

RECENT ENGLISH PRACTICE CASES.

Price, one of the respondents, who represented in the suit the equity of redemption in a great part of the mortgaged property, ought to have been brought before the Court. The main point for decision in the case was whether the purchaser of an equity of redemption could be affected by a second mortgage, to the same mortgagee, created after the purchase, on another property, or whether he was entitled to redeem the first mortgage without redeeming the second.

Lord Selborne said, p. 710, that he thought Price sufficiently represented his *cestuis que* trust for the purpose of this suit, no direction having been given by the Court to the contrary.

[NOTE.—*The Imp. and Ont. orders are identical.*]

THE QUEEN V. WHITCHURCH.

Imp. J. Act, 1873, sec. 47—cf. Ont. O. 58, r. 1 (No. 484)—Criminal cause or matter.

Held, an order of Justices under *Imp. Public Health Act, 1875, secs. 94, 96* was an order made in a “criminal cause or matter” within meaning of above section of *Imp. Act*,

[May 20, C. of A.—L. R. 7, Q. B. D. 534.]

In the above case an order had been made by Justices under the *Imp. Public Health Act 1875*, directing the defendant to fill up an ash-pit, so as to be no longer a nuisance. Under the provisions of the said Act the Justices might have inflicted a fine, which would have been enforceable as a penalty.

Counsel for defendant in objecting that the order of the Justices was made in a “criminal cause or matter,” relied on *Mellor v. Denham*, L. R. 5 Q. B. D. 467 as a decisive authority in their favour.

BRAMWELL, L. J. in the course of his judgment said :

“I think that the case before us is governed by *Mellor v. Denham*, and that we are bound by that decision. . . . The provisions of the *Public Health Act, 1875*, have been enacted as a general law for the good of the public . . . Why is not this proceeding under the *Public Health Act, 1875*, ‘a criminal cause or matter,’ within the meaning of *Jud. Act, 1873, sect. 47*? It is certainly not a civil proceeding, and it may perhaps be said that every proceeding is either civil or criminal. Therefore, independently of authority, I am disposed to hold that this is a ‘criminal cause or matter.’ The difficulty arising in this case exists in others

independently of the statute ; an indictment for the want of repair of a highway against a person bound to repair it *ratione tenuræ* is a criminal matter ; and if the person indicted is convicted, he may be fined by the Court. . . . Again, many of the offences mentioned in s. 91 of the *Public Health Act, 1875*, are nuisances at common law ; some are not. Suppose that a man is charged with one of those offences which are nuisances at common law, proceedings against him may be taken at common law, then he is assuredly a criminal ; but proceedings may be taken under the statute, and in that case he is equally a criminal. The same rule must apply as to all offences against the *Public Health Act, 1875, sect. 91*, whether they are or are not nuisances at common law, and the nature of the proceedings must in all cases be the same. Upon general principles of law, and upon the authority of *Mellor v. Denham*, I am of opinion that the case before us relates to a ‘criminal cause or matter.’”

BRETT, L. J., said :—

“The legislature has decreed that a penalty should be imposed upon a person offending against the provisions of the *Public Health Act, 1875* ; and it has been decided in *Mellor v. Denham*, that to treat the matter in that manner is to treat it as a criminal matter. . .

It is alleged that the power to impose a penalty does not turn the wrongful act into a crime, because an alternative remedy is given, namely, an order to abate or prohibit the recurrence ; but I cannot think that an alternative remedy alters the nature of the offence. I think that the present case is decided by *Mellor v. Denham*.”

COTTON, L. J., agreed that the case was governed by *Mellor v. Denham*, and that the alternative mode of proceeding did not take it out of the authority of that decision. The offence was equally criminal, whatever was the form of order made by the Justices. The summons was a proceeding in a criminal matter.

[NOTE.—*Although we have no section in our Jud. Act corresponding to sec. 47 of Imp. Jud. Act, 1873, it seems right to note the above case as illustrating our order No. 484, which though not identical, is similar to Imp. O. 62, and which declares that the new rules are not to affect “the practice or procedure in criminal proceedings.”*]