865 an estate called the Allsop Estate, at Bagillt, Flintshire, consisting of two separate parts, containing respectively 6A. 3R. 5P. and 1A. 3R. 31P., was vested in the plaintiff, Alfred Mortimer Job, and the defendants, Maria Potton, widow, and John Marriott and Caroline Eliza his wife, in three equal shares as tenants in common in fee, Mr. Marriott being seised in right of his wife.

The estate, which had coal under it, was surrounded by a colliery called the Wren Colliery, being then and theretofore held and worked by another defendant, David Jones, to such an extent as to preclude the getting of the coal by any one except Jones. In 1865 the Wren Colliery workings approached the Allsop estate, and Mr. Potton and Mr. and Mrs. Marriott were desirous of mak-

ing arrangements with Jones for working the coal. Jones offered to give a royalty on the scale usual in the district, subject to a way-leave of 2*d.* a ton; and on the 9th of March, 1865, Thomas Roberts, a mineral surveyor, acting as the agent of Mrs. [* 85] Potton and the Marriotts, * wrote to Jones to say that the owners of the land wished him to "go on working," as they were willing to take the same as other landowners got, and that they were preparing an agreement for that purpose.

On the 18th of March the defendant Jones wrote to the plaintiff, saying he was in a position to work one of the seams of coal in a portion of the land, and asking whether he, the plaintiff, would allow him to do so, and upon what terms; to which the plaintiff replied on the 20th of March as follows: "Mrs. Potton applied to me for my consent to work the coal. I wrote her I would do so, in consideration of her giving me an order to receive the amount of her share of royalty, to go to pay the sum of £100 and interest borrowed by her on deposit of her deeds some years since. She does not reply."

On the 21st of March, 1865, Roberts wrote to the plaintiff as follows: — "I have been asked by Mrs. Potton and Mrs. Marriott to superintend their share of the royalty for coals at Bagillt, as I superintend for Dr. Richardson and P. P. Pennant, Esq., in the same work; and if you will authorize me to look to your interest, I shall feel thankful. Their terms on royalty are 2*s.* 6*d.* per colliers' ton, or the ninth part: it comes to about the same. Mrs. Potton and Mrs. Marriott have agreed to 2*s.* 6*d.* per colliers' ton. Please come to some agreement as soon as possible."

On the 24th of October, the plaintiff wrote to Jones to say he had received no reply from Mrs. Potton, and that, should he succeed in bringing her to her senses, he would immediately write and let him (Jones) know.

On the 15th of December, 1865, an agreement was made by the defendants Mrs. Potton and the Marriotts, to let two undivided third parts of the coals under the Allsop estate to the defendant Jones for three years from the 15th of December, 1865, with full powers of working the same, and also the option of renewing the agreement for the term of ten years from the 25th of December, 1868.

The defendant Jones said that under this agreement he drove his level through a small portion of the Allsop estate, and during

about two years worked one of the seams under the estate to a small extent. This seam had not been previously worked, but other seams had been. The total amount of the royalty, as
*agreed, upon the coals which Jones worked during the [*86]
three years was £98 5*s.* 3*d.*, out of which he reserved for the plaintiff, whenever he should claim it, the sum of £32 15*s.* 1*d.*, being one-third of the royalty on the coal got, and he also left more than one-third of the coal ungotten.

After the 21st of April, 1868, he ceased working.

On the 2nd of May, 1868, the plaintiff wrote to the defendant Jones as follows: "I am informed that you, with others, are taking the coal from under the land of the estate called and known as the Pottons' estate in Godly's Lane, Bagillt, in which estate I have an interest of survivorship; this being done by you without my knowledge or consent, I give you notice I repudiate all such workings, and ask you for a statement of what you have taken, and by what authority you have so taken it, so far as you have gone; and so far as you may go, I shall deem it a trespass for which I shall hold you responsible without my consent first had and obtained."

In answer, the defendant Jones wrote to the plaintiff on the 5th of May, 1868, stating the agreement of the 15th of December, 1865, and adding, "The sums to which they" (Mrs. Potton and Mrs. Marriott) "have been entitled under this agreement, as per accounts rendered to Mr. Roberts, are" [then followed a statement showing Mrs. Potton's share to be £27 15*s.* 4*d.*]. "A third part of the coal has been left in the ground intact for you, which I am in a position to win if desired, but if you prefer it you can share in the royalty to which Mrs. Potton and Mrs. Marriott have hitherto been entitled, according me permission to win all the coal, and taking your third part in future. I am animated with the desire of acting in a thoroughly impartial way to each of the owners. . . . If the coal be not won now it will probably not be won at all, as I am stripping all the coals surrounding the land, and it will never pay any one to sink pits, &c., for the purpose of winning from estates isolated as yours are, and so small."

On the 6th of May the plaintiff wrote to the defendant Jones saying he repudiated in the most positive manner being a consenting party to his taking coal from under the estate; and a correspondence followed, in the course of which the defendant Jones offered to send a return of the coal got, to allow plaintiff's sur-

veyor to make a survey of the workings, and at once to [* 87] hand * over a sum equivalent to that paid to Mrs. Potton; and stated that in compliance with plaintiff's request, he had ceased working.

On the 4th of May, 1872, the plaintiff commenced an action against the defendant Jones in the Lord Mayor's Court for £850 and costs, which action the defendant Jones caused to be removed into the Court of Exchequer, and entered an appearance therein.

On the 15th of October, 1872, the bill was filed by Job against Mrs. Potton, Mr. and Mrs. Marriott, and David Jones, stating that the agreement of the 15th of December, 1865, was made without the plaintiff's consent or knowledge; and alleging that the plaintiff did not discover the fact that such agreement had been made, or that the defendant Jones was getting the coals until the month of June, 1868; that the plaintiff remonstrated, and that negotiations for a compromise of the plaintiff's claim failed; that after three years had expired the plaintiff supposed that the defendant Jones would not exercise his power of extending his term of working, and would not continue the working, but that in May, 1872, he paid a visit to the estate and discovered that the defendant Jones was just completing a new arrangement with the other defendants for a letting of the mines to him for a further term of ten years; that injury had been done to the surface, and a cottage and other buildings thereon sunk and cracked; and that the acts committed by the defendants amounted to destructive waste.

The bill prayed for an inquiry as to the value of the coals gotten by the defendant Jones under the hereditaments, no deduction being allowed for the cost of bringing them to the surface, and that a sum equal to one-third of such value be ordered to be paid to the plaintiff; further, for an account of the quantity of the coals left unworked (excluding the quantity which would be left in a proper course of mining), and of the value of such quantity, and that a sum equal to one-third of such value might be paid by the defendants, or some of them, to the plaintiff, the plaintiff undertaking to give to each of the other defendants her or his share in the coals left; and for an injunction, a receiver, and damages.

The defendant Jones, by his answer, said the value of the coal under the hereditaments was, in his judgment, about £450. He believed the plaintiff was informed long before June, 1868, by Mr. Roberts, that the defendant was working the coal. Since the ex-

piration of the three years he had been in treaty for a fresh term * of three years, in the expectation that the plaintiff [*88] would concur in it, but as he did not the treaty fell through. It was not true that great, or in the result any, injury had been done to the surface by his workings. The injury to the cottages was mainly owing to want of repair; and he had repaired the cottages, and had put them into better condition than before. The acts of the other defendants, in giving him a license, and his own acts under that license, did not amount to destructive waste, but were the only means by which the coal could be saved. He had never intended, since he received the plaintiff's notice in May, 1868, to continue the working, whether he might be entitled to do so or not. Finally he pleaded the Statute of Limitations, and acquiescence, delay, and laches on the part of the plaintiff.

In his affidavit in support of the bill the plaintiff said that he was an equitable mortgagee of Mrs. Potton's share for £100. The coals under the estate were, before the wrongful acts of the defendant, of the value of £10,000, and he now believed them to be of the value of £6000 at least. He had read the statement in the answer of Jones that he and Mrs. Potton and a Mr. Roberts informed him of the negotiations for such agreement, and that such statement was "wholly untrue."

Mr. Vavasor Powell, collier, one of the plaintiff's witnesses, denied that the coal could only be gotten at a profit in connection with the Wern Colliery. As to the part said to contain 6A. 3R. 5P., the coal could be got to advantage by independent workings. In his judgment the coal, being seven seams, under the estate was then worth £6420, and was at one time worth £10,000.

There was conflicting evidence on the other side as to the value of the coals, and as to the amount and cause of damage to the buildings.

The letters showed a negotiation in 1871 between the plaintiff and Roberts for the sale of the plaintiff's interest, which fell through. In the course of this Mr. Job, in a letter dated the 14th of October, 1871, said he would accept an offer of £180 for his share in the estate, in consideration of Mrs. Potton's obligation to him being settled at the same time. He further offered, on the 14th of November, 1871, to transfer his mortgage to Roberts for £130, an offer which not being accepted at the time he afterwards raised to £160.

[*89] *After the institution of the suit, namely, on the 30th of December, 1874, Mrs. Potton died, and the suit was revived against her representative. Mrs. Marriott had also died, and the suit had been revived against her heir-at-law.

It was stated at the bar that since the institution of the suit a decree for the partition of the estate had been made in another suit in this branch of the Court, and that a sale was in progress.

Mr. W. Pearson, Q. C., and Mr. Simmonds, for the plaintiff.

[90] Mr. Kay, Q. C., and Mr. Alexander, for the representative of Mrs. Potton.

Mr. Williamson, for John Marriott.

Mr. Hervey, for the heir of Mrs. Marriott.

[*91] *Mr. Little, Q. C., and Mr. Hemming, for the defendant Jones.

[92] Mr. Pearson, in reply.

[93] Sir JAMES BACON, V. C.:—

This is at least a very remarkable suit, whether the nature of it is considered, or the subject to which it relates. It is a suit in the Court of Chancery. I have nothing to do with the common-law doctrine, so much insisted upon by Mr. Pearson, not only from the nature of the suit, but because the suit has been brought in this Court, the plaintiff having deliberately elected to prefer the remedy which he can get here to any right or remedy he might have at law. I have, therefore, only to consider the facts as far as they are clearly in evidence, and to consider what are the rights of tenants in common in a mine.

Now, no authority has been referred to, and I believe none can be found, to say that the rights of tenants in common in a mine are not as extensive as can be suggested for each of those tenants to do what he wills with the undivided property, provided always that he does not take more than his share. The statute of Anne (4 Anne, c. 16, s. 27) has recognised that principle, and every decision which I know of has adopted it as a principle. What difference is there between a tree growing, which the Court refuses to prevent a tenant in common from cutting at his pleasure, although it is a part of the inheritance, and a tree which by some operation of nature has become carbonised and turned into cannel coal? How is a tenant in common to enjoy his share (if that is the right expression) of the common property in a coal mine, if he is not at liberty to dig and carry away the coal? The only restriction upon him is that

he must not appropriate to himself more than his share. It is not suggested here that the original defendants, Mrs. Potton and Mr. and Mrs. Marriott, who were then the co-owners, have taken any more than their respective shares. There is no suggestion of it anywhere. The document which has been referred to, and which is called their license to work, carefully restricts the license which they give within the bounds of their own rights, and there is no difference in that respect between that which Mr. Jones has done under their license, and that which they, without license might have done by their own hands. The principle of the case is therefore, perfectly clear, and is not disputed. The plaintiff is * tenant in common with two other persons in [*94] a mine, the shares in which are undivided. They have only exercised their rights, and they have left him, for anything that I can see, to exercise his. What he complains of is, that, under their leave and license, a certain quantity of coal has been taken away in which, to the extent of a third, he is interested; and that seems to be so. But that is the whole of his case, — that is, the whole of the right to relief which the plaintiff can insist upon, — and that right to relief must be governed by the facts in this case. The cause has been brought on for hearing after a decree for partition has been made in another suit, from the day of the date of which decree it must be considered that the estate has been divided into three parts, one of which belongs to the plaintiff. What hearing therefore, those common-law cases, on which Mr. Pearson has so strongly insisted, can have on the equitable relief to which the plaintiff is entitled in this Court, I am unable to perceive, in any degree.

The case of *Wilkinson* v. *Haygarth*, 12 Q. B. 837, which has been referred to, touches the question of leave and license, and the sublime mysteries of special pleading, the days of which are numbered. In the decision of the Court there, it was held that the plea was a bad plea, because the plea was of the leave and license of only two persons, when the leave and license of more than two, perhaps of three of them, was necessary in order to justify the plea. That was the whole decision in that case: it decides nothing else in the world, and does not touch the substance of this case, nor even the substance of that case in any degree; but it decided, as a matter of special pleading, that that plea was a bad plea. This mysterious doctrine of leave and license has been very often thrust upon

this Court upon the authority of cases in the Courts of common law, of which I speak with all possible respect, not with less respect than I do of the case to which the late Lord Justice KNIGHT BRUCE was not unfrequently in the habit of referring when he was invited to consider the question of leave and license, and the imperfections which might attend it. He quoted a case, the name of which I do not know, which he often cited either from the Year Books, or some not very much less remote reports, a case of a young woman who by her next friend sued a barber for having cut her hair. He was to cut her hair, and he had cut it all [* 95] off, * and she brought an action against him by her next friend; and the barber pleaded leave and license. The next friend replied that the person he represented was an infant at the time, and could not give leave and license, and so the Court held that the plea was a bad plea, and judgment went for the next friend. That is the most remarkable case of leave and license that I recollect at this moment, but it was quite as much to the purpose as the case upon which Mr. Pearson has so much relied.

But to leave all such considerations, let us see what is the case here pleaded and proved. The plaintiff's case is that he is the owner of an undivided third of the lands in question. His allegation is that "by an agreement, dated the 15th day of December, 1865, the defendants, Maria Potton, John Marriott, and Caroline Eliza his wife, without the consent or knowledge of the plaintiff, and without any previous notice to him, agreed to let two equal undivided third parts." The evidence upon that subject is that of Mr. Roberts, who has not been cross-examined, although there was an opportunity of doing so. In his evidence he proves, and it is uncontradicted, that on the 21st of March, 1865, he wrote to the plaintiff this letter: [His Honour read the letter extracted above, and continued:] The plaintiff, in his affidavit, does not repeat that paragraph, which I have read from his bill, but he does state that he did not discover that the agreement had been made until the month of June, 1868. He says he has read the statement in the answer of David Jones, that he and the said Maria Potton and a Mr. Roberts, a surveyor, informed him of the negotiations for such agreement, that that statement was "wholly untrue." That is the way that piece of evidence is met, and upon that, in my opinion, taking into consideration what Mr. Roberts states elsewhere, Mr. Roberts must be taken to have told

the truth, and the Court must act upon it as a fact, that, either at the time or before the agreement of 1865 was entered into, the plaintiff was fully apprised of it. It is not necessary to go far to find satisfactory proof of that, because the correspondence, which is verified by Mr. Jones' affidavit, shows clearly that the plaintiff was perfectly acquainted with everything that had been done under the agreement. There is a letter of a later date, in which his share of the royalty is stated to him as being equal to that of Mrs. Potton, and of the third party, and that the money has *been at his command ever since. The bill states in [*96] the fourth paragraph that the plaintiff did not discover the fact that the agreement had been made until on or about June, 1868; and then comes this statement in the fifth paragraph of the bill, of which there is not one particle of evidence: "After discovering the conduct of the defendants in leasing and working the said minerals, the plaintiff remonstrated with the defendant David Jones, and threatened to take proceedings against the defendants in respect thereof, and thereupon negotiations took place for a compromise of the plaintiff's claims, but such negotiations failed." He further alleges that he "paid a visit to the said hereditaments in the month of May, 1872, and upon the occasion of the said visit the plaintiff discovered, to his great surprise, that the defendant David Jones was just completing a new arrangement with the other defendants for a letting of the said mines and minerals for a further term of ten years." This is also plainly disproved. It is not true that any working has been carried on after the termination of the agreement for three years from 1865. It is true that there was a negotiation pending at an early time, but it is equally true that there was nothing done upon that negotiation, and that because of the plaintiff's declining to be a party to it. And is there anything in the case but this, that the plaintiff, knowing very well that his two co-tenants were working the mine, — for Mr. Jones' working is only their working, — takes no step, remonstrates in no way, not only does not apply to this Court, but does not apply to any other Court, does not offer the slightest objection to what was being done during these three years, and now by his bill comes and asks that Mr. Jones, who has been only the agent of the real owners, should be charged with the share of profits that might have been made by working this colliery? If he is entitled to anything, it can only be from the day when a decree is pronounced;

he can be entitled to nothing else. A person who has been standing by all this time, may take his account, — it is indifferent from what period he takes it, — he may take the account from 1868. I think he is entitled to such an account, but I think he is entitled to no more; and I think, with respect to any costs of the suit, it would be in the highest degree unjust if I made Mr. Jones pay any costs of this suit; although, as I have said, he is answerable for such share as the plaintiff [* 97] may be enabled to establish, by means of an * inquiry, to be due to him; and, if the plaintiff insists upon it, I will direct such an inquiry at his instance and at his risk.

Upon this subject I must say that in directing that account I cannot adopt either of the rules which have been referred to in the decided cases, because this case does not resemble in its substance, elements, or nature either of the cases to which those varying rules were applied. If a wrongdoer does an act which, if it were the case of a chattel, and capable of sustaining an indictment, would amount to larceny, then the most rigorous mode of taking the accounts is that which is adopted against him. If it has been by inadvertence, or by negligence, not culpable or tortious in any other sense, then the plaintiff is entitled to the value of the coal at the pit's mouth, allowing nothing for the mere severance but allowing for the transport of the coal to the pit's mouth. But this is not a case in the slightest degree falling within this principle. This is a case in which, if the coal had been severed by the two co-tenants, and brought by them to the surface and then disposed of, they would have been entitled to deduct from the value, in account with their co-tenants, the cost of severance and the cost of bringing it to the pit's mouth. Mr. Jones is precisely in that position now. Mr. Jones has done nothing tortious, neither larcenous nor negligent, but in the assertion, and, as I conceive, in the exercise of a strict right, has brought this coal to the surface, — has accounted to the two co-tenants for what he and they agreed was its value; and he is accountable to the plaintiff for what shall appear to be its value, but subject to those deductions. That, in my opinion, disposes of the whole of the case. I do not want to travel into the subtleties which I have listened to, not without interest, from Mr. Pearson, but which, in my judgment, have nothing whatever to do with this case, which is to be decided and dealt with in a Court of equity. Here, all that the co-tenants have done has been to take

and enjoy that which was unquestionably theirs, although it was at that time undivided. If anybody will point out to me the way in which a co-tenant of a mine could enjoy that which is his, by any other means than that which was adopted here, I will listen to it with the greatest pleasure, and change my opinion. The conduct of the plaintiff has been, in my opinion, certainly without any explanation, and, as I think, without * excuse. [* 98] It is also clear that the plaintiff, who now files a bill alleging the large value of this property, and attempts to prove by his witness that the coal under it was worth £10,000, and is now worth £6000, was ready to sell it for £180; and I cannot add the £160 to make up the price — it was a totally different transaction. The plaintiff said to Mrs. Potton, "Your husband owed me £160; if you will pay me your debt, I will sell my mine for £180." That is not selling "my mine" for £340: it is a plain unqualified suggestion, as far as it goes, that the £180 was the whole value to a purchaser of the thing which Mr. Job had to sell at that time.

To the proceedings in the common-law Courts I have already adverted. In the proceedings in this Court there has been no application for an injunction; and no such application could at any time have been successful. That there can be none now is obvious, because there has been a decree in a partition suit; but if the present plaintiff — I suppose a defendant in that suit — had any such case as he suggests upon this record, I ask why he did not bring that forward in the partition suit, and say, "In making a decree for partition, you must take into consideration that my other two co-owners carried away a part of the inheritance."

[Mr. Pearson observed that the point was very strenuously argued.]

I suppose then that I thought there was no proof of the fact. However, that is all over, and it has very little to do with the present case. All I can do in this case is to deal with this record. I find persons made parties to the suit whom the plaintiff says it was necessary for his interest to make parties to it. Very well, as he says so, and as they make no claim, as they, in my judgment, or the persons they represent, have done nothing which they were not entitled to do, as no account is asked against them at the bar, and they are not accountable, in my opinion, the plaintiff must pay their costs of the suit up to the hearing, and, if he likes, they may then be dismissed. All the decree can do besides, is to direct an

account of the coal which has been gotten by Mr. Jones, of the value of that coal, making to him all just allowances, including especially the cost of severing the coal and the cost of bringing it up to the pit's mouth; and for one-third of that, the plaintiff, being bound by no agreement, will be entitled to claim payment from Mr. Jones. I have already said I shall give no costs [* 99] against * Mr. Jones up to the hearing. The costs afterwards will of necessity be reserved; and although I have not gone into it at any great length, I desire it to be understood that I proceed upon the evidence in the case as it stands, namely, on the one hand, the discrepant evidence between the plaintiff and Mr. Vavasor Powell, and on the other hand, the plain evidence on the part of the defendant Jones and his witness, Roberts, — a person, from his employment, entitled to be listened to when he is speaking on such a subject as a coal mine, and who, as I have said, has not been cross-examined. But I give him no costs, because, although I do not blame him, he chose to go on without the authority and consent of the plaintiff. The subsequent costs will of necessity be reserved.

There only remains to be mentioned the subject of the damage which the surface is said to have sustained. On both sides it is agreed that that damage, whatever it was, was occasioned by the working. The working was a lawful thing, and the damage, if done, ought to have been repaired. It is in evidence distinctly not only that such damage was occasioned by the proper working, but that it has been effectually repaired, and that the cottage said to have had a cracked wall is now a better cottage by a great deal than it was before. Upon that subject, therefore, in my opinion, no further observations need be made.

The following are minutes of the order: —

Inquire what coals have been worked and gotten by the defendant David Jones from the mines under the Allsop Estate in the pleadings mentioned, and what was the market value thereof at the pit's mouth, and what were the costs incurred by the said defendant in getting and severing the coal, and bringing it to the pit's mouth, and deduct the amount of such costs from the amount of such value, and order the defendant Jones to pay to the plaintiff one-third part of the amount of such value after such deduction; no costs of suit as between the plaintiff and the defendant Jones.

The plaintiff electing not to keep the other defendants before the Court for the purposes of such inquiry, dismiss the bill with costs as to them; but only one set of costs is to be allowed to the defendants representing each of the two undivided third parts of the estate.

ENGLISH NOTES.

The above report of *Martin* v. *Porter* from Meeson & Welsby does not substantially differ from that in the contemporary, but seldom used report of Horn & Hurlestone. But it appears from the judgment of Lord DENMAN, Ch. J., in *Morgan* v. *Powell* (1842), 3 Q. B. 278, that the direction of the learned judge (PARKE, B.) upon which the rule had been taken (and which was, therefore, in effect affirmed by the judgment of the Court of Exchequer) was that "the plaintiff was entitled to the value of the coal as a chattel *at the time when the defendant began to take it away*, that is as soon as it existed as a chattel." Lord DENMAN points out (3 Q. B. at p. 284) that this value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth. This correction of the judgment in *Martin* v. *Porter*, which agrees with the direction given by PARKE, B., in a *nisi prius* case of *Wood* v. *Morewood* (1841) 3 Q. B. 440 *n*, has always been adopted in subsequent cases.

The principle appears to be this. The act of hewing and converting into a chattel coal which is the property of another is a trespass and *primâ facie* incapable of being made the foundation of a claim by the trespasser to be allowed for its payment. The act of hauling and raising to the pit mouth the coal which has been severed from the seam, is *primâ facie* a necessary service to the owner of the coal, and, unless the intention appears to appropriate that which is another's (which perhaps is the ground of judgment in *Plant* v. *Scott* (1869), 21 L. T. (N. S.) 106), is to be allowed for by the owner. If this intention is not imputed, there is still a distinction between what is called the harsher and the milder rule; the latter being adopted where the transaction is *bonâ fide*, and the owner of the coal, while claiming the value, makes an allowance for the cost of hewing and converting into a chattel, as well as the cost of hauling and raising.

What has been called the milder rule has been followed in *Re United Merthyr Collieries Co.* (V. C. BACON, 1872), L. R. 15 Eq. 46, 21 W. R. 117; in *Ashton* v. *Stock* (V. C. HALL, 1877), 6 Ch. D. 719, 25 W. R. 862; and in *Brown* v. *Dibbs* (Judicial Committee, 1877), 37 L. T. 171, 25 W. R. 776.

Both the modes of calculation are respectively employed in the case of

Trotter v. *Maclean* (FRY, J., 1879), 13 Ch. D. 574, 49 L. J. Ch. 256, 42 L. T. 118, 28 W. R. 244, where work (by instroke from an adjoining mine) was commenced pending a negotiation and in the *bonâ fide* expectation of obtaining a contract from trustees, and continued after definite notice that no contract could or would be entered into. The milder rule was applied as to the work done up to the time of the notice, and the harsher rule as to the subsequent workings.

The following summary is given by Mr. Justice FRY (13 Ch. D., p. 586) of the previous cases in which the respective rules had been applied: "The milder rule has been applied where the Courts have said that the defendant has acted inadvertently in taking the coal: that is the language of Vice-Chancellor MALINS in *Hilton* v. *Woods* (L. R. 4 Eq. 432). Again, it has been applied where the Courts have said that the defendant has acted under a *bonâ fide* belief of title: of that *Hilton* v. *Woods*, *Jegon* v. *Vivian*, and *Ashton* v. *Stock*, are examples. It has been applied again when the Courts have said that the defendant has acted fairly and honestly: that was the language of Lord WENSLEYDALE in *Wood* v. *Morewood* (3 Q. B. 440 *n.*). It has been applied in cases of mere mistake: that is the language of Vice-Chancellor BACON in *In re United Merthyr Collieries Company*. The harsher rule has been applied where the Courts have found fraud: of that there are numerous illustrations, one being *Ecclesiastical Commissioners for England* v. *North Eastern Railway Company* (4 Ch. D. 845). It has been applied where there has been negligence: that was the language of Lord WENSLEYDALE in *Wood* v. *Morewood*. It has been applied when the act of the defendant has been said to be wilful, as in *Martin* v. *Porter*. It has been applied where the Court has said that the defendant has acted in a manner wholly unauthorised and unlawful, which was the language of Vice-Chancellor BACON in *Llynvi Company* v. *Brogden* (L. R. 11 Eq. 188); and it was applied by Vice-Chancellor MALINS in *Ecclesiastical Commissioners for England* v. *North Eastern Railway Company*, where he thought the workings were the result of a mistake." This summary is referred to with approval by Lord Justice BAGGALLAY in *Joicey* v. *Dickinson* (C. A. 1886), 45 L. T. 643, 644. There, there was a wilful trespass by the defendant's servants without the knowledge of the defendants, and the harsher rule was applied.

The Scotch case of *Livingstone* v. *Rawyards Coal Co.* (H. L. Sc. 1880), 5 App. Cas. 25, 42 L. T. 334, 28 W. R. 357, was one of peculiar circumstances. In 1837 the proprietor of the R. estate granted a feu (perpetual right) of about an acre and half of land, reserving to himself, his heirs and successors, the whole ironstone in the ground feued. There was no reservation of coal. In 1872 the successors in the R. estate granted to the respondent company a lease of the whole property in the

coal under the estate at a royalty of 6*d.* per ton. The company, on the *bonâ fide* assumption that they were entitled to the whole coal, worked the coal under the feu, doing some surface damage to the land which had become vested in the appellant. The appellant had also been under the impression that the coal did not belong to him; but on an examination of the titles with reference to the claim for surface damage, and after all the coal had been worked out, it was discovered that the coal under the feu belonged to the appellant. It appeared that, owing to the small size of the property, the appellant could not have worked the coal or disposed of it in any way except by selling it to the defendant. It was held that what the appellant was entitled to receive was the value of his coal *plus* the surface damage; and that the best estimate of the value under the peculiar circumstances of the field was the royalty paid by the company for the coal in the surrounding field. It was, in effect, shown by Lord BLACKBURN that the principle of *Jegon* v. *Vivian* applies; but that if the particular mode of calculation used in that and the other English cases had been applied, — namely, of taking the selling price of the coal and deducting the price of hewing and drawing, — the plaintiff, by getting damages paid by letting down the surface, would have been paid those damages twice over; because they were really part of the cost of converting the coal into a marketable commodity. So that the Courts were thrown back upon the royalties as the best evidence of the value to be taken as the measure of damages.

The harsher rule was again applied by the Court of Appeal in *Taylor* v. *Mostyn* (C. A. 1886), 33 Ch. D. 226, 55 L. J. Ch. 893, 55 L. T. 651, against mortgagees in possession of a colliery who had, contrary to the covenants of their own lease, authorised their sub-lessees to work the coal contained in pillars covenanted under the lease to be left.

In *Whitwham* v. *Westminster Brymbo Coal & Coke Co.* (CHITTY, J., and C. A.), 1896, 1 Ch. 894, 2 Ch. 538, 65 L. J. Ch. 508, 741, the defendants had for years carried spoil over and deposited it on the plaintiff's land. At the trial of an action the defendants were restrained from further tipping; they were ordered to deliver up possession of the land, and an inquiry directed as to damages. The area of the land in question was about an acre and three-quarters, and about seven-eighths of an acre had been actually covered and destroyed by the spoil. The rest of the land was found to have been made valueless except for the purposes of tipping spoil. CHITTY, J., on the question of damages, held that in regard to the land which the plaintiffs had actually covered with their spoil, the defendants must pay the value to them of that land for this purpose; but, as to the rest of the land in question, they must pay on the footing (only) of the diminished value of the land to the plaintiffs. If this principle was right, the damages were agreed at £550. The Court of Appeal affirmed the judgment. The case was

appropriately described by LOPES, L. J., as something between the ordinary case of a trespass to land, and a way-leave case. RIGBY, L. J., said: "The principle is that a trespasser shall not be allowed to make use of another person's land without in some way compensating that other person for that user. Where the trespass consists in using a way over the plaintiff's land, a convenient way of assessing damages may be by an inquiry as to way-leave, which, when there is a customary rate of charge for way-leave in the locality, may furnish a convenient measure of damages; but the principle is that in some way or other, if you can do nothing better than by rule of thumb, the trespasser must be charged for the use of the land. In this case we are relieved from all difficulty about figures, because the learned counsel have agreed the amount; and all we have to say is that the principle enunciated by CHITTY, J., is right, with the consequence that £550 is the amount of the damage."

AMERICAN NOTES.

The cases of *Martin* v. *Porter* and *Morgan* v. *Powell*, 3 Ad. & Ell. (N. S.) 281, have been much cited in this country, and *Jegon* v. *Vivian* has also been somewhat cited. The rule in cases of trespass and trover is not uniformly held here, and the feature of good faith and innocent mistake has in some Courts been allowed to modify the strictness of the law. In the important case of *Woodenware Co.* v. *United States*, 106 United States, 432 (a case of cutting timber), the Court laid down the rule that (1) where the trespass was wilful the damages were the full value at demand with no deduction for labor and expense; (2) where the trespass was unintentional, the value at conversion less the amount added to its value by the trespasser; (3) where the action is against an innocent purchaser from a wilful trespasser, the value at the time of purchase. The Court said: "In the English Courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those Courts that when suit is brought for the coal so taken, and it has been the result of an honest mistake as to the true ownership of the mine, and the taking was not a wilful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine. *Martin* v. *Porter*, 5 Mee. & W. 351; *Morgan* v. *Powell*, 3 Ad. & E. (N. S.) 278; *Wood* v. *Morewood*, 3 id. 440; *Hilton* v. *Woods*, L. R. 4 Eq. 432; *Jegon* v. *Vivian*, L. R. 6 Ch. App. 742.

"The doctrine of the English Courts on this subject is probably as well stated by Lord HATHERLY in the House of Lords, in the case of *Livingstone* v. *Rawyards Coal Co.*, 5 App. Cas. 25, as anywhere else."

"There seems to us to be no doubt that in the case of a wilful trespass the rule as stated above is the law of damages both in England and in this country, though in some of the State Courts the milder rule has been applied even in this class of cases. Such are some that are cited from Wisconsin. *Weymouth* v. *Chicago & Northwestern Railway Co.*, 17 Wisconsin, 550; *Single* v. *Schneider*, 24 id. 299.

"On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong were not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. *Winchester* v. *Craig*, 33 Michigan, 205, contains a full examination of the authorities on the point. *Heard* v. *James*, 49 Mississippi, 236; *Baker* v. *Wheeler*, 8 Wendell (N. Y.), 505; *Baldwin* v. *Porter*, 12 Connecticut, 484.

"While these principles are sufficient to enable us to fix a measure of damages in both classes of torts where the original trespasser is defendant, there remains a third class, where a purchaser from him is sued, as in this case, for the conversion of the property to his own use. In such case, if the first taker of the property were guilty of no wilful wrong, the rule can in no case be more stringent against the defendant who purchased of him than against his vendor."

In *Coal Creek M. & M. Co.* v. *Moses*, 15 Lea (Tennessee), 300; 54 Am. Rep. 415, it was held that in case of innocent trespass, the damages were the value of the coal in the bed, with the incidental injury to the land. The Court said: "The authorities are hopelessly in conflict as to the proper measure of damages where coal or ore has been mined by one person upon the land of another. Much of this conflict has grown out of the forms of action at common law, and the difficulty of confining the recovery to mere compensation, where the principle upon which the form of action is supposed to rest allowed a larger recovery. The tendency of the recent decisions is to ignore the form of action, and to regulate the recovery by the rule of compensation, looking to the intention of the defendant. The course of English decision is curiously illustrative of the change of judicial opinion. Originally, even in the case of an inadvertent trespass, the plaintiff was held entitled to the value of the coal after it was mined, without any deduction for the cost of severing. *Martin* v. *Porter*, 5 M. & W. 551; *Morgan* v. *Powell*, 3 Ad. & El. 281; *Wild* v. *Holt*, 9 M. & W. 472. Afterward the rule was modified so that in a case where the trespass was fully proved, but without fraud, it was held that the defendant was liable only for the value of the coal, deducting the cost of its severance and carrying it to the mouth of the mine. *In re United Merthyr Collieries Company*, L. R. 15 Eq. 46. Again, even at law, in an action of trover, if the jury found that the defendant acted fairly and honestly under a claim of right, they were instructed to give the fair value of the coal as if the coal field had been purchased from the defendant. *Wood* v. *Morewood*, 3 Ad. & El. (N. S.) 440. And finally, in a case in the House of Lords, it was held that where the defendant innocently and ignorantly worked the coal beyond his boundary, the measure of damage was the value of the coal *in situ*, in addition to any surface damage there may be. *Livingstone* v. *Rawyards Coal Company*, 42 L. T. (N. S.) 334. And this rule has been adopted by the Court of Chancery. *Hilton* v. *Wood*, L. R. 4 Eq. 432; *Jegon* v. *Vivian*, L. R. 6 Ch. 760. The tendency of the American decision is to adopt the same rule, whether the action be trespass, as in *Foote* v. *Merrill*, 54 New Hampshire, 490; s. c. 20 Am. Rep. 151; or trover, as in *Forsyth* v. *Wells*, 41 Penn. St. 291. 'Where,' says

the Court, in this last case, 'there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind we shall have but little difficulty in managing the forms of action so as to secure a fair result. If the defendant in this case was guilty of an intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it, but only with its value in place, and with such other damage to the land as his mining may have caused. Such would be manifestly the measure in trespass for mesne profits.' And so we have held in *Ross* v. *Scott*, in an opinion delivered with this. And such was the decision of this Court in the case of a wrongful trespasser who cut timber on land in *Ensley* v. *Nashville*, 2 Baxter, 144."

The same doctrine was held in *Ross* v. *Scott*, 15 Lea (Tennessee), 479, where the Court said: "The Courts of law, trammelled by their forms of action and the principles upon which they were supposed to rest, such as title in replevin and conversion in trover, have found it very difficult to formulate a rule which would lead to uniformity in the recovery of damages for the same wrong. The result depended upon the form of action adopted and the time of bringing suit, and might be very different, although the real cause of injury was the same. We find a strong example in the case of the *Woodenware Co.* v. *United States*, 106 United States, 432. There a trespasser cut timber from the public lands to the value of sixty dollars, which would have been the limit of the recovery in trover against the wrongdoer at the place. But he carried the timber to a distant market at a heavy expense, and sold it to an innocent purchaser for $850. In an action brought by the United States against the purchaser in the nature of an action in trover, it was held by the Supreme Court that the recovery should be the value of the timber at the time of sale. The result may be logical, but the inequality between the damages and the recovery is too great to be satisfactory. And neither the English nor the State authorities have gone quite so far. The tendency of the Courts, the text-writers all agree, is to look less to form and more to the substantial object of all rights of action, which is to redress the injury by compensation. 8 Suth. Dam. 376, 488; 2 Sedg. Dam. 484; Add. Torts, s. 539; 7 Cent. L. J. 301. 'A careful examination of the authorities,' says the Supreme Court of Nevada in a recent case, 'has convinced us that there is a growing inclination among all Courts, where it can be done, to apply the only safe and just rule in actions of damages, whether *ex contractu* or *ex delicto*, and that is to give the injured party as near compensation as the imperfection of human tribunals will permit.' *Waters* v. *Stevenson*, 13 Nevada, 157; s. c. 29 Am. Rep. 293. 'In civil actions,' says the Supreme Court of Michigan, during the present year, 'the amount of recovery does not depend upon the form of the action in a case like the present (where logs were cut by mistake from the lands of another and hauled into a creek several miles from the land), but whether it be upon contract or in tort, the proper measure of damages, except in cases where punitory damages are allowed, is just indemnity to the party injured for the loss, which is the natural, reasonable, and proximate cause or result of the wrongful act complained of.' *Ayres* v. *Hubbard*, 32 Alb. L. J. 217; 57 Michigan, 322; 58 Am. Rep. 361. And such was the rule of damages applied

by this Court in *Ensley* v. *Mayor, &c. of Nashville*, 2 Baxter, 144, where timber was cut by a wilful trespasser. The measure of damages was held to be the value of the trees as they stood upon the land, and the injury to the land by their removal. The weight of authority, both English and American, now is, that where there is an honest dispute as to title, or where the trespass has been from ignorance, and not wilful, the damages will be confined to the value of the property before the trespass was committed, or, to use the language of the English Courts, 'at the same rate as if the property taken had been purchased *in situ* by the defendant at the fair market value of the district.' *Wood* v. *Morewood*, 3 Q. B. 440; *Jegon* v. *Vivian*, L. R. 6 Ch. 742; *Hilton* v. *Woods*, L. R. 4 Eq. 432; *In re United Merthyr Collieries Company*, L. R. 15 Eq. 46; *Livingstone* v. *Rawyard's Coal Co.*, 42 L. T. (N. S.) 334; *Goller* v. *Fett*, 30 California, 481; *Forsyth* v. *Wells*, 41 Penn. St. 291; *Ward* v. *Carson River Wood Co.*, 13 Nevada, 44; *Weymouth* v. *Northwestern R. Co.*, 17 Wisconsin, 550; *Foote* v. *Merrill*, 54 New Hampshire, 490; s. c. 20 Am. Rep. 151; *Longfellow* v. *Quimby*, 33 Maine, 457; *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Massachusetts, 80; *Ry. Co.* v. *Hutchins*, 32 Ohio St. 571; s. c. 30 Am. Rep. 629.

"The Court of Chancery is not hampered by forms, and possesses all the power and means to do exact justice as near as is possible. It never enforces forfeitures nor gives punitive damages. The fundamental rule of equity is to afford just compensation to its suitors. The bill before us is, under our decisions, one of pure equitable cognizance. *Almony* v. *Hicks*, 3 Head, 39. It seeks to remove the defendant's paper title as a cloud upon the complainant's legal title to the land in controversy, and as the necessary consequences of the decree to recover possession of the land in controversy and to have an account for mesne profits and waste. All that the complainant can claim on the account is just compensation for the coal mined and the wood cut. That just compensation under the foregoing principles of law and the rules of a Court of equity, is the value of the coal before it was mined and the wood before it was cut, with such damages, if any, as may be occasioned by the impairment of the value of the land by reason of the removal or mode of removal from the soil."

In *Austin* v. *Huntsville C. & M. Co.*, 72 Missouri, 535; 37 Am. Rep. 446, the Court said: "The Court below, at plaintiff's instance, gave this declaration of law: 'The measure of damages for the coal taken is the value thereof at the mouth of the shaft, less cost of raising it, and without any deduction for the expense of getting or severing it from the freehold.' The report of the referee discloses that the coal was worth one-half a cent in the mine, and seven cents a bushel at the mouth of the shaft, or in the proportion of one to fourteen. There is doubtless abundant authority which supports the above declaration of law. *Morgan* v. *Powell*, 43 Eng. Com. Law, 734; *Martin* v. *Porter*, 5 M. & W. 352; *Barton Coal Co.* v. *Cox*, 39 Maryland, 1; s. c. 17 Am. Rep. 525; *Robertson* v. *Jones*, 71 Illinois, 405; *McLean Coal Co.* v. *Long*, 81 id. 359; Waterman on Trespass, s. 1096; *Moody* v. *Whitney*, 34 Maine, 563; *Llynvis Co.* v. *Brogden*, L. R. 11 Eq. 188; *Wild* v. *Holt*, 9 M. & W. 672. But there is no lack of authority sustaining a different view of the matter. *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Massachusetts, 80; *Forsyth* v. *Wells*,

41 Penn. St. 291; *Chamberlain* v. *Collinson*, 45 Iowa, 429; *Waters* v. *Stevenson*, 13 Nevada, 157; s. c. 29 Am. Rep. 293; *Foote* v. *Merrill*, 54 New Hampshire, 490; 20 Am. Rep. 151; *Maye* v. *Yappan*, 23 California, 306; *Goller* v. *Fett*, 30 id. 481; *Ham* v. *Sawyer*, 38 Maine, 37; *Hilton* v. *Woods*, L. R. 4 Eq. 432; *Baldwin* v. *Porter*, 12 Connecticut, 473; *Curtis* v. *Ward*, 20 id. 204; 2 Greenl. Ev., ss. 253, 254; *Pierce* v. *Benjamin*, 14 Pickering (Mass.), 356; 25 Am. Dec. 400; *Wood* v. *Morwood*, 3 Q. B. 440; *In re United Merthyr Col. Co.* L. R. 15 Eq. 46." "The authorities from which we have quoted seem to us to announce the true measure of damages where there is no element of wilfulness or wrong, or such gross negligence or disregard of others' rights as leads necessarily to the inference of wilfulness or wrong, because a party engaged in mining may readily ascertain by dialing that he is trespassing on his neighbor's property. In England and in some of our sister States the result reached in cases of the character under discussion, and which gave origin to the rule which plaintiff invokes, is no doubt owing to technicalities from which we happily are freed, since we have but one form of action in this State, and consequently are not hampered by mere matters of form in seeking redress for injury done. This being the case, there would seem to be neither reason, justice, nor consistency in paying a party for his labor in raising the coal to the mouth of the pit, and paying him nothing for his labor in severing it from the freehold, *i. e.*, in getting it into such condition that it could be delivered at the mouth of the shaft. If the labor of the trespasser deserves compensation in one instance, why not in another? By the operation of what principle, based upon common sense, can you thus apportion the injury done, pay for its continuation, but deny pay for its inception?"

The best reasoning on the subject in the American Courts is in *Winchester* v. *Craig*, 33 Michigan, 205, where the Court said: "Passing for the present the adjudged cases, I can see no good reason or principle why the measure of damages in actions of trover should be different from that in other actions sounding in tort; and to hold that there is such a distinction is to permit the form of the action, rather than the actual injury complained of, to fix the damages. This would be giving the form of action a prominence and controlling influence to which it is in no way entitled, and would be permitting the plaintiff, by the adoption of a particular remedy, to increase the damages at pleasure, and that to an extent which would far more than compensate him for the injury which he sustained, and would also be a positive wrong to the defendants. Such a doctrine, if carried out to its logical conclusion, and applied to many cases which might arise, would be to allow the plaintiff damages so far in excess of the injury which he sustained as to cause us to doubt the wisdom of any rule which would thus sanction a greater wrong in an attempt to redress a lesser.

"Let us suppose, by way of illustration, one or two cases which might easily arise: a party acting in entire good faith enters upon the lands of another by mistake, cuts a quantity of oak standing thereon and manufactures it into square timber; this he ships to Quebec, where he sells it at a price, which as compared with the value of the standing timber, renders the latter insignificant. Or suppose the owner, instead of selling such timber at Quebec, ships the same to some European port, and there sells it at a still

greater advance. Or suppose by mistake he cuts a quantity of long timber, suitable for masts, and forwards it to Tonawanda, or New York, and there sells it. Now, in either of these cases, would it be just to permit the owner of the standing timber, in an action of trover, to recover the value at which it was sold? Would the price for which it sold be the amount of the actual damage which he sustained from the original cutting? The price which it brought in the market was almost wholly made up of the cost and expense of manufacturing and getting it there, no part of which cost or expense was borne by the plaintiff. Why, then, should the plaintiff recover this increased value, no part of which he contributed to in any way? Certainly not as compensation for the injury sustained by him, because he sustained no such injury. Neither shall it be for the purpose of punishing the defendants, because they have committed no act calling for such punishment. It can only be placed upon the arbitrary ground that in this form of action the plaintiff can recover the full value of his property at any place he may find it, or trace it to.

"Then, again, there is no uniformity in such a rule. One man cuts timber, but does not remove it; another cuts and removes it a short distance, adding but little to its original value; while another cuts and removes it a long distance, increasing its value thereby an hundred-fold. Separate actions are brought against each, the plaintiff in each case claiming to recover the value at the place to which the timber was taken. Now, it is very evident that although the value of the standing timber in each case was the same, and the actual injury to the plaintiff in each case the same, the verdict would be very different, and the party who had in good faith done the most, and spent the most money, in giving the timber any real value, would be punished the greatest. In fact, by increasing the value he would be but innocently increasing to a corresponding amount what he would have to pay by way of damages. In other words, such a defendant, by his labor and the means which he expended in bringing the property to the market, has given it nearly all the value it possesses; and when he is sued and responds in damages to the amount of such increased value, he has then paid just twice the actual market value of the property in its improved condition, less the value of the original timber standing; once in giving it its value, and then paying for it in damages according to the very value which he gave it.

"It may be said however that all these supposed cases are exceptional and extreme; this may be true, but in testing a supposed rule of law, we have the right to apply it to extreme cases for the purpose of testing its soundness; because by so doing, if we find that when carried out it would lead to gross injustice, and would not at the same time subserve any useful purpose, but would be in violation of other well-settled legal principles, we then have a right to discard it as being unsound, not based upon sound reason or justice, and therefore contrary to the doctrine of the common law."

"There is another class of cases where the doctrine which plaintiff seeks to have applied would work gross injustice: a person honestly and in good faith obtains possession of some young animal; he may have purchased it from some person supposed to have a good title to it, but who in fact did not; or he may have purchased it at a judicial sale, where on account of some

technical defect, the title did not pass; or it may be through a case of mistaken identity he has claimed to be the owner, whereas, in truth and fact, he was not. He retains possession, feeding and taking care of the animal until in process of time it becomes full grown and immensely more valuable. This time may be longer or shorter, depending very much upon the kind of animal. If a pig, but a short time would be required; if a calf or colt, a longer. The original owner, having at length discovered his property, demands possession, which being refused, he brings trover to recover the value. Now, most assuredly, in any of these cases, the extent of the injury which the plaintiff sustained would not be the then value of the animal. He has not fed it, taken care of it, or run any of the risks incidental to the raising of stock; all this has been done by another. Why, then, should he recover this increased value? And why should the result of the labor, care, and expense of another thus be given to him? True it is that the amount involved in these cases is not so large, but the principle is the same.

"It is sometimes said that the effect of the view which we have taken would be to compel a party to sell and dispose of property which he desired to retain as an investment, at what he might consider an inadequate price, and at a time when he would not have sold it. This may be true, yet it is no more than what happens daily, and that under circumstances much more aggravating. Take the case of a wilful trespasser: he cuts the timber of another into cord-wood and burns it; or he takes his grain and feeds it; or cattle, which the owner prizes very highly, and butchers them. In all these cases the owner has lost his property, and the law cannot restore it; the law cannot do complete justice; it cannot fully and completely protect and guard the rights and feelings of others; it can but approximate to it; and because the owner in this way may be compelled to part with his property, and thus a wrong be done him, it would not improve matters to inflict a much greater wrong upon another equally entitled to protection, in order that the first sufferer might be unduly recompensed thereby. The law rather aims, so far as possible, to protect the plaintiff, but at the same time it has a due regard to the rights of the defendants, and it will not inflict an undue or unjust punishment upon them, in cases where they are not deserving it, as a means of righting an injury, especially where it would much more than compensate the owner for the injury he sustained."

Among cases denying any deduction to an innocent trespasser for his labor and expense are, *Illinois, &c. R. & C. Co.* v. *Ogle*, 82 Illinois, 627; 25 Am. Rep. 342; *Barton Coal Co.* v. *Cox*, 39 Maryland, 1; 17 Am. Rep. 525; *McLean County Coal Co.* v. *Lennon*, 91 Illinois, 561; 33 Am. Rep. 64; *Franklin Coal Co.* v. *McMillan*, 49 Maryland, 549; 33 Am. Rep. 280; *Blaen Avon C. Co.* v. *McCulloh*, 59 Maryland, 403; 43 Am. Rep. 560. The Illinois cases allow the defendant for carriage of the coal from the pit to the mouth of the mine, but the Maryland cases do not allow even for this. None of these cases contain much reasoning of the matter on principle.

Deduction was denied to an innocent purchaser from a wilful trespasser in *Powers* v. *Tilley*, 87 Maine, 34; 47 Am. St. Rep. 304 (see note 44 Am. St. Rep. 447); *Wright* v. *Skinner*, 34 Florida, 453, citing *Woodenware Co.* v. *United States*, *supra*. In this Florida case the rules for the measure of dam-

ages in trover for timber cut are thus laid down: (1) In case of wilful trespass, the full value with no deduction for labor and expense; (2) in case of innocent trespass or of purchase from such a trespasser, the value at the time and place of the first conversion; (3) in case of innocent purchase from a wilful trespasser, the value at time and place of purchase.

The latest decision seems to be in *Dyke* v. *National Transit Co.*, 22 Appellate Division (N. Y. Sup. Ct.), 360, where it was held that the measure of damages against an innocent taker of oil is the value of the oil as it lay in the earth. The Court said: "This judgment is a violent shock to one's sense of justice. It rests mainly upon *Silsbury* v. *McCoon*, 3 N. Y. 379." "The distinction is between a wilful trespasser and a mistaken one. The one knows he is wrong, and the other believes he is right. When the latter is shown to be wrong, if he makes full indemnity, justice can exact no more." (Citing *Livingstone* v. *Rawyards Coal Co.*, 5 App. Cas. 25.) "The Courts should refuse to assist so palpable an injustice, or to sanction extortion under the forms of law."

Deduction was made to the innocent trespasser in *Forsyth* v. *Wells*, 41 Penn. St. 291; 80 Am. Dec. 617; *Herdic* v. *Young*, 55 Penn. St. 176; 93 Am. Dec. 739; *Goller* v. *Fett*, 30 California, 482; *Cushing* v. *Longfellow*, 26 Maine, 306; *Weymouth* v. *Chicago & N. W. Ry. Co.*, 17 Wisconsin, 550; 84 Am. Dec. 763; *Swift* v. *Barnum*, 23 Connecticut, 523; *Heard* v. *James*, 49 Mississippi, 236; *Smith* v. *Gonder*, 22 Georgia, 353; *Waters* v. *Stevenson*, 13 Nevada, 157; 29 Am. Rep. 293; *Railway Co.* v. *Hutchins*, 32 Ohio St. 571; 30 Am. Rep. 629; *Clement* v. *Duffy*, 54 Iowa, 632; *Austin* v. *Huntsville, &c. Co.*, 72 Missouri, 525; 37 Am. Rep. 446; 36 Am. Rep. 770; *Tilden* v. *Johnson*, 52 Vermont, 628; 36 Am. Rep. 769; *White* v. *Yawkey*, 108 Alabama, 270; 54 Am. St. Rep. 159; 32 Lawyers' Rep. Annotated, 199; and the distinction was recognized *obiter* in *Dwight* v. *Elmira, &c. R. Co.*, 132 New York, 199, 202; 28 Am. St. Rep. 563; see also *Winchester* v. *Craig*, 33 Michigan, 205; *Michigan, &c. Co.* v. *Deer Lake Co.*, 60 Michigan, 143; 1 Am. St. Rep. 491; *Gaskins* v. *Davis*, 115 North Carolina, 85; 44 Am. St. Rep. 439; 25 Lawyers' Rep. Annotated, 813; *Omaha & G. S. Co.* v. *Tabor*, 13 Colorado, 41; 5 Lawyers' Rep. Annotated, 236; *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Massachusetts, 80; *Foote* v. *Merrill*, 54 New Hampshire, 490; *Wright* v. *Skinner*, 34 Florida, 453.

In Michigan the test seems to be the extent of the labor. So in *Wetherbee* v. *Green*, 22 Michigan, 311; 7 Am. Rep. 653, where an innocent trespasser cut young trees worth $25, and made them into hoops worth $700, he was held to have made them his own; but in *Isle Royal M. Co.* v. *Hertin*, 37 Michigan, 332; 26 Am. Rep. 520, where an innocent trespasser cut cord-wood and hauled it to a landing, and the landowner seized and sold it, it was held that the latter was not liable for the value of the labor of the former. In *Gates* v. *Boom Co.*, 70 Michigan, 309, and *Busch* v. *Fisher*, 89 id. 192, it was held that in an action of replevin, "a trespasser, however innocent, acquires no property in logs cut on the land of another, nor lien thereon for the value of the labor and expense of cutting, nor can he recover such value in an action of trover or assumpsit; and that the owner of the timber so cut has the right to reclaim the logs, if he can, and if he does, the trespasser, though cutting

the timber in good faith, has no claim upon the owner, either in a legal or equitable sense; and that there is no injustice in holding that such trespasser must lose the labor he has expended in converting another's trees into logs." This quotation is from the latter case, but in the former case stress was laid on the fact that the trespasser was negligent, and it was there admitted that if the owner "sees fit to bring an action of trespass or trover instead of regaining his property, he voluntarily puts himself within the rule of damages prevailing in such actions, and thereby elects to receive only a just and fair compensation for his property as it was before the trespasser intermeddled with it."

The present writer stated the rule as follows in 26 Am. Rep. 527: "Although, as we have seen from the principal case, one cannot demand compensation for his voluntary additions to the value of another's property, without the assent of the owner, in an action for the value of what he has thus bestowed, yet where he stands on the defensive and is sued for the value of the property, he will be compensated for such additions wherever he has acted in good faith. Thus in the principal case, if the plaintiff had retained possession of the wood and forced the defendant to sue for it or for damages for its conversion, he would have received the advantage of what labor he had bestowed on it in fitting it for market. This is certainly the law in this country in trespass and trover, and in replevin where the property itself is not recovered. The rule as to a wilful trespasser is undoubtedly different."

The subject is very extensively examined by Sedgwick and by Sutherland, the two leading American writers on Measure of Damages. The former writer says: "By the prevailing view, the defendant, if he acted in good faith, is allowed the value of his labor; that is, the measure of the damages is the value of the property as it was just before the defendant's wrongdoing began." "In some jurisdictions the rule is held to be different according to the form of action; the plaintiff in trover being allowed the whole value of the property as increased by the defendant's labor, while in trespass he is confined to the damage done to the realty. *Omaha, &c. R. Co.* v. *Tabor*, 13 Colorado, 41; *Skinner* v. *Pinney*, 19 Florida, 42; 45 Am. Rep. 1; *Foote* v. *Merrill*, 54 New Hampshire, 490; 20 Am. Rep. 151." The leading case on accession in this country is *Silsbury* v. *McCoon*, 3 New York, 379; 53 Am. Dec. 307, where corn was converted by a wilful trespasser into whiskey, and the product was held to belong to the plaintiff.

Job v. *Patten* is cited in Freeman on Co-Tenancy, sect. 249 *a*.

MISTAKE.

See PAYMENT BY MISTAKE, and RECTIFICATION, *post*.