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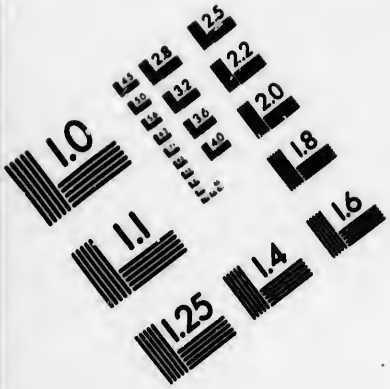

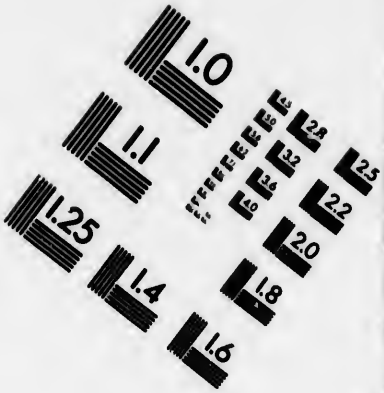

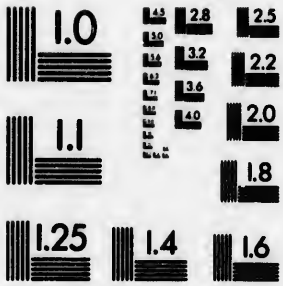

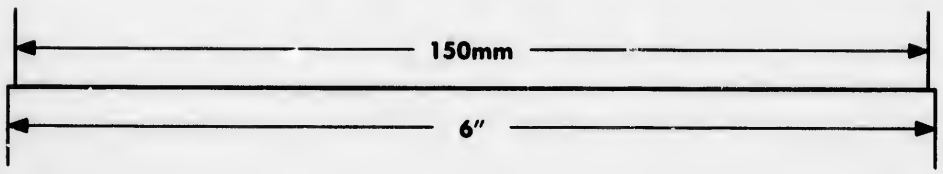

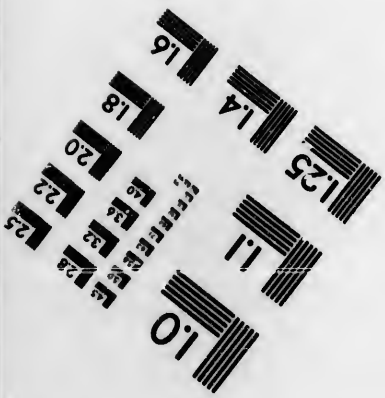

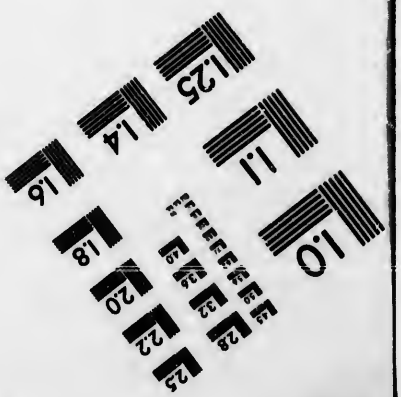

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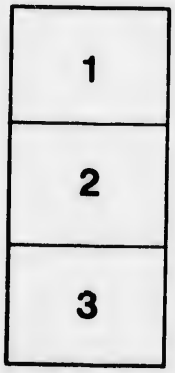

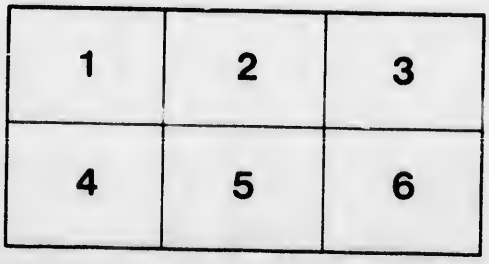

CASES

IN THE

SUPREME COURT,

NEWFOUNDLAND.

SELECT CASES

FROM THE

RECORDS

OF THE

Supreme Court

OF

NEWFOUNDLAND;

WITH A TABLE OF THE NAMES OF CASES, AND AN APPENDIX.

by Chief Justice Tucker

Ut scirent cives, quod jus de quaque re quisque dicturus esset, seque præmunirent.—Dig. 1, 2. 2. 10.

Let the Judges produce the reasons of their sentence openly; so that what is free in power may yet be limited by regard to fame and reputation.—Lord BACON, de augmentis scientiarum.

Above all, let the Judgments of the Supreme and Principal Courts be diligently and faithfully recorded; especially in weighty causes, and particularly such as are doubtful, or attended with difficulty or novelty; for Judgments are the anchors of the Laws, as Laws are the anchors of States.—Lord BACON, de augmentis scientiarum.

HENRY WINTON, ST. JOHN'S, NEWFOUNDLAND;
AND BALDWIN & CRADOCK, LONDON.

1829.

HENRY WINTON, PRINTER, ST. JOHN'S, NEWFOUNDLAND.

A

TABLE

OF THE

CASES REPORTED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT,

SAINT JOHN'S, NEWFOUNDLAND,

From the Year 1817, *to the Year* 1822.

JOHN & ROBERT BRINE, appellants,
and
MICHAEL MEEHAN, respondent.

28th July, 1817.

New trial granted by the Supreme Court, in a case where judgment had been given in the Surrogate Court against the indorser of a bill of exchange, which had been retained by the plaintiff for ten months after it came into his possession. [Post.]

THIS was an appeal from the judgment of the Surrogate Court of St. John's, given on the 12th June, 1815, to recover the sum of £53 16*s.* 6*d.* from the appellants, as indorsers of a protested bill of exchange which they paid to the respondent in the month of Dec., 1813, drawn by *W. B. Row* per procuration of *John Hill & Co.*, St. John's, Newfoundland, 2d Dec., 1813, on *John Hill & Co.*, London, in favour of the appellants.

The cause was submitted to a special jury, who gave a verdict for the plaintiff, which the court ordered to be recorded, and gave judgment accordingly; against which judgment the defendants appealed to the Su-

1817.

J. & R. BRINE
v.
MICH. MEEHAN.

preme Court, on the ground that the plaintiff had not used due diligence in sending the bill home for payment, and that he had been guilty of *laches*, in locking the bill up for several months.

Simms for the appellants, and *Lilly* for the respondent. On this day the cause having been brought before the Chief Justice by appeal, the parties admitted that the bill in question was drawn on the 2d Dec., 1813, in favour of the appellants, who in the same month indorsed it and paid it to the respondent, who held it in his possession until the month of November, 1814, when he sent it home; but John Hill & Co, the drawees, having stopped payment, were declared bankrupts, on the 6th February, 1815. The bill, of course, was protested, and *John Hill & Co.* were declared insolvent in *Newfoundland*, 25th May, 1815.

Simms, for the appellants, then proceeded to state, that the plea of custom set up by the respondent respecting bills of exchange had by no means been made out on the trial in the Surrogate Court, and urged the necessity of the holder of a bill of exchange using due diligence in presenting it for acceptance; citing, among others, the following authorities in support of the principle for which he contended,—*Bacon's Abridgment, 4th vol. pp.* 685—725; *Viner's Abridgment, 4th vol. p.* 225; *Selwin's Nisi Prius, vol.* 1*st*, *pp.* 293—294; 2*d Henry Blackstone*, 565; and *Bayly on Bills, p.* 101. He also adverted to the 15*th Geo.* 3, *c.* 31, where bills of exchange are made a legal tender for payment of *servants' wages*, which some persons had erroneously thought made them a legal tender in all cases.

Lilly, for the respondent, contended that the evidence adduced on the trial was

1817.

J. & R. BRINE v. MICH. MEAHAN.

abundantly sufficient to support the verdict which had been given; and that this case rested entirely upon what was well known to be the *custom of Newfoundland*, respecting the reciprocal rights and liabilities of the parties to a bill of exchange. He also referred to the following decisions in the Supreme Court, in which that custom seemed to have been recognized, *viz.*: *Hugh Rowe & Son* v. *Philip Leigh & Co.*, and *William Bevil Thomas* v. *Philip Leigh & Co.*

This being a case of the greatest importance to the trade of this country, the Chief Justice reserved it for further consideration; and, on a subsequent day, reversed the judgment of the Court below, with permission to the parties to have a new trial.

WILLIAM FREEMAN, appellant,
and
ROBERT KENNY, respondent.

August 4th.

A lease executed under the direction of the Court, upon a bill for the specific performance of an agreement for such lease, is *prima facie* evidence of the terms of such agreement. [Post. p. 4.]

THIS was an action brought in the Surrogate Court, and submitted to a common jury, to recover the sum of £72 2*s.* 10*d.* partly on a disputed account, and partly for damages sustained by the plaintiff in consequence of having been interrupted by the defendant in building upon a piece of ground which he had taken from defendant. The jury returned a verdict against the defendant for £42, for which sum the Court below gave judgment in favour of the plaintiff, and defendant appealed.

On this day, *Lilly*, for the appellant, and *Simms*, for the respondent, having been severally heard, the Chief Justice said:—

In this case a lease has been produced;

1817.

WM. FREEMAN
v.
ROBERT KENNY.

and it is admitted it was made between the parties in consequence of an order of Court, at the prayer of the respondent, for specific performance of an original agreement. Now a question materially arises, whether such lease must not be taken as the original agreement, or as evidence of its contents; and if so, whether the respondent, having broken the covenant respecting the obstruction of *Holly's* lights, was not liable to the re-entry of the appellant, which is complained of as the gist of the action. I shall, therefore, investigate this point more fully before I deliver judgment in this case.

WILLIAM FREEMAN, appellant,
and
ROBERT KENNY, respondent.

August 4th.

Where a lease has been executed under an order of Court, for the specific performance of an agreement, the party obtaining such lease is not estopped from proving that conditions and covenants have been introduced into it different from those which were contained in the original agreement. [Ante p. 3.]

THIS case having stood over since 31st *July*, the Chief Justice now pronounced judgment in these terms:—This case appears to have grown out of a misunderstanding between the parties to an agreement for under-letting a piece of ground for the residue of the term of a building lease. The facts appear to be as follow. The appellant, in *February*, 1815, let the piece of land, under a verbal agreement, to the respondent, for nineteen years and a half, with a condition that he was not to build upon it in such a manner as to obstruct the lights of *Maurice Holly*. A memorandum in writing to such effect was made in the presence of the parties, preparatory to a regular instrument being executed. It appears that the appellant, who was a lessee from *Hutton & Co.*, and bound down by certain restrictions in the erections to be placed on the premises, find-

1817.

WM. FREEMAN v. ROBERT KENNY.

ing that the respondent was building a house contrary to his own restrictions as a tenant of *Hutton & Co.* required him to take down so much of his building as exceeded the height to which he (the appellant) conceived himself restricted; and upon being refused, caused it to be taken down himself. It does not appear that there was anything violent or forcible in these proceedings. But *Kenny* feeling himself aggrieved by the loss of time in completing his building, applied to the Surrogate Court for a compensation in damages for the injury he had sustained in the obstruction of his building. The cause was heard before a jury, and a verdict for £42 given for the plaintiff below. In the course of argument it turned out that *Kenny* had, after the obstruction, but before action brought, applied to this Court to compel *Freeman* to perform his above-mentioned agreement, and execute a lease agreeably to the intention of the parties; and that an order of court had been made to such effect, and a lease (produced at the hearing) executed between the parties. It was contended by the appellant that this lease was the true agreement, as it originally stood, between the parties. But this was denied by the respondent; and it appeared to me, if the respondent had applied for a specific performance of an agreement, and upon obtaining an order to such effect, had actually been party to an instrument in writing, in pursuance of such order, that such instrument must, *primâ facie*, be held to be proof of the terms of such agreement; and, therefore, I directed the case to stand over until I could consult the record of the proceedings which took place in this Court, in another branch of its jurisdiction. I find, however, that the original memorandum, as well

1817.

WM. FREEMAN v. ROBERT KENNY.

as the petition of the respondent in the case, makes mention of no restrictions inthe building to be erected by him, except that the lights of *Maurice Holly* were in nowise to be obstructed or injured, and that the order of court of the 24th April merely directed a compliance with the memorandum, although the agreement, as extended afterwards, contains two covenants, against using the building as a cooper's shop, and also for a passage from *Bray's* house to *Holly's*. The lease, therefore, does not appear to be a correct statement of the original understanding between the parties, but to have been modified afterwards. Now, as it does not appear that any complaint has been made, or certainly none proved upon the record of the trial, that the lights of Mr. *Holly* have been obstructed, I do not see anything to warrant the re-entry and obstruction complained of by the respondent; and therefore I must affirm the principle of the action.—The jury have assessed the damages at £42, and the judgment of the Court below must be affirmed.

August 5th.

MICHAEL MEEHAN, appellant,
and
JOHN & ROBERT BRINE, respondents.

A Special Jury find, that it has been the custom in this country for parties to retain bills of exchange for an indefinite period, without prejudice to the holder's right to have recourse to the indorsers and drawer, in the event of their non-acceptance by the drawee. [See ante p. 8, and post.]

THIS action had before been tried in the Surrogate Court, where a verdict was given, and judgment entered, for the plaintiff.—That judgment was, however, brought by appeal before the Supreme Court, and was there reversed, with permission to the plain-

1817.

MICH. MEEHAN v. J. & R. BRINE.

tiff to bring another action; as the Chief Justice was of opinion, that the point upon which the whole case rested, viz., the existence of a valid custom in this island, that the holder of a bill of exchange might retain the same in his possession for several months after opportunities of transmitting it to England for acceptance had been afforded him, without being guilty of *laches*, had not been investigated with sufficient attention in the former trial. The cause was now submitted to a special jury, and a great number of witnesses were examined on both sides.—In a charge of considerable length, the Chief Justice stated the general law merchant respecting bills of exchange, as far as it was connected with the question at issue between these parties; and told the jury that such law must apply to this colony, as it did to all others, unless an uniform usage and custom to the contrary should be found to have prevailed. He then particularly explained the requisites to a *legal* custom, and charged the jury to find the following facts: 1st, whether such a custom as the plaintiff contended for, did or did not exist; and 2d, whether, supposing it to exist, the circumstances of the present case were such as to entitle the plaintiff to claim the benefit of it. Should their finding on both these heads of inquiry be in favour of the plaintiff, his Honour recommended them to give him a verdict, subject to the future decision of the Court as to his right of action.

The jury, after a short retirement, returned a special verdict, in strict conformity to these directions: [See it entered at length post.]

1817.

August 11*th*.

PATRICK COLEMAN
v.
The Executors of J. KENNEDY and Others.

None but Fishermen entitled, under the custom of this island, to a stay of execution until the fall of the year.

TO this action *Dawe*, for the defendants, admitted that he had no ground of defence whatever; but he prayed the Court that judgment might be given with a stay of execution until the fall of the year.

Per curiam.—The plaintiff has made out his case, and therefore he must have judgment. If any stay of execution be sought, under the custom of the island, until the season is over, the defendants must specially show that they are within the description of fishermen encouraged by national policy, and allowed to prosecute their business to the end of the season.

August 11*th*.

MICHAEL MEEHAN, appellant,
and
JOHN & ROBERT BRINE, respondents.

The custom for persons in this Island to retain bills of exchange in their possession for an indefinite period, without transmitting them to England for acceptance (as found by a special jury on the 5th instant), sustained by the judgment of the Supreme Court.—[See ante p. 1. and post.]

THIS cause was tried before a special jury on the 5th instant, when the jury returned the following special verdict. The jury find that a bill of exchange drawn by *William B. Row* by procuration of *John Hill & Co.*, on *John Hill & Co.* London, payable to *John & Robert Brine*, at 60 days' sight, dated 2d Dec., 1813, for the sum of £48 0 11*d*., was by the defendants indorsed, and paid over to the plaintiff, in the month of December, 1813, and that the said bill was held by the plaintiff until the month of October or November, 1814, and then remitted

1817.

MICH. MEEHAN v. J. & R. BRINE.

by him for payment; and on presentation to *John Hill & Co.*, London, on or about the month of February, 1815, was refused acceptance, duly protested and returned to the plaintiff, who, without any delay after the return of the said bill under protest, with charges thereon to the amount of £5 15*s.* 7*d.*, demanded payment of the defendant, who refused to pay the said bill and charges, on the ground of the plaintiff having committed *laches*, in holding said bill in his possession from the month of December, 1813, to the month of October, or November, 1814. The jury also find from the evidence, that it has been the custom in this country, for parties to hold bills of exchange in their possession for an undefined period, for their own convenience, without prejudice to the holders, and that the present case comes within the said custom. They, therefore, pray the advice of the honourable court, giving their verdict for the plaintiff, provided it shall appear to the court that the plaintiff had cause of action. After hearing a short argument by *Simms*, in which he reiterated the objections he had on a former occasion urged, to the validity of the custom which had been found by the jury, the *Chief Justice* delivered his judgment in nearly these words:—The jury have found a special custom to prevail in this island, under which the holders of bills of exchange always look to their drawers or endorsers, so long as such bills continue in this country, without any impeachment on the ground of *laches*. The custom appears to have prevailed so long, and to have been so universally understood, as to enter into and form an implied part of the contract between the parties to such bills. However, therefore, such a custom may be a departure from the common

1817.

MICH. MEEHAN
v.
J. & R. BRINE.

law merchant of England, I could not now overturn it, without a great degree of hardship, perhaps I may say *injustice*, towards the holders of bills of exchange, who took them under the implied understanding and faith, that the persons whose names were upon such bills would always remain liable to them. I must, therefore, though, I own, with *reluctance*, give judgment in favour of the plaintiff.

August 12*th*.

JOHN GREEN, appellant,
and
THOMAS WILLIAMS & Co. respondents.

B, the debtor of A, quits the island; and A, under an apprehension that the debt would never be paid, gives a considerable sum of money to a person who guarantees the payment of it, and binds himself by a regular policy of insurance to do so. The debt is afterwards paid in another country to the agent of A, by B, who subsequently returns to Newfoundland; and, on the application of A, gives him a promissory note for the sum A had paid, as the premium or the Insurance so effected by him.—Held that there was a sufficient consideration to sustain this note.

THIS case was argued yesterday, by *Lilly* for the appellant, and *Simms* for the respondents, before the Chief Justice, who adverted to all the material points of it in the judgment which he now delivered:—

Chief Justice.—In or about the month of August, 1814, the respondents sold to the appellant a quantity of fish, *to be paid for in good bills of exchange before the vessel left the wharf*. The fish was accordingly delivered, and partly paid for, leaving a balance still due of £222 18*s*. 10*d*. The respondent, *Williams*, being anxious that the payment should be completed, communicated to the master that he was not to leave the wharf till the money was paid; and was assured by the master that he would not. On that very night, however, the master privately got under weigh, and departed for Halifax. On the following morning, Mr. *Williams*, it is in evidence, was in conversation with the appellant upon the subject of the fish, when the appellant offered to give the sum of £100 and a note of hand, of his own, jointly with one *Taylor*, for the balance. To this mode

1817.

JOHN GREEN
v.
THOS. WILLIAMS & Co.

of adjustment Mr. *Williams* objected; but said, if the appellant could get any *responsible person* to join him in a security, payable at the fall of the year, he would take such security. The parties then separated, and *Green* and his friend *Taylor* were never seen nor heard of again by *Williams*, until more than a year after, when *Green* returned to St John's.

Now let us pause, and look at the present stage of the transaction. A stranger comes and purchases a valuable cargo of fish, and engages to pay for it before it is removed from the port. He pays part—leaves a considerable balance—and in the night, contrary to the express understanding and promise of the master, the fish is carried away to a distant country. The purchaser comes the next morning and proposes a new and disadvantageous mode of part payment, and without even finding a responsible security, leaves the port himself; so that the vendor has lost both his goods and his debtor, in breach of *express* contract, and I do not think I go too far in saying, of *honest and fair dealing*.

The plaintiff, finding himself deceived, and believing there was an intention to defraud him of his money, wrote immediately to Halifax, to secure the payment there if possible; and in the mean time effected an insurance in this island, against the loss to which he found himself exposed. The premium which he paid was the sum of £61 3*s*. 10*d*. It is said that this insurance grew out of a jest. It might be so; but merchants seldom throw away such large sums in mere jest. The insurance was formally entered into, and the premium regularly paid. It appears that the balance of the amount of fish was afterwards paid to the respondents'

1817.

JOHN GREEN v. THOS. WILLIAMS & Co.

agent at Halifax, and that *Green* subsequently returned to this country—when, being called upon by *Williams* to reimburse him for the expense he had sustained, by being put to the necessity of insuring against the loss to which he had been exposed, he (the appellant) gave the promissory note which is the subject of the present action. Finding, however, that he had been too hasty, he afterwards writes to the plaintiff, disavows the note, and advertises to that effect. This drew on the action, upon which a judgment was had for the plaintiff below, and an appeal instituted to this Court.

The gist of the case depends upon the legality of the consideration for which the note was made.

It is objected by the appellant, first, that the insurance made by the respondent was a gambling transaction; and, secondly, that the defendant not being a party to it, cannot be called upon to repay the premium.

Upon the first point, I am not aware of any positive law against an insurance of this description; and it certainly does not fall within the principle of wager policies.—Here was a property at stake; and the object of the insurance was to procure an *indemnity*. It was not to *make a gain*, but to *avert a loss*. At any rate, this part of the case is too obscure, and the event too doubtful, to allow me to turn the respondent over to any possible remedy to recover from the underwriters. As to the second objection, this action is not brought to recover back the premium of insurance made by the respondents, without the approbation of the appellant. It is in the nature of an action to recover damages sustained by the respondents, by reason of the appellant not performing his contract; and the note itself

1817.

JOHN GREEN
v.
THOS. WILLIAMS & Co.

is in the nature of a confession by the defendant of such damage being sustained by his failure of performance.

Suppose an action had been brought by the respondents against the appellant immediately on his arrival here, and before he gave his note, for damages sustained by reason of his breach of contract. The respondents might have shown the expense they had sustained, by being put to the necessity of insuring; and the jury might have assessed that sum among the damages they might have given. Here, then, is no new right of action given by the note, but an original demand for damages, *admitted in principle*, by the fact of the appellant giving his note, and *liquidated in the amount*, by the sum agreed to be paid thereby. How can it be said, then, that there is no consideration? At all events, here was a *moral* obligation, and a moral obligation will support an express promise, as has been already decided.* The judgment of the court below must be affirmed.

* Butler's *Nisi Prius*, p. 147,—2 East's Rep. 500.

Upon the case of *Watson* v. *Turner*, which is commonly referred to as an authority for the position here quoted, and adopted by Mr. *Forbes*, that a *moral obligation* is a sufficient consideration to support a promise, Mr. *Selwyn* has inserted the following useful note in his *Nisi Prius*, p. 58 :—

"I cannot forbear transcribing a part of the ingenious remarks, before alluded to, on this and the following case: "—The case of *Watson* v. *Turner*, Buld. N. P. 147, has "sometimes been cited in support of what has been supposed to be the general principle laid down by Lord *Mansfield*, viz., that a moral obligation is a sufficient consideration for an express promise; because, in that case, overseers were held bound by a mere subsequent promise to pay an apothecary's bill, for care taken of a pauper; but it may be observed, that this was adjudged not to be

1817.

JOHN BROOM, appellant,
and
JOHN WILLIAMS, respondent.

August 20th.

Appellant required to produce a precedent of the admission, upon the hearing of an appeal, of evidence not tendered at the trial of the cause in the Court below. [See post.]

THIS was an appeal case; and the appellant stating that he was prepared with *fresh* evidence to show that the respondent's *title was bad*.

Per curiam.—It is contrary to the rules of English courts of justice, to admit new evidence, in trying the records of former proceedings before inferior courts.

" *nudum pactum*, for the overseers are bound to provide " for the poor, which obligation being a *legal* obligation, " distinguishes the case. Indeed, in *Atkins* v. *Banwell*, " 2 East, 505, that distinction does not seem to have been " sufficiently adverted to; for *Watson* v. *Turner* was cited " to show that a mere moral obligation is sufficient to raise " an implied assumpsit; and though the Court denied that " proposition, yet Lord *Ellenborough* observed, that the " promise given in the case of *Watson* v. *Turner*, made all " the difference between the two cases, without alluding " to another distinction which might have been taken, " viz., that though the parish officers were bound by law " in *Watson* v. *Turner*, the defendants in *Atkins* v. *Banwell* " were not so bound, because the pauper had been relie- " ved by the plaintiffs, as overseers of another parish, " though belonging to the parish of which the defendants " were overseers.—3 *Bos.* and *Pul.* 250—251. It ap- " pears that the case of *Watson* v. *Turner* may be sup- " ported on *strict legal principles*, without resorting to the " doctrine of moral obligation, of which not a trace can be " found in the older cases. The defendants, being bound " by law to provide for the poor of their parish, derived a " benefit from the act of the plaintiff, who afforded that " assistance to the pauper which it was the duty of the " defendants to have provided; this was the considera- " tion; and the subsequent promise, by the defendants, " to pay for such assistance, was evidence from which it " might be inferred that the consideration was performed " by the plaintiff with the consent of the defendants, and " consequently sufficient to support a general *indebitatus* " *assumpsit* for work and labour performed by the plain- " tiff for the defendants, at their special instance and re- " quest."

1817.

JOHN BROOM v. JOHN WILLIAMS.

If such a practice has ever prevailed here, I should be unwilling to apply a strong hand to correct it in the first instance; but I must be satisfied from the record books, that such practice has prevailed. Let this case, therefore, stand over for a day or two,

It seems, then, to be the decided opinion of Mr. *Selwyn*, as well as of Messrs. *Bosanquet* and *Puller*, that *Watson* v. *Turner* is not an authority for the doctrine which it has been thought to establish; but as that doctrine has been followed in *other* cases, and as there appears to be some doubt as to the extent to which it may be carried, I shall endeavour to examine it first upon principle, and afterwards to suggest the limitations and restrictions with which it must be received and understood.

If it were practicable to enforce the whole class of moral duties by rules of law, it would, undoubtedly, be right to do so; and in such a state of society, *moral duties* and *legal obligations* would become synonymous expressions. But reason, confirmed by frequent experience, will demonstrate that, in the present condition of human nature, such an attempt would not only fail in the execution, but also be productive, in some instances, of very injurious consequences; and hence, as Lord *Kenyon* justly observed, legal obligations must, from their nature, be necessarily much more circumscribed than moral duties. Thus, the performance of a promise is certainly a very sacred part of moral duty; for he only can deserve the title of a good man, "who, though he promise to his loss, still keeps his promise true." Yet were promises deemed binding in law, *without regard to the consideration upon which they were given*, or *the manner in which they were made*, it is probable that generous and imprudent persons would be induced, by the artifices of designing and unprincipled characters, to make promises, the performance of which might even involve them in ruin; and that various *frauds* and *perjuries* would be committed in the attempt to set up, and prove by false testimony, promises which, in point of fact, had never been made. To prevent these evils the civil law wisely refused to countenance a "*nudum pactum*:" and from it we have, with equal propriety, adopted the maxim, "EX NUDO PACTO NON ORITUR ACTIO." But inasmuch as the evils to which I allude, might, in the opinion of civilians, be also guarded against *by an observance of certain solemnities in the manner of making* the agreement, or promise, as effectually (1) as by

(1) See Mr. *Fonblanque's* edition of the "Treatise of Equity," 1 vol. p. 326.

1817.

JOHN BROOM
v.
JOHN WILLIAMS.

when the appellant will be required to produce a precedent for such practice, and further to show that he was not apprized of, or had not the means of producing, the evidence which he now wishes to introduce.

a *consideration* to support it, they held that an undertaking, or promise, "VERBIS PRÆSCRIPTIS SOLEMNIBUS VESTITUM," was binding *without a consideration*; and in the same manner our Courts uphold a *voluntary bond* on account of the *solemnity of the instrument*. The common law of England appears, therefore, to correspond precisely with the civil law on this head; but our ancestors were induced, in the reign of Charles the Second, to try to throw up another barrier against fraud and perjury, by requiring that agreements which would previously have been binding if *merely verbal*, should, in certain specified cases, be reduced to *writing*, to entitle them to any legal effect; and the Courts, looking to the object and intention of the statute which was then passed, have most correctly decided (2), that the Act has, in the cases therein enumerated, rendered *writing* necessary *in addition to a consideration*, and *not substituted the former for the latter*.

From this view of the subject, it will, I think, be abundantly evident, that the *principle* upon which a consideration is required to sustain an *assumpsit*, both by the civil law and the common law of England, is the same which influenced the legislature to enact the 29 Car. II. c. 3,—viz., *a desire to check frauds and perjuries;* and hence we are furnished with a rule by which we may determine how far a "MORAL OBLIGATION" can be reckoned a *sufficient consideration* for a promise; as this must obviously depend upon the power it possesses of answering those purposes for which a consideration, of some kind or other, is deemed in law to be indispensably necessary. The expression, "*moral obligation*," was employed by Lord *Mansfield*, not in its largest signification, but in a comparatively confined sense; and it is very material that this should be constantly borne in mind, for otherwise the use of it must produce perplexing doubts and irreconcileable contradictions. Every promise which can lawfully be made, includes, strictly speaking, a *moral obligation* for the performance of it; but to say that *such* a moral obligation is a good legal consideration, is a proposition contrary to the positive language, and repugnant to the true

(2) In the important case of *Rann* v. *Hughes*, reported in a note to 7 T. R. 350.

JAMES BRISTOWE and JOHN BRISTOWE, appellants, and
Trustees of BUTLER & TODRIDGE's Estate, respondents.

1817.

August 20th.

THIS was an action to recover the sum of £723 6*s.* 8*d.* for principal and interest, due upon a bottomree bond, on the brig

[See post. p. 20].

spirit, of a long string of cases in this branch of English jurisprudence. We may safely conclude, therefore, that Lord *Mansfield* alluded to a moral obligation of a *different character*; and a little attention to the rule which has already been suggested as capable of measuring the sufficiency of all sorts of considerations will, I conceive, enable us to ascertain, with great exactness and precision, the limitations and restrictions with which his Lordship's expression must be received and understood. Now there are, we should remember, a multitude of transactions which, though they may not be obligatory in law, are, notwithstanding, binding upon the conscience of an honest man; and at the same time are as capable of furnishing, from *the notoriety of the facts which accompany them*, that *primâ facie*, or presumptive, evidence of the truth of a promise made in relation to them—which it is the main purpose of a consideration to supply—as if they were clothed with a completely legal character. For example, a loan of money fairly advanced during minority, and a debt barred by the statute of limitations, though they cannot be recovered at law, still place the debtor under a clear *moral obligation* to pay them; and, moreover, the circumstances connected with them furnish that presumptive evidence in support of an after-promise by him to pay them, which must always be wanting in the case of a naked promise to give a sum of money without any consideration, and thus the danger of frauds and perjuries, which the consideration is exclusively intended to check, is hardly greater in these cases than if the promise had been given to satisfy a subsisting legal demand. In these, therefore, there is a moral obligation, possessing, in a great degree, if not entirely, the essential properties of a legal obligation, as far as it respects the consideration of a contract; and accordingly such a moral obligation may, without any departure from principle, be permitted to support a promise. Numerous other instances of moral obligations, falling under the rule I have here endeavoured to explain, might easily be produced; but I am unwilling to swell a note which has already exceeded the limits within which I was anxious to confine it.

1817.

JAMES and JOHN BRISTOWE
v.
The Trustees of BUTLER & TODRIDGE's Estate.

Faith, belonging to *Butler & Todridge*. The cause was tried in the Surrogate Court, St. John's, on the 3d and 16th June, 1816; when that Court gave judgment for the defendants below, and against that judgment the plaintiffs appealed to the Supreme Court.

On this day, *Simms*, for the appellants, and *Broom*, for the respondents, were severally heard; the latter insisting upon several grounds, that the appellants could not claim on the bottomree bond, and resting his chief objection upon the fact of the bonds having been signed by *Butler* alone, without any authority from his partner *Todridge*.

The *Court* ordered the matter to stand over for consideration till next court-day.

August 20th.

The Trustees of PETER M'PHERSON's Estate, appellants, and HUIE, REED & Co. respondents.

The agent to an insolvent estate transfers certain bills of exchange, belonging to that estate, to some of the trustees, and states, by a memorandum in writing, that the transaction was a *loan*.—Held that the parties receiving the bills were, at all events, liable to restore the amount of them; since the transaction was *fraudulent* if the intention was to transfer the bills, not as a loan, but as a *bonâ fide* payment.

AFTER hearing all the circumstances of this case, which was brought before the Supreme Court, upon appeal from the judgment of the Surrogate Court, the *Chief Justice* said:—

It is admitted on all sides, that the bills, for the amount of which this action is brought, were part of the insolvent effects of *M'Pherson & Co.*, which had been received by *Boucher*, the agent for collecting those effects; and were handed over by *Boucher*, to *Huie, Reed & Co.* in the nature of a *confidential loan*, as it is contended by the plaintiffs, but as *bonâ fide payment*, as is contended by the defendants. I must observe that the most favourable point of view in which I can regard it, is as a *loan*; for if it be otherwise, it is a fraudulent conversion of

1817.

The Trustees of P. M'PHERSON's Estate
v.
HUIE, REED & Co.

an insolvent estate, to give an undue preference, and that preference to a *trustee*. But I shall dispose of the case upon the only evidence which has been brought before me. It is the evidence of Mr. *Boucher* himself, who, by a memorandum made at the time, and which is admitted to be in his hand, states that he "*lent* the bills to the defendant out of *M'Pherson's* estate." The transaction was entirely between *Boucher* and *Huie* (one of the defendants). The clerk knows nothing of the nature of the transfer of the bills, except that he received them from *Huie*, and was directed by *Huie* to place them to *Boucher's* credit. Now *Boucher's* memorandum, which was admitted by the surrogate, says they were "*lent*" from *M'Pherson's* estate. How shall I, therefore, without any evidence, except *Boucher's*, say they were *not lent*? Here was also an *express promise*; but I do not think it necessary to determine upon that ground. I reverse the judgment below.

Against which judgment *Mr. Reed* gave notice of an appeal to his Majesty in Council, but afterwards withdrew the appeal.

JOHN BROOM, appellant,
and
JOHN WILLIAMS, respondent.

August 23*d*.

A lessor's not availing himself of a right secured to him by the terms of the lease, of taking back the premises, does not amount to an acceptance of the assignee as his tenant, so as to relieve the lessee from his liability to pay rent.

THIS cause stood over from the 20th instant, and this day the *Chief Justice* declared, that no new evidence could be allowed to be produced in this particular case, as there was nothing to show, but what was in the previous possession of the appellant:

1817.

JOHN BROOM v. JOHN WILLIAMS.

and that it was not, consequently, necessary for him at present to decide, whether new evidence ought in *any* case to be received on the hearing of an appeal.

His Honour then proceeded to observe, that it was clear from the terms of the memorandum, that if the lessee intended to assign his interest, the lessor was to have a right of taking back the premises. But, *non constat*, because he did not disapprove of the assignee, or in other words, did not wish to avail himself of such preference, that he accepted of such assignee as his tenant, and thereby released his lessee from his first liability.

The letters are explained by the last clause in the memorandum, to relate merely to the lessor's reserved preference, in case of assignment; and as there was no act which, on the part of the respondent, or his attorney, amounted to an acceptance of the assignee as his tenant, the appellant is bound for the rent in arrears; and therefore the judgment below must be confirmed.

JAMES BRISTOWE and JOHN BRISTOWE, appellants, and Trustees of BUTLER & TODRIDGE's Estate, respondents.

August 23*d*.

The Court held, 1st, that a part-owner cannot hypothecate the vessel beyond the extent of his own interest in her, without an authority from the other part-owner to do so.—2d. That the obligee in a bottomree bond is not bound to prove that the money was applied to the purposes for which it was lent.—3d. That the obligee can only recover to the amount of the proceeds of the sale of the obligor's proportion of the vessel.—4th. That the obligee's security did not depend upon the performance of the specific voyage for the purposes of which the money was raised.—5th. That a bottomree bond is not such a transfer of property in a vessel as to require a compliance with the provisions of the Registry Acts.

IN this case the *Chief Justice* delivered the following judgment:—

1817.

JAMES and JOHN BRISTOWE v. The Trustees of BUTLER & TODRIDGE'S Estate.

This was an action brought before the Surrogate Court, for the recovery of the value of a vessel, called the *Faith*, which had been seized by the defendants, as trustees of the insolvent effects of *Butler & Todridge*, and claimed by the plaintiffs in virtue of a bond of bottomree, conditioned for the payment of the amount of certain outfits and necessaries furnished by the plaintiffs upon the security of the said vessel. All the facts are admitted in argument; and five questions are made for the determination of this Court:

1st.—That the obligor, *Henry Butler*, being only *part-owner* of the vessel, had not the right to hypothecate the *whole*.

2d.—That it does not appear that the money alleged to have been advanced, was actually expended for repairs and necessaries of the vessel.

3d.—That the appellants can only recover to the extent of the money for which the vessel was sold.

4th.—That the obligees had only a specific security *upon the event of a particular voyage*, which voyage not being performed, they must resort to their personal security against the obligor, or the owners of the vessel; and

5th.—That where an assignment, or interest in the nature of an assignment, of any property in a British port is set up, there must be a compliance with the provisions of the Register Act.

1st.—Upon the first point. It does not appear that *Henry Butler*, who executed the bottomree bond, was authorized to do so for his partner; and the general question arises how far one partner, being then at a distant point of the empire, has a right to hypothecate the share of another partner. I cannot find that this point has ever been expressly

1817.

JOHN and JAMES BRISTOWE
v.
The Executors of BUTLER & TODRIDGE's Estate.

decided; and, therefore, I must endeavour to determine upon general principles as they are applicable to the point. A general partner in trade, is considered as a partner in a ship; and as a part-owner in a ship cannot sell the share of another part-owner, it would seem to follow, that he cannot mortgage it, which, in its consequences, may amount to a sale.

Indeed, it is said in *Molloy*, and other general writers upon the subject of bottomree, that *part-owners* may pledge a ship, *to the extent* of their *respective interests*, although it is admitted, that the *master* may hypothecate the whole of said ship in case of necessity. The reason of this distinction may not appear very evident. The power of the master grew out of various exigencies, in the course of remote voyages, where access to the owners was impossible, and without which power of pledging the ship, no confidence could have been raised, and no assistance obtained; and usage has confirmed a power which was at first assumed, and probably questionable. But instances of part-owners being abroad, and necessitated to raise money upon, or pledge of, the ship, are of unfrequent occurrence, and do not appear to have been sanctioned beyond the extent of their interests.

It is to be regretted that the master had not been made a party to the bond, as that circumstance would have cured every difficulty; but as he was not, and the voyage upon which the bottomree was taken, was rather an *original adventure*, commencing and intended to terminate at an English port, where the security was given (and it is worthy of remark, *through this island* where this vessel was domiciled), than part of the first voyage, I feel myself bound to

1817.

JOHN and JAMES BRISTOWE v. The Executors of BUTLER & TODRIDGE's Estate.

hold, that the bond is only binding upon the share of the person executing it—supposing it valid in other respects.

2dly.—As to the second point, the bond expresses the sums advanced by the appellants to have been "*for fitting, furnishing, and equipping the Brig.*"

If, therefore, it were, as there is nothing in the evidence to prove the contrary, a fair and regular loan of the money for the purpose expressed in the bond, there is no necessity for the lenders to look to the application of the money; but they are entitled to their action against the owners, and to their lien (so far as it has been expressly and legally given them) on the ship, *without proving that the money was properly applied.*

The suggestions drawn from the account furnished by the appellants, against *Henry Butler*, are too remote to weigh against the positive evidence of the bottomree. It might be an account for other particulars than those furnished for the brig; and this, I understand, can be proved, if necessary, to be the fact.

3dly.—The appellants in this action, can only prevail to the extent of his obligor's share of the vessel, or the proceeds thereof.

4thly.—I cannot conceive a doubt but that the appellants had a lien upon the brig *Faith*, to the extent of *Butler's* interest, at the time of the seizure by the assignees. The vessel was mortgaged by the insolvent, with a condition that the mortgage was to be void on payment of the money advanced, within so many days after the return of the brig from her destined voyage.

The lien, therefore, commenced immediately, but defeasible upon the performance of the condition, and absolute after the term of performance had expired. A bottomree

1817.

JOHN and JAMES BRISTOWE *v.* The Executors of BUTLER & TODRIDGE'S Estate.

is a lien—and the money in this case was lent *on the hull and body of the brig, &c.*, which constitutes a bottomree.

5thly.—A bottomree bond is not such a tranfer of property in a vessel as to require any compliance with the provisions of the registry acts. It gives the creditors a *right of action* to be carried into effect by a court of justice, but not a *right of property* in the ship itself.

Upon the whole, I reverse the judgment of the Surrogate Court, and decree for the appellants to the extent of the proceeds of *Butler's* interest in the vessel.

August 23d.

In the matter of GARRETT MEADE'S Estate.

Order to Executors to render an account of their administration of their testator's estate to the Probate Court by a given day.

ON this day a memorial was presented to the Court, by *James Murphy*, for himself and his partner, *Matthew Gleeson*, stating that they had lately received certain powers from Ireland, constituting them the attornies of Messrs. *Wyse & Quans*, of Waterford, Ireland, who, it appears by the said statement, were at the fall of the year, 1816, considerable creditors of the late *Garrett Meade*, deceased; and that they have this year, sent a considerable quantity of provisions, consigned by them on a joint account, with the said *Garett Meade*, who died in the spring of the present year, leaving by his last will and testament, *James Foley* and *Robert Dooling* his executors; and which property, consigned on a joint account as aforesaid, has, at the request of the said executors, been put into the hands of Mr. *James Clift*, commission broker, who has given security in double the amount thereof, for a due performance of his duty in the disposal of said

goods: and also a certain authority constituting them the attornies of *Mary Meade*, the widow and relict of him the said late *Garrett Meade*; and praying that the Court would direct that all the goods, books, accounts, debts, and effects, belonging to the said *Wyse & Quans*, may be handed over to them, and also such property and papers belonging to the said *Garrett Meade* as the Court may think just and equitable, in order that a statement of the affairs of the said *Garrett Meade* may be sent home as soon as possible.

1817.

In the matter of G. MEADE's Estate.

It is ordered by the *Court*, that the said *James Foley* and *Robert Dooling* be, each of them, furnished with a copy of the said memorial, and that they do comply with the prayer contained therein—or, in default thereof, that they do prepare an account of their administration to the estate of the late *Garrett Meade*, and appear in Court on or before Thursday next, the 28th instant, to show cause why they do not comply with the prayer contained in the memorial.

By order of the Court,

JAMES BLAIKIE, *C. S. C.*

JOHN COCKESLEY, and ANN his Wife, *against* FRANCIS BICKLEY,

August 25th.

TO recover the sum of £2,108 4*s.* 4*d.* principal and interest of money lent to the said *Francis Bickley*, who is a partner in the house of trade under the firm of *Bickley, Angel & Co.* Newfoundland.

The *Court* took time to consider what course ought to be adopted towards an absent defendant, who has property under the attachment of the High Sheriff.

The writ was issued on Saturday last, the 23d instant, at the instance of *Richard Reed* and *Richard Langley*, the attornies of

1817.

COCKESLEY v. BICKLEY.

the plaintiffs; but the defendant being at present in England, the schooner *Charles*, of which vessel the defendant is one-half owner, was attached by the *High Sheriff* under the said writ.

The defendant having no representative in this island, the case was not gone into; as the *Chief Justice* stated that it should stand over until he should give further directions respecting the attachment of property belonging to persons not resident in this island.

HUIE, REED & Co. appellants, and The Trustees of PETER M'PHERSON's Estate, respondents.

August 20th.

From the Supreme Court, to His Majesty in Council.

Appeal to the King in Council allowed in a case where the judgment was for £100 (exclusive of costs), though the 49 Geo. III. c. 27, s. 5, only gives an appeal from judgments *exceeding* that amount.

THIS cause was originally brought in the Surrogate Court on the 7th Nov., 1816, to recover the sum of £100, stated to have been lent by *Alexander Boucher*, the agent for the insolvent estate of *Peter M'Pherson & Co.* to *Huie, Reed & Co.*; and that Court, on the 16th day of the said month of November, gave judgment for the defendants. The case was afterwards brought by appeal before the Supreme Court, and the judgment of the Court below was reversed on the 20th of the present month. An appeal to the King in Council from this decision of the *Chief Justice* was thereupon immediately entered by *Huie, Reed & Co.*, and security for the due prosecution of the appeal given by them.

In this state of the proceedings, the trustees of *P. M'Pherson & Co.* moved the Court to issue a writ of execution, on the

1817.

HUIE, REED & Co and The Trustees of P. M'PHERSON's Estate.

ground that the law regulating appeals had not been complied with, inasmuch as the judgment of the Court was for only £100, the sum sued for; and that the Act of the 49th Geo. III. c. 27, s. 5, expressly states, that it shall be lawful to appeal from the judgment in decree in the Supreme Court for any sum *exceeding* £100.

In reply, it was urged that the appeal had been regularly made, and security given for the due prosecution thereof.

His honour the *Chief Justice* stated, that whenever there was a doubt as to the intention of the legislature, the Court would always feel anxious to lean to the side of the party appealing, so as to enable him to have the benefit of a higher tribunal; and, therefore, although the act says *above* £100, and the bond taken was only £200, the Court would not issue a writ of execution, but allow the appellants to go on with their appeal. But it was ordered by the Court that, in future, the costs of the suit should be added to the amount of the judgment; and, when an appeal is made therefrom, that the bond for the prosecution of the appeal, shall be taken for double the amount of judgment and costs.

In the cause between JOHN GREEN and THOMAS WILLIAMS.

August 28th.

ON this day, Messrs. *James Macbraire*, (by his attorney, *Peter Henderson*), and *George Lilly*, the sureties of *John Green*, in the appeal which he entered from the judgment of the Surrogate Court, St. John's, on the 1st July, 1816, appeared in the Court, agreeably to the order of the 26th instant;

The Sureties of an absent principal in an appeal-bond, ordered to pay the amount of the judgment, interest, and costs.

1817.

In the cause between GREEN and WILLIAMS,

and it having been proved that *John Green* has quitted this island without leaving any property or effects here on which the *Sheriff* might levy the amount of the judgment against him, it was ordered that they, the said *James Macbraire* and *George Lilly*, do forthwith pay to the said plaintiffs in the above-mentioned cause, the sum of £61 5*s*. 7*d*. sterling, with legal interest of 5 per cent. per annum thereon. And also the costs of suit incurred by the said plaintiffs.

August 30*th*.

MICHAEL DEA *against* GEORGE WINTER.

Submission of a suit to arbitration, at the instance of the parties, under a rule of Court.

ON this day, the above-named parties applied to the Court, and stated that they wished to submit all the matters in dispute between them to arbitration; and for that purpose, Messrs. *Dennis Hannagan*, *Richard Aylward*, and *Alexander Haire*, were, by the court and the parties, nominated arbitrators in the said cause.

And, at the instance of the said parties, it was ordered that the award, signed by any two of the arbitrators, and delivered into Court, on or before the 6th day of September next, should be made a rule of the Supreme Court of Newfoundland, and considered final and binding on them, the said *Michal Dea* and *George Winter*, their and each of their heirs, executors, administrators, and assigns.

JOHN SQUARE & Co. *against* MATTHEW MOREY.

1817.

August 30th.

Case postponed on account of the absence of the defendants until the spring, with a provisional order for the intermediate custody and disposal of the property belonging to the defendants in this country.

AS this case involved property to a very large amount, (£3,716 10*s.* 0*d.*), and as all the defendants were at present absent from the Island, the *Chief Justice* this day ordered, that this cause do lie over, until 1st May next, in order to give time to the defendants to appear in person, or by attorney, to defend the action. That in the meantime an inventory be made of all the goods, property, effects and credits of the defendants, and the same be returned into court; and that the attachment be continued on the said goods, property, effects, and credits; and that if any of the goods, or effects, be of a perishable nature, that the same be sold, and the money be lodged in Court, or placed on security.

That the debts due to the defendants, be collected by Mr. *Matthew Morey*, jun., and security given that the sums received shall be forthcoming, to abide the decree of the Court in this suit.

MICH. RYAN *against* J. TERRINGTON, Esq.

September 1st.

A public officer, acting as such for the benefit of the public, is not individually liable under any engagement he may have contracted in his official character. [Upon this point, *vide.* 1. T. R. 172; 1. East, 135. 579; 5. East, 148; 2. Taunt, 374; 15. East, 384.]

THE defendant is the ordnance storekeeper, and had, in his official character, advertised for a quantity of wood, for the use of the department to which he belongs. A number of tenders were, in consequence, delivered at his office; and among them an offer by the plaintiff to furnish 150 cords, at 48*s.* per cord, was included, and accepted by the defendant as being the most advantageous to Government. A delivery of 117 cords under this contract, was admitted on both sides; and the plaintiff now sought to

1817.

MICHAEL RYAN
v.
JOHN TERRINGTON, Esq.

recover by this action, first, the balance of £24, which he contended was still due to him, on the quantity of wood he had actually delivered; and secondly, the sum of £79 4*s.* being the value of thirty-three cords which he insisted the defendant was bound to receive from him, over and above the quantity he had delivered, and which the defendant, as he alleged, had wrongfully refused to accept. The answer of the defendant to the action was, that he had paid for all the wood he had actually received, and that he was not bound to receive more than he had done.

The cause was submitted to a jury; and a number of witnesses were examined, the substance of whose testimony is contained in the foregoing statement of facts; but a considerable difficulty arose in determining in what light the jury ought to view a receipt produced by the defendant, corresponding in *amount* with the sum claimed by the plaintiff, as the balance due to him on the wood actually sold and delivered to the defendant, but differing in *date*, and some other circumstances, from the transaction which formed the subject of the present dispute.

In his charge, the *Chief Justice* told the jury, that a public officer, acting ostensibly in his official character, was not individually liable upon any engagement he may have entered into for the benefit of the public service; and that, therefore, that part of the present action which sought to charge the defendant with a breach of contract in not taking the wood to the full extent of the plaintiff's tender, certainly could not be supported; but that if the Jury believed, from the evidence, that the defendant had received from the *Commissary* the full value of the wood delivered, and had not

paid over the whole sum to the plaintiff, the defendant was accountable for the balance, as money had and received by him to the use of the plaintiff; and that the Jury ought accordingly to give a verdict for the part unpaid. With respect to the *receipt*, it undoubtedly was presumptive proof of payment; but the Jury should take all the circumstances connected with it into their consideration; and it belonged to them exclusively to decide for what purpose it was given, and to what object it ought to be applied.—Under this direction, the Jury soon returned a verdict for the plaintiff for £24.

1817.

MICHAEL RYAN *v.* JOHN TERRINGTON, Esq.

HUTTON, M'LEA & Co. *against* GEORGE RENNIE.

September 5th.

ON this day, at the instance of Mr. *Robert Hutton*, a rule was granted, ordering *George Rennie*, master of the brig *Betsey*, to appear in Court on Monday next, the 8th instant, to show cause why he refuses to fulfil a certain agreement, which was entered into between him and Mr. *Hutton*, for the charter of the said brig on a foreign voyage; the minutes of the said agreement having been taken down in writing by Mr. *William Kydd*, and approved by him the said *George Rennie*.

Order for a party to show cause why he refuses to perform an agreement.

MICH. MEEHAN *against* JOHN. & . . BRINE.

September 5th.

A Question having been raised as to the liability of the parties in this cause to the *costs* of the *two actions* that had been tried between them, the *Chief Justice* stated, that as one of the trials was granted more upon public grounds, for the satisfaction and

Where a trial had been granted, principally on *public* grounds, the costs were ordered to be borne equally by the parties.

1817.

MICH. MEEHAN
v.
J. & R. BRINE.

guidance of merchants on a very material point relating to bills of exchange, and, by consequence, affecting the interests of the whole commercial community, than for the particular advantage of either of these parties, he thought that the costs of that trial ought to be borne equally between them; but, that the costs of the other trial must follow the judgment, which had been finally given against the defendants.

September 15*th*.

LIDSTON NEWMAN, appellant,
and
JOHN GOFF, respondent,

Under the present circumstances of this country, a lessee who cultivates waste land is not to be presumed to have done so with the concurrence of the lessor, and for his benefit.

THE action out of which this appeal arose, was brought in the Surrogate Court, to recover a large sum of money, for rent of property which the defendant contended did not belong to the plaintiff. It was tried by a jury, who found a general verdict for the defendant; and judgment was accordly given in his favour by the Court below. After hearing a few observations from both sides, the *Chief Justice* said:—

The right of *rent*, must depend on the right to the *property* out of which that rent is to issue; and this brings the *title* into question. It appears, that in 1780, old *Solomon Goss* conveyed to appellant "all the plantation then in his possession, situate at Torbay, or in the possession of any other." From the general words of this instrument, old *Goss's* possession, at the time of conveyance, being the only words of description, we must look at *Goss's possession*, to see what property the appellant derived from him; and this was purely a question of *fact*, for the jury on the former trial to determine.

1817.

NEWMAN v. GOSS.

Since, then, they have given a general verdict in favour of the respondent, I must conclude that they found that the property in dispute was not in the possession of *Goss* at the time he conveyed to the appellant.—But a *point of law* has been made, *viz.*, that admitting the property in dispute not to have been taken in, or used by, the original grantor, yet if it has been done so by either the lessee or his assignee, at any period of the time, it must be presumed to have been taken in with the consent of the lessor, and to form part of the leasehold property. But this country differs so extremely from England, that I cannot hold the case cited to apply here. Newfoundland is almost entirely waste and uncultivated; and if a person holding a leasehold property were to be considered as incorporating with it all the waste which he may chance to reclaim from its wild state, I should unsettle half the titles in the island.—Let the judgment below be affirmed.

THOMAS COONEY *against* JOHN WINTER.

September 16th.

Interest allowed in a case where money had been deposited for safe-keeping, and was not forthcoming when payment was demanded.

TO recover the sum of £166 10*s.* 5*d.* for monies belonging to the plaintiff, deposited by him with the defendant. It appeared, upon the trial, that some agreement had been in agitation between the parties, by which a real security was to be given by the defendant to the plaintiff, for the payment of an acknowledged debt.

The *Chief Justice.* I have little doubt but the agreement produced contains the terms proposed by the defendant; but as there was no signing by the party sought to be bound by the agreement, I think it is

1817.

COONEY v. WINTER.

pretty strong presumptive evidence, that the plaintiff did not consider the agreement complete, and, therefore, I cannot hold that it is a bar to the plaintiff's right to recover. The plaintiff is a labouring man, who appears to have deposited his money with the defendant for safe keeping, and, therefore, it should have been forthcoming when he demanded it. If the defendant had it not then in his power, he had used it, it is to be presumed, for his own benefit, and therefore an allowance of interest, till paid is but reasonable. The presumption is, further, that the plaintiff, under an agreement to receive interest, would not easily have been brought to relinquish such right to principal and interest for a security by which he was merely to receive his principal by distant intalments and without interest.

Judgment for the plaintiff, for the sum due at the date of the last account, and interest thereon, to be computed up to the present day.

GRAHAM LITTLE, appellant,
and Trustees of
DOOLING & KELLY, respondents.

1817.

September 18th.

The trustees to an insolvent estate take possession of certain premises under lease to the insolvents, and retain the same for several months after the transfer of the property of the insolvents to them: and it was holden by the *Court*, that they were still at liberty to reject the insolvent's interest in the term, and were, consequently, only liable to pay as for use and occupation during the period they actually held possession of the premises.—It was also decided that there is no custom in this country which entitles a landlord to a year's rent when the insolvency takes place at a time before any rent is positively due.

THIS is an appeal from the Surrogate Court, in an action brought by the plaintiff, who is the present appellant, to recover the sum of £500, being for one year's rent of a certain house leased by the appellant to *Dooling & Kelly* for the term of twenty-one years. The last year's rent, ending on the first of November, 1815, was duly paid by the lessees; but in the course of the following year of the term they became insolvent, and the respondents were appointed trustees to their effects.

The *Chief Justice*. It would seem that the trustees, upon entering on their duty, were at first doubtful whether they would retain the insolvents' interest in the lease, or abandon it, and that they ultimately determined to abandon it; but as there was a large amount of valuable stock which had belonged to the insolvents, upon the premises, they entered into possession and retained the house, for the purpose of disposing of the stock, until the first day of May, 1816, when they vacated the premises, and sent the key to the appellant, who refused to accept it.

It further appears that some communications had taken place between the appellant and respondents, about the period when the house was to be delivered up; and although the paper which has since been admitted in evidence was not produced below, I was anxious to collect every proof of an *actual agreement*, in order to avoid the uncertainty of determining upon circumstances. But as the paper in question merely contains a pro-

1817.

LITTLE & Trustees of DOOLING & KELLY.

position made by the appellant to two of the trustees, is not signed by the two trustees to whom it was delivered, and does not appear to have been approved by all the trustees, and, in point of fact, has not been acted upon, I am compelled to return to the case as it has been transmitted from the lower Court, and, in the absence of any fixed and determinate agreement, decide it upon the law which applies to the circumstances and statement admitted by the parties.

In the course of the argument it has been contended, that the bankrupt laws do not apply here. As a system of insolvent debtors' law they certainly do not apply; because we have a peculiar system of our own, specially made for us, and because there are not the means here of carrying the English bankrupt laws into effect. But although the bankrupt laws, as a *system*, do not apply to us, we must always refer to decisions of the Courts at home, to guide us in the determination of those points which grow in common out of insolvent cases. With this view, English courts have had recourse to the *cessio bonorum* of the civil law; and it is remarkable that the rule which is applied in cases similar to the present, is in reality *borrowed* from the Roman code upon the subject of succession, "DAMNOSAM QUISQUAM HÆREDITATEM ADIRE NON COMPELLITUR;" so in cases of bankruptcy the assignees are not obliged to take the bankrupt's term in an estate, unless they like to do so. Now what are the circumstances before us? It is not even contended that the trustees expressed any intention of taking an assignment of the insolvents' lease. On the contrary, it appears from the evidence of *Hannigan*, who was in treaty for the house with

1817.

LITTLE & Trustees of DOOLING & KELLY.

the appellant himself, early in February, that it was mutually understood it was to be given up, but at what period does not appear to have been exactly settled between the parties. For rent, therefore, as *a rent*, they are not liable, but merely for *use and occupation*. There was no privity of relation, as of landlord and tenant, between the appellant and respondents. They merely entered, under the possession of the insolvents, for the purpose of taking and disposing of the effects which were upon the premises; and when they had performed this necessary purpose, they sent the key to the landlord, in token of their giving up the house. Regular notice and tender of rent were not necessary, because there was no tenancy to determine as between these parties. In point of fact, there was a subsisting term at the time, for it appears that, up to the very day of the trustees occupying the house, one of the insolvents *(Dooling)* continued in possession; and *non constat* but he might have determined to retain his term in the house, and if he had continued to pay his rent the landlord could not have turned him out. But it is alleged that, by the custom of this country, in case of insolvency, the landlord is entitled to a year's rent out of the effects of the insolvent; but I cannot find on record any proof of such a custom, nor should I feel disposed to follow it if I had. Surely, in this country, where property in the soil is hardly recognized as real property, the interests of landlords cannot be protected beyond those of landholders in England.—Cases may easily be supposed in which the force of such a custom would sweep away the whole of an insolvent's effects, and defeat the entire policy, as well as the direct provisions, of an *Act of Parliament*. I in-

1817.

LITTLE & Trustees of DOOLING & KELLY.

cline to believe the custom contended for, means nothing more than this;—when rent is in arrear, and the lessee becomes insolvent, the landlord, having a *right to distrain* for his rent, may commute his right for a year's, or any other proportion, of rent, which he and the trustees may agree upon; but this must be by express convention; and if there be none, the proportion to be paid must be collected from the circumstances of the right which the one party has waved, and the benefits which the others may have thereby received. In the case before us, the appellant had no right to distrain, for no rent had yet become due, and, consequently, he had no further remedy against the respondents, than for the use and occupancy of the premises during the time they actually possessed them. In estimating the value of the use and occupation, the rent reserved by the lease may be presumed a fair criterion to go by. Now the trustees occupied the house in question from the 27th December, 1815, till the 1st May, 1816, being little more than four months; and for this period there has been an allowance made by the *Surrogate* equal to half a year's reserved rent. The rent reserved seems to have been very high; and the judgment below in giving one-third beyond it, has, I think, gone to the full extent of what the appellant can fairly be entitled to. It is to be remembered that the possession of the trustees was not optional, but rendered necessary by the trust they were bound to perform, and I therefore have no hesitation in affirming the judgment of the Surrogate Court, which was for £250 against the respondents.

1817.

JONAS BARTER *against* JAMES JOHNSTON.

October 2d.

A master employs an apprentice, whom he had undertaken to teach a particular trade, in another line of business; the Court of Sessions thereupon cancel the indentures—and the Supreme Court give judgment against the master in an action brought by the apprentice's father to recover a compensation for his services during the time he was in defendant's employ.

THIS action was to recover Twelve Pounds, Three Shillings, and Fourpence, amount due as wages to plaintiff's son, while an apprentice to the defendant.

It appeared that plaintiff's son was bound an apprentice to defendant, as a *cabinet-maker*. But that defendant having no employment in that line, had taken his apprentice with him to Harbour Grace, where defendant was building a church.

That the apprentice, not conceiving himself liable to work as a *house carpenter*, and feeling that he was losing his time, by not learning his trade, came to St. John's, and complained to the magistrates, who, after having had the parties several times before them in Sessions, and being satisfied that the defendant had not employment for the said apprentice in the line of cabinet-work, cancelled the indentures.

After hearing the parties, and several witnesses produced by them, the *Court* gave judgment, that the plaintiff should recover against the defendant, at the rate of £14 14*s.* per annum up to the day on which the apprentice left the defendant at Harbour Grace.

Trustees of DALTON & RYAN *against* JOSEPH SIMMS.

October 3d.

No action can be sustained for goods sold on the *usual credit*, until after the 20th October.

THE action was brought to recover the sum of £80 0*s.* 5*d.*, of which £50 0*s.* 5*d* were charged for goods sold and delivered, and £30 for the maintenance of defendant's family while he lived with Mr. *Dalton*.

Sundry papers, books, and accounts, were

1817.

DALTON & RYAN v. SIMMS.

produced; when it appeared to the Court, that the goods had been sold and delivered on the *usual credit*, to be paid for in the fall of the year; and that, therefore, the time of payment not having yet arrived, the action for the price of them was premature. And as to the £30, the Court did not hold the defendant liable.

Judgment *pro defendente*.

HUIE, REED & Co. *against* THOMAS MILLEDGE.

[*October 7th.*

Where a cause of action arises in New Brunswick, the property of the defendant is not liable to attachment under the 49 Geo. 3, c. 27.

THIS cause came on yesterday, and Mr. *Reed* having been further heard,

It appeared that the fish, which formed the subject of the action, had been shipped by the plaintiffs, without the knowledge or concurrence of the defendant, to be disposed of on the account and risk of the plaintiff.

That the fish had been sold by the defendant, who, in December last, from St. John's, New Brunswick, advised the plaintiffs of his having done so, and that he held himself accountable for the net proceeds.

Under these circumstances, the Court considered the cause of action to have arisen in New Brunswick, and, consequently, that the Court could not attach the property of the defendant who resides there, under the act of the 49th Geo. 3, cap. 27. The suit was, therefore, dismissed; but without costs.

ROGER FLAHAVAN *against* GEO. GAMBLE.

1817.

October 9th.

A stay of execution granted, in consideration of the poverty of the defendant.

TO recover £5, for rent of a house. The defendant acknowledged the debt to be justly due; but stated, that he had no means of paying it at present; that he had a wife and family to support; and that the sum of £20, which would be due to him for wages, by his master, Mr. *Hogan*, constituted the only fund for the satisfaction of this debt, and of several others with which he was already encumbered. Under these circumstances, the Court gave judgment *pro querente*; but directed execution to be stayed; and at the same time, desired Mr. *Hogan* to hold the wages that might become due to the defendant, subject to the orders of the Court.

Trustees of CRAWFORD & Co. appellants.
and
CUNINGHAM, BELL & Co. respondents.

October 23d.

In the 49th Geo. 3, c. 27, the words "*current season*" and "*current supplies*," have an evident relation to, and are explanatory of, each other: *Season*, meaning *the time of the year when the fishery is* carried on; and *supplies*, meaning *the articles actually used in the fishery.*

THE parties having been severally heard, on a former day, the *Chief Justice* now pronounced the following judgment:

This case has raised a question upon the construction of the act of the 49th of his Majesty, commonly called the Judicature Act, viz. who is to be considered a *current supplier*, within the meaning of the act, so as to be entitled to a preferable payment, in the distribution of an insolvent's effects? As it is a question of great moment to the commercial interest of this Island, and one upon which some difference of opinion has prevailed, I have delayed passing the judgment of this court upon it, until I should be enabled to give the subject that deliberate and frequent at-

1817.

Trustees of CRAWFORD & Co. & CUNINGHAM, BELL & Co.

tention, which its importance seemed to demand. I cannot but be aware, that in the opinion which fell from the Court, upon the hearing of this appeal, I differed, in a great degree, from the opinions which appear to have been entertained by my predecessors in this seat, and were the decision that is now sought, of less importance to the community, I should defer to the precedents which have been set me, and rather follow a rule of construction, however I might be so unfortunate as to differ in opinion from those who formed it, than venture to unsettle a course of decision. But impressed as I am, with the original error in the interpretation of the act, and perceiving, as I cannot otherwise than perceive, that the consequences of that error have been injurious, in proportion to the extent to which it has been followed, I feel that I ought not to surrender my own judgment; and that there is a point beyond which courtesy may cease to be a virtue in a Court. The facts of this case are very few, and I shall briefly re-state them. In the month of December, 1815, *Andrew Crawford*, one of the house of *Crawford & Co.* purchased of the respondents, *Cuningham, Bell & Co.*, a cargo of West India produce, which was designed for the Halifax market; and which they agreed to pay for in bills, to be drawn for in January following, at six months date, on England. The cargo was consequently delivered, and sent to Halifax, and the bills drawn and remitted; but before payment was due, the house of *Crawford & Co.* became insolvent, and the bills were returned under protest.

Upon this state of the facts, the respondents brought their action in the Surrogate Court against the Trustees of *Crawford & Co.* for the *full amount* of their demand, and

1817.

Trustees of CRAWFORD & Co & CUNINGHAM BELL & Co.

recovered it, upon the ground, that the goods sold and delivered as above-stated, were in the nature of *current supplies*; or supplies furnished in the current season of the insolvency, which took place in May, 1816.

From the judgment of the *Surrogate*, an appeal has been brought, and it now becomes the province of this Court to apply its own interpretation of the law to the facts which have been stated. But it may be convenient, for the sake of perspicuity, first, to take a summary view of the state of the case before the passing of the act, and of those circumstances which probably gave rise to the particular provisions which have excited the present question.

The trade of this Island was at first confined to a simple fishery. Vessels used to resort here, for the mere purpose of catching, curing, and carrying away fish, and no articles of supply were introduced, but such as were immediately necessary for the fishery. But as the persons who resorted here were commonly in indigent circumstances, and could only raise a credit for those supplies which were essential to their fishery upon the faith of the catch of the voyage, it was natural that a local custom should grow out of this order of things; that the employer should have a preferable claim upon the fish for the payment of his supplies, and that the fisherman should look up to the same lien for his wages. This local law of preference may be traced beyond any positive enactments, and is particularly recognised in the act of 15th of His Majesty, or as it is commonly called, *Sir Hugh Palliser's Act.*

It is probable, that as the Island became populous, and new avenues of trade were

1817.

Trustees of CRAWFORD & Co: & CUNINGHAM, BELL, & Co,

opened, the local custom of preferable payment was gradually extended beyond its original simplicity; for the first Judicature Act of 1791, seems to refer to an *undue preference* amongst creditors, and goes on to apply a remedy. By the 6th section of the act 49th Geo. III, cap. 27, it is stated that it will greatly contribute to the *advancement of the trade and fishery* of Newfoundland, if the effects of persons becoming insolvent, were divided amongst their creditors *with more equality than had theretofore been practised*; and it is enacted, that as often as it should be made to appear to the Court, out of which process of attachment issued, that the goods attached were insufficient to pay every creditor to the full amount of his debts, it should be lawful for the Courts to summon the parties at a given day; and if, upon examination, it should appear that the debtor could not pay twenty shillings in the pound, to declare him insolvent, and immediately proceed to collect his effects, and distribute them *rateably* amongst all his creditors.

So far, the Act contains a simple, although an equal, system of insolvent law. But inasmuch as a large and valuable class of the community remained as formerly, without capital or credit, except such as they could raise upon the fish they might catch in the season, it was necessary to secure this credit to them by binding it up in the body of the law, and therefore an enactment, *in the nature of an exception* to the general law, immediately follows, by which it is provided that in the distribution of the effects of an insolvent, every fisherman who shall be a creditor for *wages*, become due in the then *current season*, shall first be paid twenty shillings in the pound; and in the next

1817.

Trustees of CRAWFORD & Cy. & CUNINGHAM, BELL & Co.

place, every *creditor for supplies furnished in the current season* shall be paid twenty shillings in the pound; and lastly, all other creditors equally, as far as the effects will go.

In the construction of these clauses of the Act, it must be considered a remedial statute. It states the mischief and provides the remedy;—the mischief consisted in the *inequality* which prevailed in the payment of debts,—and the remedy provided is, by enabling the Courts, upon proof of impending insolvency, to declare the fact, proceed to collect the insolvent's effects, and distribute them *equally* amongst all his creditors, giving a preference only to the *fisherman* for his wages, and to his supplier for those supplies which were advanced upon the faith of the voyage, and which are entitled to all the equitable considerations of a *lien*. To have extended such a preference any farther would have been to neutralize the spirit of the Act, and, instead of introducing a more equal mode of payment, to have created the most unequal system of insolvent law in the world. In this view of the Act, the words "current season" and "current supplies" have a natural relation, and are explanatory of each other—*season* meaning the time of the year when the fishery is carried on, and *supplies* meaning the articles actually used in the fishery; and if these words had always been confined to their natural import, no difficulty could have been raised upon the act; but by the gradual extension of the term "supplies" to all the dealings between one person and another in Newfoundland, it has ceased to have any definite or intelligible meaning, and the statute is now interpreted as if there were no such word of limitation in it as *supplies*—as if it gave an

1817.

Trustees of CRAWFORD & Co. & CUNINGHAM, BELL & Co.

indiscriminate preference of payment, to every person who shall be a creditor in the course of the year; whether it might chance to be for supplies of the fishery, or the purchase of a farm, or the luxuries of a table. In proportion also, as the term "supplies," departed from the original simplicity of its meaning, the word "season," kept pace with it, until it was found necessary to have two seasons, one for the fishery, and the other for trade; and "season," which originally signified nothing more than those temperate months of the year, when vessels might fish on the Banks of Newfoundland, was made to commence when the fishery was practically at an end.

But it is not merely for reversing the order of nature, and creating a contradiction in terms, that this departure from the act is to be deprecated. In its operation it is calculated to destroy all faith in the dealings between man and man in this Island. It gives rise to insolvencies, which are frequently forced upon unfortunate traders, because the creditors are fearful of giving time for payment, lest they should lose an equal claim to their debts; and it strikes at the root of all confidence in trade, and compels a creditor to shut out compassion from his door.

I am aware that Newfoundland has been considered as a *mere fishery*, and, by a political kind of fiction, every person in it is supposed to be either a fisherman or a supplier of fishermen. I am not disposed to interfere with any political considerations upon the subject; but I must observe that such a fiction differs from the true principle of legal fiction—IN FICTIONE LEGIS SEMPER SUBSISTIT ÆQUITAS; and it is, beside, a great departure from the fact; since there

1817.

Trustees of CRAWFORD & Co. & CUNINGHAM, BELL & Co.

is a considerable trade from this island, sanctioned by Parliament, and independent of the fishery. Witness the several acts which were passed in the 51st year of the King, those which have passed since, and the act of the last session of Parliament, authorising a reciprocal trade between this Island and all the other colonies. But we have no occasion to look further for an example than to the case before us, which was a shipment of *West India produce from this port to Halifax;* and which, without doing violence to common sense, cannot be considered as a supply for the fishery of Newfoundland. Such are my sentiments upon the act; and under the impression of them, it is impossible for me to affirm the decree of the Court below. I have a consolation in knowing, that if my humble judgment should err, that it is in the power of the parties to have it corrected; and I shall hope, that as this is the leading case of a class of cases, involving a very large amount of property, that the parties will take the benefit of an early appeal to his Majesty in council.

Judgment reversed.—Against which judgment, the respondents gave notice of an appeal to His Majesty in Council.

ABRAHAM MALZARD *against* HUIE, REED & Co.

October 28th.

Where goods are sold *on credit*, the price thereof is subject to attachment in the hands of the vendee, under an execution against the vendor.

PEMBERTON, of Burin, was indebted to *Huie, Reed & Co.*, who commenced their suit against him in the Surrogate Court, at St. John's, and recovered judgment on the 25th June, 1817.

Before this judgment in favour of *Huie, Reed & Co.* was pronounced, an action was commenced, and an *attachment* sued out,

1817.

MALZARD v. HUIE, REED & Co.

by *Samuel & George Moulton*, of Burin, dated 4th May, 1817, under which the fish of *Pemberton* was attached in the hands of his attorney *Mulloy*. During the force of the attachment, *Pemberton*, who was then at Halifax, wrote to *Mulloy*, under date 15th May, directing him to dispose of the fish in his hands, and apply the proceeds to pay the amount of certain bills (to which he was a party) then under protest. Upon communication between the parties, *Samuel & George Moulton withdrew their attachment*, and the fish was then sold by *Mulloy*, the agent of *Pemberton*, to *Malzard*, in consideration of his *(Malzard's)* becoming bound by promissory note, or undertaking, to pay the said plaintiffs *(Moultons)* and one *Hamilton* the amount of their demand against *Pemberton*. This transaction took place and was completed by the 14th June, and the fish delivered to *Malzard*, who brought it to St. John's, where it was immediately attached by *Huie, Reed & Co.*, upon the alleged ground that the above was a collusive transaction, and that the fish still remained the property of *Pemberton*.

The *Chief Justice* ordered the case to stand over for proof of the facts on each side; and, in the mean time, plaintiff to be allowed freight, at the rate of 1*s.* 6*d.* per quintal, by *Huie, Reed & Co.*, who were to give security for the balance.

NOTE.—Another action arose out of this proceeding, in which the present plaintiff sued the *High Sheriff* for having illegally, as he insisted, attached the fish which formed the subject of dispute between these parties. After a full investigation of all the circumstances connected with the transfer of the fish to *Malzard*, the *Chief Justice* held that the sale was *not fraudulent*; but, at the same time his Honour decided, that as the price of the fish had not been paid, the sum to which it amounted was attachable in the hands of *Malzard*.

Trustees of CRAWFORD & Co. appellants,
and
HUNTERS & Co. respondents.

1817.

October 28th.

Articles really necessary for the fishery, and furnished, *bonâ fide*, for the prosecution thereof, are entitled to a preference as *current supplies*, without reference to the period of the year in which they were issued, provided they were supplied *after the close of the preceding season.*

THIS action was brought in the Surrogate Court to recover the sum of £1447 9*s.* 0*d.* as current supplies for 1816, being the amount of goods sold and delivered by the respondents to the appellants in the month of December, 1815, *after the close of accounts* between the parties for that year.

The bills which were drawn for payment of the above sum having been returned under protest, the respondents commenced their action for the amount, and obtained a judgment below, from which the present appeal was brought to the Supreme Court.

On this day his Honour the *Chief Justice* gave the following judgment:

As the facts of this case bring it within the *principle* laid down by this Court in the case of *Cuningham, Bell & Co. versus* Trustees of *Crawford & Co.* it must follow the same course of decision, and the judgment of the *Surrogate* must be *reversed.* But some doubts appearing to rest upon that decision, whether a creditor for supplies furnished *before the beginning of the fishing season*, as defined by the Court, is to be considered a *current supplier* of that season; and it being desirable that every doubt should, as far as possible, be removed; I shall take this opportunity of explaining the scope and object of the decision, which appears not to have been accurately understood.

The case of *Cuningham, Bell & Co.* was intended to draw a broad line of distinction between the *general trade* of this island, and *the fishery*, properly so called. In the form-

1817.

Trustees of CRAWFORD & Co: & HUNTERS & Co.

er to enforce a more equal payment of debts, and in the latter to secure to the current supplier that preference which was intended to be given him by law, and which must always be endangered, and often destroyed, by admitting every creditor to rank indiscriminately with him. By protecting the security of the supplier, the credit of the fisherman is increased; and by advancing the fisherman, the fishery is advanced. The Court, in defining the terms "*season*" and "*supply*," was anxious to avoid fixing any precise time for the one, or enumerating the articles which should compose the other, but to leave every case to be determined by its own facts. It is always hazardous to lay down general rules, because it is difficult so to frame them as to meet every possible case; and to fix any precise time when the supply for the season should begin, would be to fix upon the Court the necessity of sometimes doing injustice. This much may be safely said: If the articles supplied be really essential to the fishery, and be advanced to the fish-maker for the purpose, and with the *bonâ fide* intention, of enabling him to commence or continue his usual occupation, they are current supply; and the Court will not stop to inquire on what day, or in what month, the articles were advanced, provided they were supplied at any time after the close of the preceding season.

The *Court* reversed the judgment of the Surrogate Court; and the respondents gave notice of an appeal to his Majesty in Council.

1817.

BAINE, JOHNSTON & Co. *against* JOHN NICHOLS & Co.

October 28th.

Order to supplying merchant to furnish a statement of his account with one of his dealers, that the proceeds of the year's voyage may be distributed *ratably* among the current suppliers.

THE plaintiffs having obtained judgment against *Edward Jellance*, a dealer of the defendants, on the 16th September last, subject to other current claims, on this day, at the instance of the plaintiffs, an order was issued directing defendants to return into this Court, on or before the 10th day of November next, a true and correct statement of the account current between them and the said *Edward Jellance*, so that a ratable distribution of this year's voyage may be made to the current suppliers.

Exparte, GRAHAM LITTLE, in the matter of DOOLING & KELLY's insolvency.

October 30th.

If premises which have been mortgaged be destroyed by fire, after the insolvency of the mortgagor, and whilst they were under the controul of the trustees, the mortgagee can claim upon the general funds of the insolvent.

AFTER hearing the parties in support of the petition and against it,

The *Chief Justice* said: This is a petition presented by *Graham Little*, one of the creditors of the insolvent estate of *Dooling & Kelly*, praying to be admitted to a ratable share in the distribution of the estate.

It appears, by the statement of the parties, that the petitioner formerly carried on a considerable business in St. John's, as a shopkeeper; that being about to retire from business, he sold his stock in trade to *Dooling & Kelly* for the sum of £5,130, and as a security for the payment, took a mortgage upon certain houses, to be void on payment of the above sum by three even instalments at certain specified times; but the mortgage-deed did not contain any formal covenant for payment of the money.

1817.

Ex parte, GRAHAM LITTLE in the matter of DOOLING & KELLY'S insolvency.

In pursuance of this deed, *Dooling & Kelly* entered into petitioner's business, as *general shopkeepers*, and took possession of his stock and trade. The first instalment was regularly paid; but in the month of November, 1815, before the remainder, amounting to the sum of £3,420 had become due, they were declared insolvent, and trustees were appointed to collect their effects, and divide them among the creditors according to law.

Soon after the insolvency the petitioner proposed to the trustees to give up his claim upon the insolvents' effects, upon condition that the above-mentioned houses, together with the arrears of rent, should be delivered over to him. To this proposal there appears to have been no direct reply; but it would seem that the trustees did not deem it right to accede, inasmuch as they afterwards received the rents of part of the mortgaged premises, and the petitioner never entered into possession of them. Before anything, however, was done, the whole of the mortgaged property was destroyed by fire; and in consequence of the loss of his security, the petitioner claimed to rank as a general creditor upon the estate of the insolvents; and with this view he wrote to the trustees, who replied that the *debt was not disputed*, and that he would be entitled to a share of the dividend when the *current supplies*, and other *preferable claims*, should have been paid 20*s.* in the pound.

Upon this admission by the trustees, I shall merely observe, in passing, that it is the duty of the Court, under whose authority the trustees are particularly placed, not to suffer the interests of creditors to be injured by unguarded admissions.

Unless, therefore, the claim of the peti-

1817.

Exparte, GRAHAM LITTLE in the matter of DOOLING & KELLY'S insolvency.

tioner may be found to rest upon a more solid foundation, this admission will not support it. These are the principal facts, upon which two questions have been raised for the consideration of the Court; is the petitioner's debt a good subsisting demand against the general funds of the insolvents? and is the fund itself to be divided equally amongst all the creditors, or only amongst the creditors of the year 1815, the year of the insolvency?

Upon the first point, it is not disputed that the mortgage was given for a *bonâ fide* debt. Indeed, every mortgage implies a *debt*; and although there may be no covenant for the payment of it, yet the mortgagor continues liable in equity;—it has been expressly so decided.

In cases of bankruptcy in England, if a creditor hold an insufficient security for his debt, he may have the security sold and applied in the first place, to the payment of his demand, and prove the balance, if any remain due, under the commission; and it should seem, upon the same principle, if the property upon which a specific security is held, be deteriorated, or destroyed, the creditor may resort to the general fund in the hands of the debtor or his assigns.

A doubt did certainly present itself to me, at the hearing of this petition, whether the debt which is now demanded, being payable *at a day after the bankruptcy*, was not thereby destroyed. For regularly, at common law, a contingent, or *future debt*, was not provable under a commission of bankruptcy; and the statute 7th Geo. 1st., which was intended to remedy the law, does not apply here. But, upon looking particularly at the statute, it will be found to be *declaratory* of the law; and it is also to be observed that the act for

1817.

Exparte, GRAHAM LITTLE In the matter of DOOLING & KELLY'S insolvency.

regulating insolvencies in this Island, speaks of such persons "as shall be creditors," and would seem intended to have a *prospective* force.

Before I enter upon the second point, I shall direct the accounts to be produced, and the proceedings of the trustees to be laid before the Court.

November 14*th*.

A writ of *Habeas Corpus* to remove the body of *Pat. Kent* from the gaol at Ferryland, and a writ of *Certiorari* to remove certain proceedings in the Court of Sessions, at Ferryland, into the Supreme Court, issued by the *Chief Justice*.

ON this day, *Dawe* (upon the affidavit of *Patrick Crane*) moved the Court to issue a writ of *habeas corpus*, to bring up the body of *Patrick Kent*, whom he stated to be in confinement in the gaol at Ferryland, under a sentence passed on him by *John Baldwin*, *Robert Carter*, and *Andrew Morrison*, Esqs. justices of the peace for the district of Ferryland. He also moved the Court for a writ of *Certiorari*, to remove the proceedings held in the said Court of Sessions in the cause entitled the *King* v. *Patrick Kent*.

The *Court* granted both his applications, and the several writs were issued accordingly.

November 14*th*.

Order to a party to produce an account, upon oath, of the property and effects in his hands, belonging to an intestate estate.

In the matter of J. ENDERCOTT's Intestacy.

IT having been stated to the Court, that *John Endercott*, of the parish and county of Devon, England, lately died intestate, leaving certain property and effects in this island, part of which is stated to be in the possession of Mr. *William Butt*, of Western Bay, planter, his late master; it is, therefore, ordered by the Court, that he, the said *William Butt*, do forthwith make out his account current with the estate of the said deceased, and certify the same upon oath.

1817.

In the matter of ENDERCOTT'S Intestacy.

It is further ordered by the Court, that he, the said *Wm. Butt*, do, immediately on the receipt of this order, transmit the said account, together with such balance as remains in his hands, belonging to the estate of the said deceased, to the clerk of this Court; at the same time, transmitting an account of such goods, chattles, and effects, as may remain in his hands, or in the hands of any other person residing in Conception Bay, so far as comes within the knowledge of him, the said *William Butt*.

WINTER *against* WINTER and others.

November 20th.

In an action in which one party was sued as the principal, and two others as sureties, in an annuity bond, the Court gave judgment against the principal, with permission to the plaintiff to look to the sureties, in the event of his not being able to obtain satisfaction from the principal.

THIS was an action brought by *George Winter*, as the attorney of his father *James Winter*, to recover the sum of £200, being one year's annuity due by Mr. *John Winter*, to his father, *James Winter*, on the 20th November, 1816; the payment of which was secured by a bond executed by the present defendants.

Mr. *George Winter* proved his having demanded the money; that Mr. *John Winter* had refused payment; that he had informed Mr. *Gill* and Mr. *Langley*, the executors of Mr. *Knight* (the other defendant), of such refusal, and that he had, therefore, brought the present action to enforce the payment.

Mr. *John Winter* gave a statement in writing, of his defence; and *Simms*, was heard on behalf of the sureties.

The *Court* gave judgment in favour of the plaintiff against *John Winter*, in the sum sued for; and intimated to the plaintiff, that the other defendants would become liable, if satisfaction of the debt could not be obtained from *John Winter*.

1817.

December 2d.

A servant in the fishery who takes the supplying merchant's bill in payment of an order drawn by his employer for wages, thereby discharges the master from all liability to pay him.

PHILIP MEANY *against* THOMAS PYNN.

THIS was an action brought to recover the sum of £22 2*s.* 9*d.*, being the amount of a *servant's wages*, for which a bill of exchange had been drawn under the following circumstances. The plaintiff was shipped by the defendant in the spring of 1815, as a fisherman, and was to receive as wages for the season the sum of £30, to be paid in cash or good bills of exchange at the close of the season. An order was drawn by the defendant in favour of plaintiff upon his supplying merchants, *Robert Johnston & Co.* of this island, for the sum of £20, being the balance of wages due from the defendant to plaintiff, upon a statement of their accounts.

The order was accepted by *Johnston & Co.*, and in payment thereof, *they* drew a bill of exchange on Greenock, in favour of the plaintiff, by whom it was indorsed over, and in the course of negotiation presented for payment, but being refused, it was returned to this island under protest for non-payment. Upon this state of the case, the plaintiff brought his action against the defendant for the balance due him for wages for the season of 1815, and also the expenses to which he had been put, in consequence of the bill he had received being dishonoured.

Per Curiam. This case, however small in amount, involves a point of considerable magnitude and importance, *viz.*, how far a planter, after having given an order for wages upon his merchant, and the merchant having accepted it, and drawn a bill of exchange in favour of the servant for the amount, continues liable for the wages for which the order was drawn.

1817.

MEANY v. PYNN.

The rule of law which prevails in other countries, by which a party to a bill, or other security for payment of money, is discharged by the holders accepting a *new security*, is perfectly clear; but there are circumstances connected with similar transactions in this island, which make the rule not so clear in its operation here. In the first place, the servant usually contracts to be paid in a *good* bill of exchange on Great Britain or Ireland; and as the employer, who is seldom but one remove above the servant, has no means of drawing such a bill, it might be presumed that the employer intended to guarantee the goodness of the bill upon his faith in his merchant, although he might not be, *de facto*, a party to it. But, on the other hand, it might be said that if the employer had intended any such guarantee, the bill should have been drawn in his favour, and by him indorsed to the servant, who would then have had his double security upon the bill; and that the circumstance of not having resorted to so natural a way of fixing this responsibility of the planter, raises a presumption equally strong, that the planter did not intend to guarantee his merchant's bills.

In cases which admit of doubt, from the absence of express agreement, principles drawn from general convenience and public utility may fairly be called in to determine the balance.

In most instances the planter is a mere servant himself, and possessed of little credit besides that which he derives from the circumstance of his connection with the merchant. The merchant pays the disbursements of the voyage, receives the fish, and ultimately discharges the servant's wages, so far, at least, as the effects of the voyage will go.

1817.

MEANY v. PYNN.

It is to the produce of the voyage itself that the servant first looks for his payment; and it is in looking to this source of payment that the law has strongly protected him; but it is the merchant who receives the fish and oil, and who always receives them subject to the *lien* of the servant for his wages. If the merchant were to be released from this liability, and considered as a stranger in the transaction, the servant would most frequently be the greatest sufferer.

If, then, for certain purposes of protection to the servant himself, the merchant is considered as a party to the contract between the servant and the planter, would it not be weakening this protection, by holding that, in giving his bill of exchange, the merchant merely acted as an indifferent person, and in the event of the bills being dishonoured, and his estate becoming insolvent, that the servant is to be considered in the light of a general creditor, and not entitled to any preference of payment for wages; for, correctly speaking, wages are the reward due from the person beneficially interested in the services performed to the person performing such services.

Now, if the bill of exchange, which is generally expressed as the mode of payment for wages, is understood to be the planter's bill of exchange; or, in other words, that the planter still continues liable for the wages of the servant, notwithstanding such bill of exchange, it must follow that the bill of exchange itself carries no specific claim for wages along with it, so as to be entitled to a preference of payment in the event of the merchant who drew it, becoming insolvent; and, short as my own experience in this Court may be, it is sufficient to convince

1817.

MEANY v. PYNN.

me, that, as the solvency of the planter depends upon the solvency of his merchant, if this preference of payment were lost to the servant, he would, most commonly, lose his wages along with it. And the uniformity of justice requires that the same rule of construction should always be applied to similar cases; and that a bill of exchange should not be considered as good for wages, if the merchant's effects will pay it; and no bill at all, if the planter be the better paymaster of the two. Circumstances, however, may vary the relation of the parties to a transaction in other respects like the present. For example, an express agreement, or an understanding amounting to an agreement, would do so; but, in the absence of all agreement whatever, I must decide upon popular principles; and it affords me a consolation to think, that the decision I am about to pronounce in this case is consonant to the rules of determination in England.—I shall, therefore, hold, that the servant, in taking the merchant's bill in payment of an order drawn by his employer, thereby discharges the planter, unless a contrary intention of parties be shown.

In deciding in this way, however, I am aware that my limited acquaintance with the business of this country leaves me very open to error in forming my judgment; and I shall, therefore, be always ready to listen to any new arguments which may be made upon the subject.

1817.

December 8th.

PATRICK KEEF *against* Trustees of SHANNAN & Co.

Servants in the fishery who have taken, at the close of the season, bills from the supplying merchant in payment of their wages, are entitled, upon the return of those bills under protest, and the insolvency of the drawer, to claim upon his estate as for wages.

PER CURIAM.—This case is the converse of that of *Meany & Pynn*, and furnishes a practical illustration of the reasoning upon which that case was decided. The plaintiff was shipped by one *Murphy*, a planter, in the year 1815; and at the close of the season received a bill of exchange, drawn by *Shannan & Co.* who were the receivers of his fish and oil, upon a branch of the same house in Greenock. The house failed in the spring of 1816, the bill was returned under protest to this country, and the planter has not a farthing in the pound to pay the servants. If, therefore, the bill of exchange which the plaintiff received be not available to him as a preferable claim upon *Shannan's* estate, he must lose his wages altogether.—That a bill for wages carries a preferable claim, has been already decided; and it only remains to inquire how far the bill in question, being drawn in the fall of the year, and the insolvency taking place in the spring of another year, will affect this particular case.

The act of the 49th of the King, gives a preference to the fishermen for wages become due in the *then* current season; which, taken literally, means the current season of the fishery. But in giving effect to the provisions of this act, we must remember that it is the practice of the Courts in this island to discourage insolvencies during the fishing season, for reasons of evident policy; that wages, in reality, are not payable until the close of the season, and that when they are paid, in pursuance of the statute, it is in *bills of exchange*, the goodness or badness of

1817.

KEEF v. SHANNAN & Co.

which cannot be ascertained until they are sent home and presented for payment; which must occasion a delay of some months, and, without any imputation of *laches* on the part of the servant, may throw him entirely out of the protection of the act, if the word *current* be confined to the exact limit of the season. To give the law any operation at all, it must be construed to include all the interval between the close of one season and the commencement of another (while the proceeds of the voyage may be supposed to be not entirely appropriated, and new relations growing out of the approaching season not yet contracted); during this time, the reason of the thing requires, that if a bill for wages be dishonoured, the demand for which it was given should still subsist in the full force of a prior claim against the drawer of his effects.

To give the law a contrary interpretation, would be to make it a dead letter. It is rather to be lamented that its provisions had not gone further, and given the creditor for wages of the preceding season an equal claim with the supplier of the same period; for the fisherman is clearly the first object of the care of the legislature. But since this preference is confined to the current season, it becomes the duty of the Court to give that liberal interpretation to the Act which may secure to the fisherman the benefit which was intended to be conferred upon him.

As, therefore, the merchant who may have furnished supplies for the season, is considered a current supplier within the equity of the statute; so the servant who may have received a bill for wages, is entitled, upon the faith of such bill, to have a preferable claim for his wages, although the sea-

1817.

KEEF
v.
SHANNAN & Co.

son be past in which they were earned, provided it be before the commencement of a new season.

In determining the case in this way, I am led to believe that I have fulfilled the intention of the legislature, without deviating from any principle of law, or doing any violence to propriety in language.

The principle of the case being disposed of, the next thing to be considered is its bearing upon the estate of *Shannan & Co.*, part of which it appears has been already distributed in conformity with the rule of interpretation which held all credits whatever within the year to be supplies for the current season of the fishery. It is difficult how to deal with a case so circumstanced. Equity, perhaps, would decide that the loss should fall equally upon all who are interested in the residue of the estate. Therefore let the servant's wages, due upon bills drawn in 1815, be computed in such ratio to the residue of the estate, as the full amount would have been to the whole estate, provided there be assets sufficient to pay all that stand upon similar claims.

JAMES SHAW *against* PETER LEMESSURIER.

1817.

December 9.

The owner and master of a vessel may recover freight for the carriage of goods which have been destroyed in consequence of having been shipped in *an improper condition.*

Quære, if freight can be recovered for articles which perish from an *inherent principle of decay.* As suppose fruit to be *entirely destroyed* through the length of the voyage, and the heat of the weather, whilst the boxes in which it was inclosed are landed in a perfectly sound state.—The question is, can freight be demanded for them? It is remarkable that this case seems not to have received any direct adjudication in an English Court of Law. In the *West India trade* the freight is payable upon the quantity of sugar *delivered*, which is invariably *less* than the *quantity shipped;* and this furnishes, to a certain extent, an argument *against* the right to freight in the case put hypothetically. But the usage of a *particular trade*, which may possibly be grounded on circumstances *peculiar to it*, cannot determine a *general principle* without close investigation of the *reasons* upon which the practice was established. [See *Winsor* v. *Stabb*, in the Appendix.]

PER CURIAM. This is an action to recover the amount of freight claimed for the carriage of a cargo of potatoes, turnips, and other articles, from Prince Edward's Island to this port. There was no written contract of affreightment; but the bill of lading expressed the quantity of goods received on board, and stipulated for payment of £100, upon their delivery at St. John's.

The vessel sailed about the beginning of November, and had favourable weather, and a short passage of five days; but upon her arrival here, a great *deficiency* has been found in the potatoes and turnips, on delivery. This deficiency constitutes the ground of resistance to the payment of freight. The defendant contending that he is not liable for freight, until all the goods which were shipped are delivered; and the plaintiff maintaining that all the goods have, in reality, been delivered, but that in consequence of some of the potatoes being in a *frosted condition* when they were shipped on board, there has been a great destruction among them, as well as a diminution in bulk.

Several witnesses have been examined on the part of the plaintiff; and from the whole of their testimony, it appears that part of the cargo was actually put on board in a frosted state, and the greatest loss among the potatoes was in the situation on board the vessel where these frosted potatoes were so put on board. It is proved that when they took

1817.

SHAW
v.
LE MESSURIER.

heat from the hold of the vessel, the frost was converted into wet, and communicated with the rest, so as to leaven the whole contiguous mass with corruption.

It has been attempted to show that the deck of the vessel was insecure; that there was no lining round the main-mast, below which the greatest loss happened. But this is successfully refuted by the testimony of the mate, who swears there were wedges which fitted tight, and that dunnage was also put round the mast to protect the cargo; and a witness, who was casually called in Court, proves that the vessel is perfectly tight.

It is evident, that a great loss has happened; and it is, I think, proved that a great part of this loss has been occasioned by the frosted condition in which the potatoes were originally shipped. But how shall we account for the loss in the *turnips*, which generally arrived in good order?

Much reliance is placed upon this fact by the defendant, who argues from it that there has been a great *embezzlement of the cargo*. Supposing this presumption to be partly true, yet I think there are circumstances in this case, which go a great way to relieve the responsibility of the owners.

The cargo was shipped to be delivered in St. John's. During the time they were in the exclusive charge of the master of the vessel, the owner was unquestionably bound for their safe-keeping.

But it appears in evidence, that the *potatoes were retailed* on board; that a clerk of the consignee was sent on board to sell them; and that even the master and mate assisted in selling and receiving the money for small quantities. Surely it was not part of the original contract that the vessel should

1817.

SHAW
v.
LE MESSURIER.

be used in this way. Besides, the consignee sent his own clerk on board to retail the cargo, and must be considered as thereby taking a delivery of the cargo and removing the responsibility of the owner, since the authority over, and disposal of, the cargo were placed in other hands than those of his appointing.

Upon the whole, I think the defence cannot be sustained; but as I am unwilling to release the owner altogether from his engagement, as to the delivery of the goods not proved to be destroyed, I shall hold him liable for the deficiency of the turnips.

Judgment for the plaintiff, £100, subject to the deduction of the value of five bushels of turnips.

PATRICK WALSH *against* SAMUEL G. CARTER.

December 10*th*.

Where the distance of the settlement in which the cause of action arose, rendered it difficult for the party whose account was disputed to support it by evidence, the *Ch. Justice* gave judgment for the sums in controversy; but at the same time granted the defendant permission to bring an action to recover back the money which, under the present bearings of the case, he held him liable to pay.

THE plaintiff had been a servant to the defendant, and the present action arose upon some charges which had been made by the defendant in the account furnished by him to the plaintiff. The sum in dispute amounted to £9 8*s*. 6*d*.; and included the following litigated items, *viz*., pair of boots, £2 5*s*. 0*d*.; summer expenses and extra provisions, £2 18*s*. 6*d*.; five days' neglect, £1 5*s*. 0*d*.; and time not served, £3 0*s*. 0*d*.

The *Court* considered the evidence adduced by the defendant in support of the two first charges, quite satisfactory; but in the absence of sufficient proof to establish the propriety of the two other charges, the *Chief Justice* gave a judgment for the plaintiff upon them; at the same time intimating to the defendant, that as the transaction had taken

1817.

WALSH v. CARTER,

place at a settlement remote from St. John's, he would permit him to bring an action to recover back the money now adjudged to the plaintiff, if he should think proper to do so.

Memorial and Order for superseding THOMAS LANE's Insolvency.

December 10th.

Declaration of insolvency superseded, at the prayer of the creditors and insolvent.

ON this day a memorial was presented and read, of which the following is a copy:

To the Hon. FRANCIS FORBES, *Esq. Chief Justice, &c. &c.*

The Memorial of WILLIAM HAYNES and JOHN THOMSON, trustees to the insolvent estate of *Thos. Lane*, of Ragged Harbour,

SHOWETH:—

That on the 16th day of November, 1816, *Thomas Lane*, of Ragged Harbour, planter, was declared insolvent in the Surrogate Court, and your memorialists were appointed trustees. That your memorialists appear to be the sole creditors, as no other claim has been made. That an agreement, with which your memorialists are satisfied, has been proposed by the said *Thomas Lane* for the liquidation of his debts.

We, your memorialists, for ourselves, therefore, with the consent, and at the desire, of the said *Thomas Lane*, request your Honour to order the said declaration of insolvency to be superseded.

J. THOMSON,
H. SIMMS, for
W. HAYNES,
} *Trustees.*

1817.

I hereby declare my consent to the request stated in the within memorial.

THOMAS LANE, his × mark.

LANE's insolvency superseded.

Catalina, 8th November, 1817.

JOHN JACK,
ARTHUR NEIL, } Witnesses.

Let the insolvency be superseded.

F. FORBES, *C. J.*

WINTER *against* WINTER and Others.

December 11*th.*

THIS was an action to recover the sum of £200, sterl. being one year's annuity due by *John Winter* to his father, *James Winter*, on the 20th day of November last; and for the regular payment of which, Mr. *Nicholas Gill* and the late *Stephen Knight* bound themselves, their heirs, executors, administrators, and assigns, by a bond, dated St. John's, 2d October, 1806.

The judgment which was given in this action on the 20th ult. (see ante p. 55) amended, in consequence of the principal obligor in the bond having been declared insolvent.

In consequence of the insolvency of *John Winter*, the *Court* directed the judgment given against the same parties, on the 20th November last, to be amended, and to be entered up against these defendants generally.

1817.

December 20th.

JAMES STEWART, Esq. *against* GEORGE HUTCHINGS, Esq.

THE defendant had acted for a long series of years as Marshal of the Vice Admiralty Court in this Island, under a commission from the Governor; but the plaintiff had been appointed to the same office by an admiralty patent, dated so far back as the 9th August, 1808, and now sought, by the present action, to recover the amount of the fees and emoluments received by the defendant, during the time in which the plaintiff contends that the office vested in him by the patent. The particular facts of the case, as established by the evidence, and the rules of law applicable to the several points growing out of those facts, are clearly and distinctly stated in the following luminous and instructive charge to the jury:—

The *Chief Justice.* The present is an action for money had and received, being the amount of certain fees and emoluments received by the defendant, as Marshal of the Vice Admiralty of this Island, during the time, as the plaintiff contends, when the office was vested in him.

The case is a mixed one of law and fact, and resolves itself into two general heads of inquiry:—First, from *what time* is the plaintiff legally entitled to receive his fees? And, secondly, *what proportion* is he equitably entitled to receive?—The first is a question of law for the consideration of the Court; and the second is a question of fact for the Jury. Upon the first point: it appears that in 1796, a commission was given by the then Governor to defendant, as Marshal of the Vice Admiralty; in virtue of which he entered upon his office, and continued in it

The office of Marshal of the Vice Admiralty is not in the grant of the Crown in its regal character; and cannot, therefore, be in the appointment of the Governor, unless he holds a civil commission as Vice Admiral.—Nor can the title of an individual appointed to this office by the Governor, merely in virtue of his power as the King's representative, derive any support from the recognition of him in that capacity by the Lords of Appeal & the High Court of Delegates. On the other hand, a person appointed to this office by an admiralty patent is to be considered as holding that office, not from the period of his assuming the duties of it, but from the time of its enrolment in the Registrar's Office in London.

1817.

STEWART v. HUTCHINGS.

until 1813, during which period, and after the date of the plaintiff's patent, the defendant received monitions from the lords of appeal, and the delegates, addressing him by name, as the Marshal of the Vice Admiralty of Newfoundland; and the validity of his appointment was never doubted by himself, or disputed by others, until he was unexpectedly superseded by the Lords of the Admiralty.

Upon his appointment from the Governor, the defendant has rested much of his case; and the Governor, as the King's representative, is undoubtedly invested with many great prerogatives of the crown, amongst which is the right of filling up such vacant offices within his government as may lie in the grant of the Crown. But it is to be observed that this particular appointment is incidental to the office of the Lord High Admiral, which has been so severed from the Crown, by the grant of that great office, that nothing (*a*), it has been said, but the authority of Parliament, can re-unite them. As, therefore, the office of Marshal of the Vice Admiralty is not regularly in the grant of the crown, in its regal character, so it cannot properly be within the appointment of the Crown's representative as such; and no *civil commission* appears to have been granted to the Governor here, as Vice Admiral. Still less can any title be derived from the recognition of the Lords of Appeal, or the High Court of Delegates; for as the office was not within their direct appointment, so it could not derive any force from any indirect acknowledgment by them. In point of strict *legal title*, the defendant appears never to have been duly appointed to

(*a*) 6 Rob. A. R. 298.

1817.

STEWART v. HUTCHINGS.

the office of Marshal. He was, however, an officer, *de facto*, created by the Governor, under the necessity of the case; and, until he was removed by a competent power, his acts, as to all others, were lawful, and he was entitled to his fees.

The patent of the plaintiff, appointing him to the office in question, bears date as far back as the year 1808; but from some unexplained circumstances of delay, it is stated that he did not receive it until the year 1815. In the mean time, however, having seen his name affixed to the office in the Court Calendar for 1812, he applied to the Judge of the Vice Admiralty to be admitted to his office, but was refused, as he had no commission to show. On the 21st May, 1813, he received an official exemplification of his patent; and on the 3d June following, took the usual oaths, and entered upon his office.

In this stage of the transaction, a circumstance took place which, for the purpose of clearing the case, it may be necessary to explain. It was the application of the plaintiff to be allowed the sum of for the fees received upon the custody of some American prizes, after the arrival of his commission, and the decision of the Judge of the Vice Amiralty thereupon; which was followed by an appeal, and, subsequently, an application to the Lords of the Admiralty for redress. Upon looking into the statement of what took place in the Vice Admiralty, it appears to me to be rather expressive of the opinion of the *Judge*, upon a point of convenience, in preserving entire the custody of certain vessels then under adjudication, than decretal upon the subject-matter in dispute. The *Judge* must have been aware that the case, being one of disputed right

1817.

STEWART v. HUTCHINGS.

between two subjects, was not within his jurisdiction, and therefore refused to disturb the possession of the thing in dispute. By the laws of England, an office is a freehold, governed by the law of the and ; and the mere circumstance of its functions being performed in the Vice Admiralty, conveys no more authority to that (*b*) Court to determine the right to the office, or its fees, than it can have to decide upon the title or profits of an estate.

To return to the plaintiff's title: his patent is dated in 1808, but he did not claim his office until 1812, and did not enter upon it until the following year. Admitting him to the benefit of the excuse which has been alleged, that he was not apprized of his appointment before, I proceed in the chain of inquiry to ascertain from what time his appointment legally commenced, so as to entitle him to his fees (*c*). It is said in the books, that officers in a Court who have no other creation but by admission, are not officers until they are admitted and sworn ; but that an officer by grant of the King, is an officer immediately, without being admitted and (*d*) sworn. In a case in some respects like the present, it is said by the highest authority, that investiture does not make an officer when he is created by patent, but he is an officer presently before he is sworn ; and this reasoning was used in the case of the Sergeant-at-arms of the House of Commons, a great executive officer, requiring all the notoriety of appointment and solemnity of investiture which may be supposed essential to the appointment of Mar-

(*b*) 8 Coke, 47 Dy. 152 sec. 49 Geo. 3, cap. 27, sec. 11.
(*c*) Vin. ab. Tit. off. g. 2.
(*d*) Craigh *v.* Norfolk, 1 Mod. 123.

1817.

STEWART v. HUTCHINGS.

shal of the Vice Admiralty. There is, however, a point of difference between the cases referred to and the present; and it is this,—that in those cases it is to be presumed that the patentees were in possession of their title-deeds of office, which was not the case in this; but the patent in question had been enrolled at the Admiralty, the proper office for that purpose, and received the only delivery which the situation of the plaintiff would allow—a delivery to the hands of his attorney. The failure in its transmission was a circumstance which could not affect the legality of the title; it was a *defect of proof of title*, not a *defect of title itself;* the enrolment in the registrar's office, in London, forms the true epocha of the plaintiff's legal right to his office. It is true that the Judge of the Admiralty here, refused to confide the process of his Court to a person who was not prepared to show the authority under which he claimed it; and it is clear, I think, that the Judge was justifiable in using his discretion in the case. But that circumstance would not disturb the right of the plaintiff, although it subjected him to the loss of such a portion of the profits of his office as the person performing its duties would be entitled to; beyond this, it could convey no right to the defendant. If he chose to continue in the office after he was apprized that the title was in another, he continued under a liability of accounting even for the profits of it to the proprietor.—Assuming, therefore, as we are bound in legal strictness to hold, that the plaintiff was, *de jure*, the Marshal of the Vice Admiralty from the delivery of his appointment in 1808, we arrive at the *gist* of the action,—*from what time is he entitled to an account of his fees.* By analogy to the claim in equity for

1817.

STEWART v. HUTCHINGS.

the *mesne profits* (*e*) of an estate, the plaintiff is not entitled to any portion of the profits until he affected the defendant with the knowledge of his appointment. No direct proof has been brought as to the time; but it is probable that it must have been known to the defendant, about the time that the Judge of the Admiralty laid the case before the Governor, and was desired to continue the defendant in office.—[See Exhibits, 3, 4, 5, 6.]

The second point in the case depends upon its facts; what are the *customary* fees of the Marshal? and what *proportion* of them should be allowed to the defendant for the trouble, the expenses, and the responsibility he incurred?

The Marshal has charged upon the custody of the droit ships, at the rate of seven shillings and sixpence per day; and that charge was allowed by the Court.

It cannot, as has been contended, be regarded as a gratuity, flowing from the bounty of the admiral and the captors. (*f*) The *custody* of all prizes by the practice of the colonies, is in the Court; and the Court exercises its authority by the hands of its officer. The circumstance of capture before declaration of war against a new enemy, makes no difference. Until war is declared, the court is the guardian of neutrality, and has the right, as well as it is bound by duty, to see that the rights of nations are not invaded. It has been decided at Halifax, by an eminent Judge of the Admiralty, upon the authority of a case which had gone before the Lords of Appeal, (*g*) that the Marshal is entitled to seven shillings and sixpence, cus-

(*e*) Preced. in Ch. 517—19; and see 4 Brown, 621
(*f*) Stewart, A. R., case of *Herkimer*, p. 149—50.
(*g*) Stewart, A. R., 595.

1817.

STEWART v. HUTCHINGS.

tody-fee, as well as to a poundage upon sales; these, therefore, appear to be lawful and customary fees. In determining the *quantum meruit* of the defendant, the amount of fees, &c. received by him appears to have been as stated in the account produced, £3,355 3*s*. 7*d*. But it must be taken into consideration, that the office has been exercised by the defendant, during a long period, when its profits could not have repaid the trouble of holding it; and that during the period of its becoming profitable, it became equally onerous and responsible.

Had a single vessel or cargo been lost or injured through neglect, it would have swept away the whole of the profits of the Marshal; and the plaintiff would not, in all probability, have come forward to share the loss, as he has done to divide the profits. The expenses of the office must also have been considerable; indeed, taking every thing into consideration, the fees and emoluments of Marshal of the Vice Admiralty, are not much more than a fair remuneration for the trouble, the expense, and the responsibility of the office. But upon this part of the case, the jury have heard the evidence, and it is for them to compute the proportion of the fees and emoluments to which the plaintiff may be entitled.

The Jury, after a very long retirement, returned a verdict for the plaintiff £1250.

December 23d. ON this day the parties were heard, by their attornies, for and against a new trial, and the Court took time to consider the application.

JAMES STEWART, Esq. *against* GEORGE HUTCHINGS, Esq.

1817.

December 24th.

The *Court* will not grant a new trial, even where the sum given by the verdict seems to be too high, if there are circumstances attending the case which render it desirable that it should be taken before the King in Council by appeal.

ON this day the Court refused to grant a new trial, when the *Chief Justice* delivered his judgment as follows:—

Considering the responsibility of the person officiating as Marshal, charged at his personal risk, with the custody of a large amount of property; considering that the poundage upon sales is scarcely equal to the per centage on ordinary auction sales; considering, above all, the great *laches* of the plaintiff in sleeping for four years upon a title, which if he be legally entitled to hold, he was conscientiously bound to claim, and not to make a convenience of a person who thought he held by a perfect title; considering these things, I own, I am not quite satisfied with the amount of the verdict, and think it too high.

However, as I was apprized at the time the business came before the Court in another form, that whichever party failed here would appeal to the King in Council, I think I shall best answer the purposes of justice by re[illegible]ing the new trial and recommending an appeal.

The rule of law which holds an officer by grant from the Crown to be in immediately by his patent, will receive, if it be hard, that mitigated interpretation which may meet the true ends of justice.

Here I can only say, ITA LEX SCRIPTA EST; and if there be any legal consequences between the grantors of the office in question, and the patentee, arising from the long *non user* of the office, the advisers of the crown will best know how to deal with such a circumstance.

New trial refused.

1817.

December 24th.

DANIEL ROBERTS, Esq. appellant.
and
ANDREW SIMPSON, Esq. respondent.

High damages assessed by a jury, are not a ground for reversing the judgment of an inferior Court.

THIS was an appeal from the Surrogate Court. It appeared by the transcript of the record, that the defendant, who was captain of H. M. S. *Hydra*, had caused the plaintiff, who was a merchant residing in this town, to be seized by his boat's crew, and conveyed on board His Majesty's ship, where he had been detained for some time. The defence was, that the plaintiff had interfered with the defendant while in the act of abating a nuisance, in pursuance of an order of the Governor.

On this day, *Chancey*, on the part of the appellant, and *Simms*, on the part of the respondent, severally addressed the Court; and the *Chief Justice* then delivered the following judgment:—

The Court has diligently examined every part of the evidence in this case, and listened to the arguments of the parties, to extract, if possible, some point of law upon which to found its interference.

It is well known from the construction of the Surrogate Courts in this Island, that they have not the benefit of that legal precision, in sending cases to the consideration of a Jury, which only professional men could give them; and that law and fact are sometimes alike committed to their decision. Whenever a case has been submitted to this Court, in which the determination was intimately connected with the right understanding of the law, I have always been anxious to correct any errors, or misapprehensions, by reversing the judgment of the Surrogate

1817.

ROBERTS v. SIMPSON.

Court, with leave to bring a new action, as the party may be advised.

In the case before me I can discover nothing upon which to interpose. The appellant was sent by his Excellency the Governor to execute a particular order; and if he had confined himself to the execution of the Governor's commands by abating the nuisance complained of, or ordering others to abate it; and if, while in the execution of his duty he had been forcibly interrupted, and had resisted such interruption by opposing force to force, the act for which he has been sued might have been justified. But, unfortunately, the appellant mixed himself in a personal quarrel, first by words, and afterwards by force, with the respondent, accompanied by what the law terms false imprisonment.

These facts are not denied; but it is contended that the damages were disproportionate to the injury;—perhaps they were. But has this court a *constitutional right to disturb the verdict of a jury, upon a matter exclusively within their province to determine?*

The 49th of the King gives this Court a summary jurisdiction in civil causes, which are, however, to be tried, as nearly as may be, according to the practice pursued at home. It gives the right of trial by jury to the suitor, without limitation or control. I hold it as clear that, in the declaration of this constitutional right of trial, the suitor in this Court is entitled to the benefit of a verdict, in as full, free, and ample a manner as he would be in any Court in England. Now what have Courts in England held upon verdicts in cases of personal injury?—that they are purely for the consideration of the jury; as fellow-men, having common feelings, but, at the same time, common in-

1817.

ROBERTS v. SIMPSON.

terests with the parties to the cause, they are sure, on the one hand, not to compromise an injury; and, on the other, not to oppress by their verdict. This verdict has given high damages; but I cannot, by comparing this with cases where new trials have been refused at home, call them "excessive and outrageous," so as to warrant a new trial. The legal remedy for the appellant would have been to have applied to the *Surrogate* for a new trial, upon the ground of excessive damages. Looking at the case and the law under which I sit, I do not think that I can constitutionally reverse a judgment which is not erroneous in law, and merely because the damages are higher than I should have been disposed to allow had I been on the jury.

Judgment affirmed.

In the matter of ROBERTSON & MORTIMER'S Insolvency.

December 24th.

By the *Chief Justice*:—

Decision of the *Chief Justice* on a question voluntarily submitted to him by the parties interested on a point connected with a claim upon an insolvent estate.

A Question has been voluntarily referred to the decision of the Court, by the trustees and creditors of this estate, as to the right of *William, Mary, and Elizabeth Mortimer*, to rank as creditors upon the said estate. It appears that *Robertson & Mortimer* were declared insolvent in the Surrogate Court in March last.—That *William, Mary*, and *Elizabeth Mortimer*, of the family of one of the firm, lent £1,065 to the house, upon *bond*, with *interest*; and that *Gladstone* also lent the sum of £1,000 in the same way. Now the trustees contend, that this money was lent as *capital*, upon the show of which

1817.

In the matter of ROBERTSON & MORTIMER's, Insolvency.

the general creditors were induced to trust and give credit to the house; but they distinctly admit, that before the credit was given, the house of *Robertson & Mortimer* was formed, and the principal creditor had promised his support. Upon the above facts, as stated, I see no just reason why the creditors, *William, Mary, and Elizabeth Mortimer*, should not come in as general creditors upon the insolvent estate.

In the matter of THOMAS KOUGH & Co's Insolvency.

January 3d, 1818.

Order to trustees of an insolvent estate, to deliver into Court an account of their proceedings.

IT is ordered by the *Court*, that a copy of the memorial presented by *Atwood* and *Haynes*, creditors to the insolvents, be served on the trustees to the estate of the said insolvents; and that the said trustees do, on or before the 7th instant, deliver into Court a statement of what has been done by them as trustees aforesaid; showing the particulars of monies and effects received by them —of the manner in which the same have been disposed of—of the claims on the said estate, and the nature of them—with the amount of the unappropriated effects belonging to the said estate; so that a distribution thereof may be made without delay: or that they, on the said 7th instant, show cause why they refuse to comply with this order.

1818.

January 3d.

In the matter of JOHN WINTER's insolvency.

Application from the mortgagees of premises, pledged to them by a party who had since been declared insolvent, to have them sold in satisfaction of the balance of the debts still due to the mortgagees by the mortgagor,—with the Chief Justice's order thereon.

ON this day, Messrs. *Attwood & Haynes* presented a memorial to the *Court*, of which the following is a copy:—

To the Hon. FRANCIS FORBES, *Esq.*, *Chief Justice.*

The Memorial of HENRY SIMMS, on behalf of ATTWOOD & HAYNES,

HUMBLY SHOWETH:—

That Mr. *John Winter*, of St, John's, on the 4th January, 1815, executed to the said *Attwood & Haynes* the mortgage, herewith laid before your Honour, of premises situated near the Ordnance Yard, as security for the sum of £784 0*s*. 0*d*. then due from him, payable with interest on the 20th of November following.

That there is still due to the said *Attwood & Haynes*, on the said mortgage, the sum of £133 18*s*. 5*d*., with interest thereon from the 14th of January last, agreeably with Mr. *Winter's* note of hand of that date.

That the said mortgagor having been lately declared insolvent in your honourable Court, your memorialist respectfully solicits the authority of your Honour to sell, by public auction, the interest of the said *John Winter* in the premises on which the said mortgage has been given, or a sufficient part thereof, to satisfy the claim of the said mortgagees on the same.—Your memorialist, as in duty bound, will ever pray, &c. &c.

(Signed) HENRY SIMMS.

St. John's, 2d January, 1818.

1818.

In the matter of JOHN WINTER'S insolvency.

Upon which memorial his Honour the *Chief Justice* made the following order:—

If the fact of the amount of balance claimed be not disputed, the trustees may go on to sell the insolvent's interest in the lease, and out of the proceeds must first pay the amount of principal and interest to the mortgagees; and *if there be a surplus*, apply it as *part of the general fund;* or, *if there be a deficiency*, to the *credit of the mortgagees*, against the *general fund* as a *general credit.*

(Signed) F. FORBES, *C. J.*

Trustees of DALTON & RYAN *against* ATTWOOD & HAYNES.

January 7th.

Held, 1st, that a creditor who proves his debt generally against an insolvent estate, without giving notice of particular securities in his possession for the satisfaction of it, does not thereby necessarily wave his right to the benefit of such securities; 2d, that though payments made, and securities given, in contemplation of insolvency, with a view to an unfair preference, are *void*, yet that a preference given even on the very verge of insolvency, *in virtue of a previous agreement*, is not so; 3d, that a party who advances money to another, through the medium of an agent not usually employed for such purposes by the supposed borrower, does it at his own risk and peril; 4th, that the private transactions between the individual partners of two firms, cannot be blended and incorporated with the *partnership accounts* between those firms, in the event of the insolvency of either of them.

THIS case embraces several interesting points, all of which are distinctly stated and examined in the following decree upon it.

Per Curiam. The primary objection made by the plaintiffs' agent, namely, that Messrs. *Attwood & Haynes*, in proving their balance upon oath against the estate of the insolvents, without mentioning the securities they held, amounted to a *waver* of such securities, cannot be sustained. It is the practice in England, when a creditor appears to prove his debts, to require him to give up his securities to the assignees; but in doing so he does not wave his priority of claim which he has upon such securities to the extent of his demand; but they are delivered up to the assignees, who are to dispose of

1818.

Trustees of DALTON & RYAN v. ATTWOOD & HAYNES.

them, and apply the proceeds, first, in payment of the debt for which they were pledged, and the surplus, if there be any, to the bankrupt fund. If there is a deficiency, such deficiency is ranked as a general credit against the estate. Here we have no rule of Court exactly to the same effect, and it may be expedient to make one; but in the mean time, if a creditor have a security, he must account for it before he will be admitted to come in as a general creditor.—The defendants' account was delivered in and attested on the 12th of December, and the credit for the order on *Marten* does not appear to have been entered until the following *month*, when the principal part was recovered; and the credit for the cutter *Active's* fish is not given until *several months* after. So that at the time the account was delivered, it was not known whether the order would be paid or the fish arrive safe; when and where only they could be considered as payments. These circumstances naturally account for the defendants' omitting to take the benefit of those securities, of which, if they were otherwise legally entitled to them, such omission would not deprive them.

But it is contended, they were given with a view to a preference, and therefore void. I certainly do admit that, although the bankrupt acts do not apply here as *express laws*, yet that the *principle of equal justice growing out of them*, as interpreted by the Courts at home, furnish us with *the best rules of equitable decision*; and amongst them I have no hesitation in saying, that a manifest intention to prefer one creditor to another, in the contemplation of insolvency, would be considered avoiding any payment made under such circumstances. For such

1818.

Trustees of DALTON & RYAN v. ATTWOOD & HAYNES.

an act in England, although not an act of *bankruptcy*, is regarded as contrary to the equity of the statutes, and void.

In the two payments in this case, one was an assignment of part of a cargo of fish the evening on which the attachment which led to the insolvency was served; and there was an order given to the defendants to receive money due to the firm of *Dalton & Ryan* a few days after the writ, and only the day before the insolvency was declared. This was certainly pressing very close; and if such a case were now to occur, I should have no difficulty in setting it aside. But I must remember that these things were done when it was supposed they might be lawfully done, under the misconstruction which the Courts gave to the 49th Geo. 3d, cap. 27. Indeed the agent himself admits that he *gave the order*, supposing the defendants had a preferable claim as *current creditors*, and that it could make no difference. The order having been given to the defendants to receive money, without any express direction as to the appropriation of it, and the makers being at the time indebted to the defendants, I do not see how I can consider it otherwise than as a payment to them.

With respect to the assignment of the *Active's* cargo, it appears to have been conducted in a very obscure and ambiguous way; but it is proved that at the time of the assignment, a certain quantity of fish was due from *Dalton & Ryan* to replace other fish which had been borrowed; that it had been *faithfully promised to be returned* from the cargo then expected on board the *Haddock*; and that it was this *very vessel's cargo, afterwards partly laden on board the Active*, which was assigned in compliance, as it would seem, with a *previous promise*, and certainly a very

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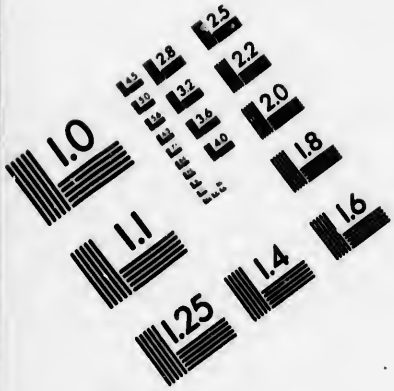

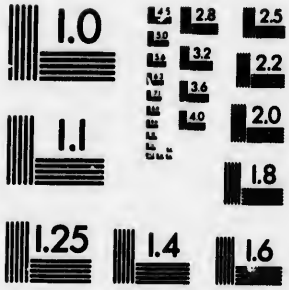

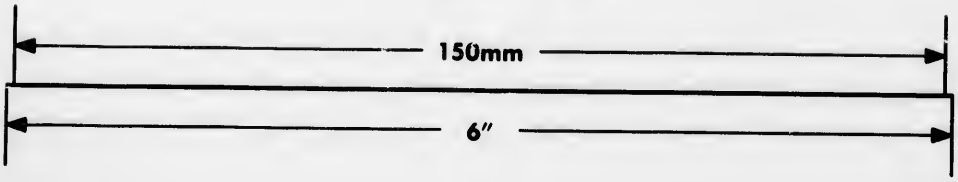

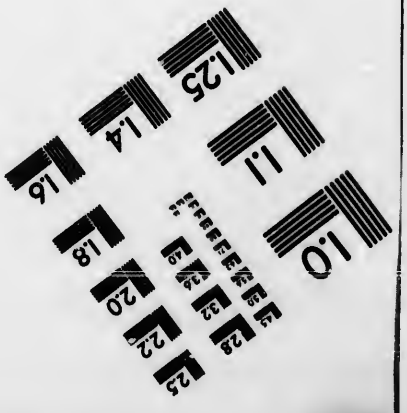

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1818.

Trustees of DALTON & RYAN v. ATTWOOD & HAYNES.

earnest requisition. Assuming this as the fact, which it appears to me to have been, from the evidence of *Shelly*, the notes produced, and even the admission of the agent himself as to the loan of fish, and taking it in conjunction with the promise of early payment, and the requisition to send the *Haddock to the defendant's wharf*, which was only refused on account of the delay, it brings this case within the principle laid down by Lord *Mansfield* in *Harman & Fisher* (*Cowper*, 125), and is a preference in virtue of a previous agreement without fraud.

Having disposed of these two main objections as raised by the agent for the trustees, I shall be brief with the other parts of the case. The sums charged by the plaintiffs for monies delivered *Casey*, I should be afraid to sanction. It is like offering a bounty to deception; and, in point of fact, it has not appeared that *Attwood & Haynes* ever authorised any delivery of money to *Casey*, in their name. It was demanded, also, not as *payment*, for *Attwood & Haynes* were then in debt to *Dalton & Ryan*, but as a *loan*. To have refused the money, would at the utmost have been only *prudent*; but to pay it to a person not usually employed for such purposes, was to expose themselves to imposition, and to hold out temptation to fraud in others.

The sum of £240, which appears to have been the private account between *Haynes* and *Dalton*, cannot, in any point of view, be admitted into their partnership accounts. The bill for £200 was drawn to *Dalton*, personally, for the benefit of his son, and was a gift from *Haynes*. As a matter of convenience to partners, this mode of adjusting their separate debts may be sanctioned amongst themselves, but it must be by some

agreement or admission of the other party. And it appears, that *Ryan*, one of the partners, expressly desired the entry in the day-book to be expunged, as soon as he saw it; and that it was not brought into joint account, until near *five years* after it occurred.

I must, therefore, reject that item in the defendant's account.

1818.

Trustees of DALTON & RYAN v. ATTWOOD & HAYNES.

REGULA GENERALIS.

January 7th.

IT is this day ordered, that whenever a creditor of an insolvent estate shall appear to prove his debt, he shall be required to state the amount of any pledge or other security he may have in his possession, or power, for such debt, and the circumstances under which he holds the same; in order that the trustees may be enabled to see that such pledge, or security, is disposed of to the best advantage, and duly applied, in the first instance, to the discharge of such debt; and if there be any surplus, that the same be applied to the general fund of the insolvent estate; or if there be a deficiency, that such deficiency rank as a general credit against the same estate.

(Signed) F. FORBES, *C. J.*

In the matter of DALTON & RYAN'S Insolvency.

January 9th.

A ratable distribution among all the creditors, without the least preference to any class of them, ordered by the Court, in a case where the insolvents were proved to be *general shopkeepers.*

ON this day, Mr. *John Ryan*, on the part of Messrs. *Timothy Ryan, Patrick Morris, Thomas Meagher, jun. and James Mortimer*, trustees to the said estate, produced in Court a statement of the claims against the same, as they appear by the books of the

1818.

In the matter of DALTON & RYAN'S Insolvency.

insolvents; and prayed that the Court would take the same into consideration, and order the said trustees to make a distribution of the realised funds belonging to the said estate, to be made according to law, to the several claimants thereon, without delay, agreeably to the said statement.

The *Court* having taken the same into consideration, and having ascertained that *Dalton & Ryan* were *general shopkeepers*, without any immediate or particular connection with the fishery, ordered, that the trustees to the said estate should proceed to make a dividend of the funds which have been realised, ratably, amongst the creditors of the said estate, in conformity with the decision of the Court in the cases of *Cuningham, Bell & Co.* and *Hunters & Co.* against the trustees of *Crawford & Co.* Against which order, Mr. *Robert Job*, as the attorney of *John & Robert Gladstone*, of Liverpool, England, gave notice of an appeal to His Majesty in council; on the ground, that they considered their claim entitled to priority, as being a *current supply*, in pursuance of the 49th of the King, c. 27.

Exparte, GRAHAM LITTLE in the matter of DOOLING & KELLY'S Insolvency.

January 14th.

A resolution of creditors contrary to the provisions of an act of Parliament, is altogether void,

PER CURIAM. This is an application to the Court, at the prayer of *Graham Little*, to order the distribution of the effects of the insolvents, *Dooling & Kelly*, agreeably to law. The Court has already decided that the petitioner is a creditor of that estate, and with a view of ascertaining the extent of his claim, ordered the production of the accounts of the estate, and the proceedings

1818.

Exparte, GRAHAM LITTLE in the matter of DOOLING & KELLY'S Insolvency.

of the trustees in the business of distributing it.

It appears that, soon after the insolvency, a general meeting of the creditors was called, at which it was resolved, amongst other things, that the stock in trade of the insolvents should be divided into lots of ten pounds value, to be ascertained agreeably to the cost of the articles, as stated in the stock-book of the insolvents, and distributed amongst the creditors for the current year of the insolvency by ballot, so as to make a dividend, as nearly as might be, of ten shillings in the pound. This extraordinary dividend was accordingly made; and the trustees, with a great deal of diligence it must be admitted, proceeded to realize the remaining effects of *Dooling* & *Kelly*; and by the 1st January following were prepared for a final distribution. They accordingly called a second meeting of the creditors, at which it was resolved, that as all the current creditors had not received at the rate of ten shillings in the pound, such as had not should receive a special dividend of *five shillings in money*, which was deemed equal to *ten shillings in goods*, so as to place them upon a par with their co-creditors for the year 1815. And it was further resolved, that the *demand* of the *petitioner* should rank as *a debt of* 1814, but not as a *current supply* or preferable claim. The residue of the undistributed effects were stated to amount to £3,340, and it was agreed to submit the proceedings of the meeting for the approbation of the *Surrogate*.

In reviewing these proceedings, I cannot refrain from observing, that they exhibit so extraordinary a departure, not only from *law*, but also from *antecedent practice* in similar cases, that it is difficult to conceive

1818.

Exparte, GRAHAM LITTLE in the matter of DOOLING & KELLY'S Insolvency.

how they could have been fallen into; and certainly impossible for this Court to justify them.

When the trustees of *Dooling & Kelly* were appointed, they became ministerial officers of the Court. It was their duty to sell the estate and distribute it according to law; and if they felt any doubt, to have applied to the Court for further directions. But, instead of pursuing so plain a path of duty, they convened a general meeting of the creditors, and, under the sanction of a majority of voices, dispensed with the provisions of the law, and resolved away the rights of a creditor, standing upon a claim which one might have supposed peculiarly entitled to consideration—a claim to participate in those very goods which he had sold to the insolvents, and which were the subject of his demand.

It is stated that, under the altered circumstances of the times, this mode of sale was most beneficial to the creditors. Perhaps it might have been; but surely this was not a sufficient reason to justify the breaking through an act of Parliament.

It appears that the remaining effects have been realized, and amount to the sum of £3340. They are the effects of persons not in any manner engaged in the fisheries, but mere *shopkeepers*, and *general retailers;* and, as such, I shall in conformity with the late decision of the Court, direct the undistributed effects to be divided *equally amongst all the creditors, share and share alike*—crediting such as have received shares *in specie*, with the amount of such shares, agreeably to the rate at which they were distributed by lot. I do not see how I can determine otherwise; for it may be impossible, at this day, to ascertain the exact va-

lue of these shares, at the time they were divided.

1818.

In the matter of DOOLING & KELLY'S Insolvency.

January 15th.

The right of trustees to appeal, contrary to the wish of one class of creditors on an insolvent estate, doubted by the court.

ON this day, *Simms*, on the part of the trustees to the estate of *Dooling & Kelly*, gave notice of an appeal from the judgment of the Court, respecting the distribution of the remaining effects now in the hands of the trustees.

In answer to which notice, *Lilly*, on the part of the creditors generally, contended that the trustees cannot prosecute, or enter, any appeal against the wish of the general creditors.

The *Chief Justice* observed, that it seemed to him that the *trustees*, as such, could not, under these circumstances, appeal; but that any creditors who felt themselves aggrieved, or injured, by the decree, might do so. As the case, however, was new, he should give it further consideration; and, in the meanwhile, would direct a stay of proceedings, with an order that the time to be allowed for giving security to prosecute the appeal should be computed from the day on which he should deliver his final decision upon this case.

1813.

January 15th.

PETER HENDERSON *against* BROWN, HOYLES & Co.

Upon a sale of property, the goods will continue at the risk of the vendor, until every thing has been done in relation to them, which was required to be done by the conditions of the sale.

THIS was an action to recover the sum of £106 12*s.* 0*d.* for goods sold. The defence was, that the goods in question had never been regularly delivered to the defendants.

Per Curiam. This is an action to recover the sum of £106 12*s.* 0*d.*, being the value of eight casks of molasses which were consumed in the fire of the 7th November last, and which the plaintiff contends had passed to the defendants by a complete sale. On the part of the defendants, it is insisted that the contract was still open; that as the price was to depend upon the guaging, which the plaintiff was to do before it was delivered, all had not been done to perfect the sale; and that, consequently, the entire property in the molasses had not passed to the defendants, so as to render them liable to the loss. To this plea, the plaintiff rejoins that the molasses had been guaged only a *few days before*, upon being delivered to him; and that the interval was too short to have varied the quantities of the casks. And he has produced a certificate, stating the quantities as he received them, and according to which, he must be supposed to have re-sold them to defendants. But this argument is certainly not tenable. Whatever the quantities might have been, as between the plaintiff and his vendor, they are not necessarily alike as between the plaintiff and the defendants. It is impossible to admit this as an argument; and, besides, the certificate produced merely shows the gross quantity of *nine* casks, one of which had been sold to another purchaser; and, therefore, the remaining eight puncheons had

1818.

HENDERSON v. BROWN, HOLLIS & Co.

not been so guaged, as to be exactly ascertained. The plaintiff's own witness also states that he was directed to guage the molasses before he delivered it; so that all had not been done, on the part of the seller, which ought to have been done, and, therefore, I cannot distinguish this case from those of *Hanson* v. *Meyer*, 6 East, 614, and *Rugg* v. *Minett*, 11 East, 210.

The plaintiff, in order to have fixed the liability of the defendants, should have guaged the casks, and sent notice thereof to the defendants, or sent a bill of parcels with the price, which, being all that remained for him to do, would have relieved him from the risk, and thrown it upon the defendants. His allowing the molasses to remain in his store, was an act of accommodation, not unusual in trade; but that circumstance cannot be considered as a delivery to the defendants. In short, the plaintiff had not done all which, by the contract, it was necessary to do, and, therefore, he cannot recover.—Judgment for defendants.

JOHN DAMBRILL *against* JOHN DUNSCOMB & Co.

January 19th.

The assignees of a lease are only liable so long as they continue in *possession* of the demised premises. [See a sensible note by the late Professor Christian, in his edition of Blackstone's Commentaries, vol. 2. p. 327, upon the question raised in this case.]

BY this action, the plaintiff sought to charge the defendants with a liability to pay for the repairs of certain premises of which the defendants had been in possession as the assignees of a lease, but had parted with that possession some time before the action was commenced against them.

Per Curiam.—There is no point of law clearer than that the assignee of a lease is liable for the covenants contained in the lease no longer than he continues *in the*

1818.

DAMBRILL v. DUNSCOMB & Co.

possession of the lease. He is a constructive tenant of the landlord, by the fact of possession; and during the continuance of that possession, he is liable for the rent, as well as running covenants. But as he is only liable for possession, so with possession he loses his liability.

The plaintiff's own witness has proved, that a *few months* before the defendant assigned his interest, the house was in good order. The presumption may be, that the short interval of time, during which the house remained unoccupied, would not allow of the great dilapidations which are now said to exist.

Indeed, it has been said by the plaintiff's wife, several times, in *Court*, that it was the assignees of the defendant, who did the injury. In point of *fact*, therefore, the plaintiff has not been able to prove that there was any breach of covenant during the period the defendant held the premises; and the presumption is not strong enough—or rather the fact that the assignees of the defendant did the mischief, will not entitle the plaintiff to a judgment.

There was a misapprehension of the law by the plaintiff, who should have received the *keys* when they were offered him. On every ground, therefore, the defendant is entitled to a judgment in his favour.

JAMES MURPHY, appellant,
and
SAMUEL KOUGH, respondent.

1818.

January 21st.

The disclosure of the name of the original author of a slanderous report *previously to the commencement* of the action, held to be a bar to the same.

THIS was an appeal from a judgment given in the Surrogate Court. The respondent had instituted an action there against the appellant, for uttering and circulating certain false and scandalous words, tending to injure the character of the respondent, and had laid his damages at £2,000. The case was submitted to a special jury, who gave the plaintiff below a verdict for two hundred pounds; and a judgment for that sum was afterwards entered in his favour.

After hearing the parties at considerable length, the Court *reversed* the judgment of the Surrogate Court; as it appeared that the appellant had disclosed to the respondent the names of the persons whom he had heard utter the words spoken, *previously to the commencement of the action.**

* In the record of this case, the ground for reversing the judgment of the Court below, is certainly stated, as in the foregoing report, to be, that the defendant below had disclosed the name of the author of the slander to the plaintiff *before the action was brought*; but I very much doubt this being a true statement of the facts upon which Mr. *Forbes* rested his decision; as I apprehend that the plaintiff had a sufficient cause of action, unless the defendant named the author of the slander *at the very moment he repeated it*. I am aware, indeed, that this point has never received a *direct adjudication* in Westminster Hall, as it has never been directly raised in any of the cases that have been argued there; but in Lord *Northampton's* case (12 Rep. 234) it is expressly said, that "if J. S. publish that "he hath heard J. W. say that J. C. was a thief, and the truth be so, he may justify." And the reason assigned is, that the author named may be in such low estimation that J. C. might have suffered no injury from his slander. Now this reason clearly does not apply when the name of the author of the slander is disclosed at a period *subsequent to the publication*, but *prior to the commencement of the action*; because in that case it has, for a time, been

1818.

January 22d.

A principal residing abroad is not liable to pay for the board and lodging of his agent in this country, unless he promises or undertakes to do so.

JAMES SMITHERS & Co. *against* THOMAS WILLIAMS & Co.

THE only question in issue between the parties was, whether the plaintiffs were liable to pay for the board and lodging of their agent; the defendants having charged them for the same, and retained a large sum of money in their hands on that account. A jury found, specially, "that *James Smithers jun.* as agent to *James Smithers & Co.*, lodged and boarded at the expense of *Thomas Williams & Co.*, from the 19th Jan., 1813, to the 25th July following; and that the charge of four guineas per week for that time was not an exorbitant charge;" and after having heard both parties upon the effect of this verdict, each party contending that the judgment ought to be in their favour,

The *Chief Justice* said: The verdict having been special, turned the case upon one main point, *viz.*, Is a principal, who sends

circulated *on the credit of the defendant*, and may thus have done an injury to the plaintiff, which it could not have produced if the disclosure had been made at the moment when the slander was repeated. And, accordingly, it is assumed by *Scarlett*, arguendo, in *Woolnoth* v. *Meadows*, 5 East, 463, and distinctly admitted by Lord *Ellenborough* and Mr. Justice *Le Blanc*, that "in order to "enable a defendant to justify slanderous words, upon "hearsay, he must disclose *at the time of uttering the* "*slander* the name of the person from whom he heard it." It may be material to add, that these observations are confined to *oral* slander; and that it is still an unsettled question whether a defendant can, by having named the original author at the time of publication, justify the publishing in *writing* slanderous words spoken by such other (2 East, 426). They are evidently not acts *ejusdem generis*; and under the principle of the different rules which have, consequently, been established in regard to them, the leaning of the opinion of some eminent lawyers seems strongly to be *against* the efficacy of such a justification.

1818.

SMITHERS & Co. v WILLIAMS & Co.

an agent to this island to transact his business, liable for the *personal expenses* of such agent, except he undertake to pay such personal expenses? Surely such a principle is not sustainable. The defendant himself, after the departure of *James Smithers*, jun. acted as the agent of the plaintiffs, and collected various sums of money, for the full amount of which he credited them in 1814 and 1815. Consequently, the money he received he did receive as the monies of *James Smithers & Co.*, and not as *James Smithers, jun.*, and charged his commission accordingly upon the sums he received. It is not attempted to be shown what was the nature of the agreement between *James Smithers, jun.* and his principal, or what reward or commission he was to receive. Nor is it pretended that the defendants were privy to the relation between the principals in England and their agent in Newfoundland. There has been nothing in the shape of proof of any guarantee or express promise by the plaintiffs to pay the defendants any private expenses which their agent might incur. The case, then, is resolved into this simple question;—is a principal who employs an agent abroad to transact his business, generally, liable for the mere personal and private expenses of such agent, without any promise to the person with whom they were contracted to pay them? I must own I never heard of such a principle before. The law of England is the law of Newfoundland; and I cannot sanction such a departure from it, in a country where so much business is conducted by agents. I shall, therefore, give the plaintiffs a judgment for £111 12*s.*, which is the sum charged by defendants for the board and lodging of the agent; but I shall not allow the costs of a special jury.

1818.

Against which judgment, the defendants gave notice of an appeal to his Majesty in Council.

In the matter of trust of GODFREY'S Estate.

January 23d.

The Court will not set aside a deed made in conformity with the interpretation which the Courts had given to an Act of Parliament, although that construction appears to be erroneous.

AFTER having heard the several parties, *viz.*, the *trustees* under the deed of trust, the *petitioners* for the distribution under such deed, and *John Ryan* on behalf of certain *English creditors* (not parties to the deed),

The *Chief Justice* observed, that the deed appeared to have been executed at a time *when all the parties to it* were supposed to have preferable claims; and that, therefore, as the Court had refused to re-open accounts settled, or payments made under such interpretation of the law by the Courts, he did not feel himself at liberty to set it aside. It was a conveyance to trustees for the current creditors; and the deed conveyed the beneficial right to the property assigned in as full a manner as it was then possible to do. The right was *conveyed*, although it was to be enjoyed *hereafter*, and this case is like one of an actual distribution, which the Court has refused to disturb, until the decision of the King in Council can be had.

NOTE.—In the above case the effects of GODFREY were actually delivered over to the power and disposal of the trustees, and were consequently sold for the benefit of the trust.

January 24th.

A fishery may be carried on *upon shares*, without counteracting the provisions of the 15th Geo. 3, c.31.

STUART & RENNIE *against* DAVID WALSH.

THE circumstances attending this case, and the important questions arising out of the facts of it, are distinctly stated, and

1818.

STUARTS & RENNIE v. WALSH.

carefully investigated, in the following judgment:—

Per Curiam. This is an action brought by the plaintiffs, the suppliers of a voyage to the Labrador, against the defendant, under the following circumstances:—In the spring of last year the defendant was out of employment, and two persons, named *Merrigan* and *Jarvis*, applied to the plaintiffs to advance them supplies for an intended voyage to the Labrador, and were refused.—These men applied to other persons for employment, and, being refused, again returned to plaintiffs, who agreed to supply them, but on one express condition—that they should ship their servants upon *shares*, and not for *wages*. This was agreed to; and the defendant was engaged by *Merrigan & Jarvis*, and signed a shipping paper by which he was to receive "the sum of twenty-one "pounds, *if the voyage would afford it*;" but it was understood that the supplies taken from *Stuarts & Rennie*, with freight, &c. were to be paid *first*. The voyage was unproductive, and fell short of the supplies furnished in nearly the sum of one hundred pounds. The first question which presents itself is—whether this agreement between *Merrigan & Jarvis* and the defendant be not contrary to law? and, consequently, whether the plaintiffs can recover in an action evidently founded upon such an agreement?

By the 15th of the King, every person who employs any fisherman for the purposes of the fishery in Newfoundland, must enter into a written agreement with him, stating the wages he is to receive and the term he is to serve. But the evils complained of in the act, and the remedy which this provision was intended to apply, together with the wording of the clause of the act, do not en-

1818.

STUARTS & RENNIE v. WALSH.

able this Court to pronounce broadly that no other contract can subsist in the fishery than that mentioned and regulated by the act. It is notorious that a great part of the fishery in this island is carried on upon shares, or, in other words, by a number of men who form a partnership, and are to receive the *profits* of the voyage in lieu of wages. It were impossible to calculate the mischief which might ensue if I were to pronounce such an association unlawful. It is a matter which requires legislative interference; but I cannot hastily substitute a decision for an enactment, and remedy the want of a law; and it must be determined, upon the threshold of this case, whether or not there can be a fishery voyage upon shares.

I shall hold that a fishery may be carried on upon shares, without contravening the provisions of the 15th of the King, although a great part of the act is evidently impracticable and obsolete.

The next question which arises is, how far the defendant is liable to the plaintiffs under the express terms of his undertaking?

The plaintiffs contend he is liable to the *full extent of the proceeds of the voyage*, until all the supplies are paid; but the defendant maintains that he is only liable for the *supplies immediately furnished to himself*. The account produced is, by name, against *Merrigan & Jarvis*, as the planters or masters; but many articles appear to have been supplied for purposes independent of, or not inseparably connected with, the voyage of which the defendant was a shareman. Such articles must be abstracted from the account; and for the supplies actually furnished, and the expenses actually contracted, for the particular voyage of

last summer, *and no other*, the defendant is liable to *the extent of his interest in the proceeds of the voyage.*

1818.

MARTIN FITZGERALD *against* GEORGE LILLY.

January 21st.

A surety cannot be charged beyond his express agreement.

THE extent of the defendant's liability, under a guarantee given by him for the payment of rent by a tenant of the plaintiff, formed the only point in dispute between the parties in this case: the plaintiff contending that the security was *general for whatever rent might become due during the existence of the term*; and the defendant insisting that it was *strictly confined to the rent of the premises for one year.*

The *Chief Justice* said, that as the guarantee, which was given before the date of the lease, contained a promise to pay *rent*, and *not rents*; and as there was nothing in it which referred to the lease in question, either by word or circumstance, he could not consider it as guaranteeing more than a *year's rent.* That the covenant for re-entry, in default of the payment of a year's rent, materially strengthened this construction; as the defendant might have founded upon this clause an expectation that he could not be responsible for more than one year's rent.—That a surety cannot be charged beyond his express agreement; and that it would be giving improper encouragement to that loose and slovenly manner of doing business with which this transaction had evidently been conducted, to extend this guarantee one iota beyond its precise words.

Judgment *pro defendente.*

1818.

January 31st.

In Appeal—In the matter of CRAWFORD & Co's. Insolvency.

If two firms, consisting entirely of the *same* members, carry on *distinct* branches of trade, and both become insolvent, the property and effects of the firm in Newfoundland shall be distributed by trustees, appointed by the creditors of that firm, and under the law of this island.

AT the hearing of this cause, in appeal, an objection was made, on the part of the appellants, to re-opening those particular claims which had been admitted by the *Surrogates*, inasmuch as no appeal had been duly entered from the decision of the Court below; but the Court over-ruled the objection, observing that the *Surrogates* had, in the first instance, refused to allow any appeal whatever, and, according to the letter of the act, the objecting parties themselves were not regularly before this Court. It would not be proper to be over-nice upon matters of form, particularly where so little had been observed; and, as no substantial right was injured, or impeded, the Court would, under the circumstances, consider the whole case as re-opened.

The parties were then respectively heard, first, against and in support of the insolvency as declared in this island; and, afterwards, upon the claims of the creditors in Scotland to share in the dividend in Newfoundland. And, at the close of the argument, the *Chief Justice* pronounced the following decree:—

This matter comes before the Supreme Court by appeal from the decision of the *Surrogates*, upon the claim of certain creditors in Scotland, to a dividend of the effects of *Crawford & Co.* under the insolvency which has been declared in this island. As the propriety of the claims must, in a great measure, depend upon the facts of the case, and as many of the leading facts are before the Court merely upon the admission of parties, it may be necessary to take a short

1818.

In appeal, in the matter of CRAWFORD & Co's. Insolvency.

view of the state of the case before I enter upon its merits.

It appears that the house of *John Crawford & Co.* was an ancient and respectable establishment in trade at Port Glasgow, which branched out into two collateral concerns,—one at Lisbon, under the firm of *Joseph Tucker Crawford & Co.*, and the other at this island, under the firm of *Crawford & Co.* The respective firms in Scotland and in this island consisted of the same partners, but the concerns were kept entirely distinct, and in all their dealings with each other, regular accounts were opened, and the same conduct in every respect pursued, as if the proprietors had been distinct persons.

In the course of their trade, *Crawford & Co.* exported fish and oil from Newfoundland to different ports in Europe, the proceeds of which, as is the practice of the fishery, found their way to the hands of their correspondents, *John Crawford & Co.*, who, consequently, became the fund-holders of the house in Newfoundland. The former house was declared bankrupt in the month of February, 1815, and the latter became insolvent in April following.

Upon these facts of the case, a preliminary question has been raised, whether this Court is not bound to recognize the laws of Scotland (*a*), and the sequestration which issued under them, and to supersede the insolvency which was declared in this Island after such sequestration, upon the general principle that *personal property is held to be situate in the country where the insolvent is domiciled*, and to be governed by the laws of that country as completely as if locally

(*a*) See Bell. Com. on Scot. Law 631. and cases cited in note c.

1818.

In appeal, in the matter of CRAWFORD & Co's. Insolvency,

placed within it? This is certainly a very large—a splendid proposition. But regarded as a rule of international justice, it may be allowable to say INTENTATA NITET; for it is still in its infancy, guarded by cautious qualifications, and untried in all its remote and possible consequences. What those consequences might be, as applied to this country, where a peculiar law of distribution prevails, is rather a matter of speculative, than an essential, inquiry at present. But it would not be difficult to frame a case from the materials before the Court, and a case of very probable occurrence, in which the application of the principle, in the general form contended for, would be attended with a degree of inconvenience, such as might call in question its very existence as a practicable rule of justice. Suppose, for instance, a person to have engaged extensively in the fisheries in this island, where he holds his stock, his counting-house, in short, the local habitation of his trade; that in the course of years he acquires opulence; and leaving his capital and concerns under the management of agents, retires to England, where he happens to embark in some independent speculations, which bring him within the pale of the bankrupt laws at home, and induce a failure in his engagements in this island. Shall the whole of those engagements, in all their various branches and intertextures, be transferred to the adjustment of assignees, acting under the direction of authorities sitting on the other side of the Atlantic, at a distance from the place where the engagements were contracted, where the body of creditors are resident, and from which all the evidence in the case of dispute must be drawn? Or should the shorter course be adopted, of proceeding

1818.

In appeal, in the matter of CRAWFORD & Co's. Insolvency.

under an insolvency in this island? It is held by the Prize Courts (*b*), nor will the doctrine be entitled to the less weight because it is drawn from Courts whose peculiar province it is to determine the largest questions of international law, that trade itself may acquire a domicile, and impress it upon the individual independently of mere personal residence: and if it may in relation to the state, there seems no just reason why it should not in relation to individuals. Might not the property in trade, which is visibly fixed and subject to local liabilities, form an exception to the general principle, that personal property has no locality?—Whatever may be the true solution of such a question, should it occur, I am not at present called upon, by the case before me, to determine it; for there is a circumstance in this case which, according to my apprehension, takes it out of the range of the principle even in its most general form, and it is this—that *Crawford & Co.* were a *distinct and separate firm* in this island, at the time of their insolvency. It is not denied that they carried on an original and extensive trade in Newfoundland under a distinct name; and there seems no reason why a different style should have been assumed, if it were not intended to hold out to the world that the firms were distinct. But it is contended that the two houses in reality consisted of the same partners, and were, therefore, in fact, one and the same. It often happens in England *(c)* that the same persons are engaged in subordinate partnerships, which, with reference to their separate creditors, are considered as distinct; and, *a*

(*b*) 1 Rob. A. R. 15.
(c) Expte. Johns, Cook B. L. 638.

1818.

In appeal, in the matter of CRAWFORD & Co's. Insolvency.

fortiori, they should be so considered, where the establishments are in different countries, where the respective creditors cannot possibly have the means of knowing what may be the remote relations of the parties, or the aspect of any collateral concern, and must, therefore, be presumed to deal with each firm upon the faith of its own trade and apparent property; and in such cases, the effects in possession of each house at the time of insolvency are considered as distinct property, and liable to be divided, in the first place, amongst the creditors of such house *(d)*. Now if the two firms of the *Crawfords* were distinct, and the property of each firm liable to its separate creditors, how can the effects of the house at *St. John's* pass under an assignment of the effects of the house at *Port Glasgow*, for the benefit of the creditors of the latter, the creditors of another house? It is true, indeed, that in cases of conflicting commissions of bankruptcy at home, it is the practice of the Court of Chancery, to select that one under which the most ample justice can be done, and order separate accounts to be kept of the respective estates, in the same way as if there had been separate commissions *(e)*. But it should be observed that, in such cases, the Lord Chancellor has an entire undivided jurisdiction over the whole subject-matter, as, indeed, the selection of a particular commission pre-supposes; and the very principle upon which the present practice of that Court rests, after some variation has been adopted, may be turned as an argument against its extension to a separate concern in the colonies, where the jurisdic-

(*d*) 2 Bro. Ch. R. 15. 6 Ves. 123 & 747.
(*e*) 3 Ves. 545. 13 Ves. 109.

1818.

In appeal, in the matter of CRAWFORD & Co's. Insolvency.

tion of the chancellor does not ordinarily run. For how can it be reconciled with *convenience* and *economy*, to require the body of creditors in this island to send their debts to Scotland, to be proved under the sequestration there? But there still remains another great objection, which, in the absence of every other, would, I conceive, be conclusive in the present case. The law of insolvency in this island is peculiar to it, and the course of distribution different from that in Scotland. By the 49th of the King, (*f*) there are certain preferences of payment to particular creditors here, which are unknown there; and, although it is not presumable that the legal rights of creditors would be less respected in Scotland, yet, as a matter of mere policy, it is surely desirable that property, subject to distribution in conformity with a particular law, should be adjusted at the place where that law prevails; for the law of the place, necessarily enters into all contracts between parties, and forms an implied and operative part of all their dealings. Upon the maturest consideration, therefore, which I have been able to give this important subject, I am of opinion that the declaration of insolvency in this island must be sustained; and that the separate creditors of the house of *Crawford & Co.* must be first paid out of the separate estate of that partnership, between which, and the house of *John Crawford* & Co. it will be necessary to state an account, and on whichever side the balance appears, such balance must stand as a credit, and be proved as a ratable demand (*g*).

Having disposed of the *principle* of the

(*f*) Ch. 2. and see 1 Hen. Cook, 691.
(*g*) Expts. Johns Cook, B. L. 538.

1818.

In appeal, in the matter of CRAWFORD & Co's. Insolvency.

case, I shall proceed to examine the claims of the Scotch creditors, according to the order in which they are made. The first of these claims is that of *Jean Crawford*, who styles herself the widow, and sole solvent executrix, of the will of the late *John Crawford*, and prays to be admitted to prove the sum of £45,767, as having been received by *James*, *Andrew*, and *Joseph Tucker Crawford*, co-executors of their father's will, and being still due to the estate. As this claim stands in the same relation to the estate of the principal firm, it is natural to suppose that some application of a similar kind was made to the trustees in Scotland; and I am left to infer that if it had been attended with success it would have been so stated, as an argument, at least, in favour of its being allowed in this island; and I should gladly have attended to what passed on the other side of the water, as a precedent for my own proceedings on this. But, as nothing is made to appear, I must examine the claim upon its own merits and the evidence before me. It is stated that *John Crawford*, by his will, left the bulk of his property, real as well as personal, to his wife, the present claimant, for her life, with power to dispose of the accruing rents and profits; the remainder to his eight children, among whom were his three sons before mentioned. After the decease of *John Crawford*, a large amount of stock in the public funds was sold, and the monies arising therefrom, as well as the rents of certain real property, and other sums belonging to the testator's estate, were received by his sons, *with the consent*, as is admitted, of Mrs. *Crawford*; but under what authority the stock was sold, or in what manner either that or any other part of the property was appropriated, is nowhere

1818.

In appeal, in the matter of CRAWFORD & Co's. Insolvency.

stated. From the affidavit in support of the claim, it would appear to have been employed in the general trade which the testator had carried on, in partnership with his three sons, and which was continued by them, under the same firms, as during the life of their father. However, it forms the basis upon which the present claim is made by Mrs. *Crawford*, on behalf of her husband's estate. It might be sufficient for me to say that the claim cannot be supported by the evidence before the Court, because it is not proved that any part of the monies received by the *Crawfords*, in their character as executors, was employed in the establishment in this island. But there are certain circumstances which, it appears to me, would tend to destroy the claim under any form. In the first place, the *Crawfords*, who have been declared insolvent, have a reversionary interest in the very sum which is now sought to be recovered; and it remains to be shown how far Mrs. *Crawford*, as executrix of the will of her deceased husband, having suffered his property to be employed in trade, has not made herself a partner, and become liable to the full extent of any interests she may derive under the will (*h*). If such be the case, it would seem equitable that any sums of money which have been received by the representatives of the late *John Crawford*, to the prejudice of the rights of the other children claiming under his will, should be considered in the nature of private debts, and liable to be satisfied, in the first place, out of their separate property and reversionary interests. But it is not for the Court to wander in pursuit of a subject which is not before it, and in

(*h*) 1 Maul. and Sel. 416.

1818.

In appeal, in the matter of CRAWFORD & Co's. Insolvency.

which, from the absence of facts, it is exposed to error. It is sufficient to determine that the claim of Mrs. *Crawford*, as at present brought, cannot be sustained; and the decision of the *Surrogates* must, therefore, be affirmed.

The claims of the other Scotch creditors, taken collectively, amount to the sum of £67,459; they rest upon one and the same ground, and may all be resolved into a simple question of fact,—are they creditors of *Crawford* & Co. of *Newfoundland?* By their own showing the credit they gave was to the house of *John Crawford* & Co. of *Port Glasgow*; and as the latter is considered in the light of a distinct firm, it follows that these claims must also be rejected. I observe that the *Surrogates* admitted the first four accounts, as set forth in the transcript of their proceedings; but upon what ground of distinction, does not appear. It is stated, however, that it was in consequence of those particular claimants having been able to trace the goods which were sold to the house at home, to the possession of the house in this island. But I cannot agree that any substantial distinction can be founded upon that circumstance. As soon as the goods were delivered, they became the property of the vendees, and were mixed up in the undistinguishable mass of their effects; so that had an insolvency immediately followed, the vendors would not have stood upon a better footing than the generality of the creditors. But if in this case they should be allowed to come here and claim for goods delivered to a distinct concern, between which and the house in St. John's there are mutual accounts, the consequence must be that the amount claimed, instead of being a credit in favour of the house at home, becomes the

1818.

In appeal, in the matter of CRAWFORD & Co's, Insolvency.

credit of the individual, and, of course, alters the state of accounts between the two firms, and is attended with the effect of giving a preference to particular creditors, contrary to every principle of the bankrupt laws. I must, therefore, reverse that part of the decision of the *Surrogates* which admits the claims of these particular creditors, with the exception of *Lawries'*, which was originally a direct credit to the house in *Newfoundland;* but in consequence of what has been stated, and with the appearance of truth, that *Lawrie* was referred by that house to *John Crawford* & Co. for payment, and agreed to his demand being placed to his credit in the books of that firm, I must let this demand lie over until that fact can be ascertained. It may be necessary to add, that this estate must be divided in conformity with the course lately determined by this Court, and not according to the old interpretation of *current supplies.*

From which judgment, or decree, *Simms*, for the claimants, gave notice of an appeal to his Majesty in Council; and (on behalf of the several claims of William Bennett, as trustee under the Scotch sequestration; William Bennett & Co. for money lent William Bennett & Co. for premiums of insurance; Joseph Marryat & Son, and Jean Crawford) entered into security for the due prosecution of said appeals within the time prescribed by law.

1818.

February 6th.

HENRY SIMMS *against* FRANCIS HODDERN.

Time allowed to an absent defendant to appear; and the sale of a vessel belonging to him, which was held by attachment under the process of the Court, directed to take place immediately, for the purpose of preventing the deterioration of the property.

THIS action was brought to recover the sum of £181 17*s.* 4*d.*; and property of the defendant had been attached, but there had not been any service of the writ upon him, as he was absent from the island. The circumstances of the case were shortly these: The owner of the vessel called the *Brilliant*, being at St. John's, and requiring necessaries for the same, took them up upon *bottomry*, conditioned to pay the amount advanced upon the return of the vessel from her then intended fishing voyage. The vessel returned, but the money was not paid; and it is now sought to recover it by this action. Proof of these facts having been adduced, the *Chief Justice* said:—

This vessel has been *attached* for a debt, which has been proved to be due by a bond which was given for the payment of it at a time long past. Enough has appeared to satisfy the Court that the vessel is exposed to loss and deterioration, and that it is expedient to order her to be *sold*, as would be done by any other perishable property.

The defendant must have a reasonable time to *appear*. In the mean time, let the property be sold, and the proceeds held subject to further orders.

1818.

February 7th.

Trustees to the estate of JOHN HILL & Co. appellants, and HENRY SHEA, respondent.

The Court will not review the verdict of a Jury upon *matters of fact.*

THIS cause came on in the Surrogate Court, on the 19th December, 1816, before the worshipful *David Buchan*, Esq. and a special jury, to recover the sum of £93 sterling, being the amount due for the purchase of a lot of ground by the defendant below, at public auction, being part of the estate of *John Hill & Co.*, situated at Prince Edward's Island; and that Court having given judgment in favour of the defendant, agreeably to the verdict found by the jury, the plaintiffs below appealed to this Court.

It appearing doubtful to the Court, from the transcript of the proceedings, what were the points at issue between the parties below, and whether the *time* for completing the conveyance according to the *conditions of sale*, had been waved at the trial, or had gone to the jury, and these particulars being disputed between the parties, the *Chief Justice* examined *Nicholas Gill*, one of the Jury who was present, upon the facts, and who stated that the time of delivering the title-deed had gone to the jury, and was considered in their verdict.

Per Curiam.—This is an application to this Court, to review the verdict of a jury, upon *matters of fact*, entirely within their province. This I have already declared to be out of the power of the Court.

Trial by jury is a constitutional right, expressly extended to this island by an act of Parliament, and a jury here has co-extensive rights with a jury in England.

How stood this case at the trial in the Surrogate Court? The plaintiffs call upon

1818.

Trustees of JOHN HILL & Co. v. HENRY SHEA.

the defendant to pay for the purchase of certain lands at Prince Edward's Island.

The defendant contends, that by the conditions of the sale, as exhibited at the time of sale, the vendors were to give a legal title on or before the 20th November, 1815; but that, in fact, they did not make out the title-deeds till near *Christmas*, and that the title was not legal. That, in short, they had not complied with the *conditions* of sale, either in the time, or in the perfecting of the title. This case went to the jury, who determined, by their general verdict, all they could determine—the fact of the time, and that the condition had not been complied with. The jury could not try the title, because that is a pure question of *law*.

But suppose I were to go into this part of the case, and say that the title, *when tendered*, was good; yet the defendant must have his judgment upon the fact, as found by the Jury, that it was not *completed* when it ought to have been by the conditions of sale.

That *time* was an ingredient in the trial below is, I think, apparent, not only from the explanation of the juror, but also from the course of proceeding; as it was made a point in the defendant's case by the cross-examination of the plaintiff's witness as to the time when the deeds were prepared, and the purchasers required to complete the purchase.—The judgment of the Court below must, therefore, be affirmed.

1818.

February 7th.

Petition of Mr. RYAN.

THE memorial, in substance, stated,—that the petitioner had for many years carried on business, under the style of *Ryan & Sons*, at Liverpool and at Newfoundland; the first-mentioned branch of it being conducted by *Joseph Ryan*, one of the sons of the petitioner, and the other branch by the petitioner himself. That in consequence of the protest and return of some bills which the petitioner had drawn, he consulted his friends as to the measures he ought to adopt; and by their advice a general meeting of his creditors was convened, and a statement of the affairs of the firm laid before them.—That at this meeting trustees were appointed, and Mr. *Henry Shea* authorized, as agent, to dispose of the property, and collect the debts due to the concern, for the benefit of all the creditors. That at the same time that petitioner received the first intimation of the protest of his bills, he was informed by *Joseph Ryan* that he expected to be able to effect a compromise with the creditors in *England*, to whom he had felt himself justified in holding out a prospect that the property in *Newfoundland* was more than sufficient, if not sacrificed by an untimely sale, to discharge all the claims upon it in this country. That from the occurrence of several unforeseen and calamitous events, the hopes entertained by *J. Ryan* will be so far from being realized, that he will soon learn that the property here has not yielded, under the best management, enough to pay ten shillings in the pound upon the amount of the Newfoundland debts; and that the petitioner and his son are thus placed in the painful predicament of having, though unin-

Where there are two branches of the same firm, the one in England and the other in Newfoundland, the property of the firm in each country is, in the event of bankruptcy, or insolvency, exclusively divisible among the creditors who trusted the branch of the firm established in that country in which the property is situated.

1818.

In the matter of RYAN's petition.

tentionally, held out false and delusive expectations to a numerous class of their creditors, who have thereby been lulled into a repose which may prove highly prejudicial to their interests. The petitioner then positively avers that the house of *Ryan & Sons*, at Liverpool, did not carry on any business whatever that was not directly connected, and closely interwoven, with their trade to this island; and concludes with entreating the Court to take the whole case into its most attentive consideration, and to make such order thereon as it may deem best calculated to dispense equal justice to all parties.

To which application the *Chief Justice* gave the following answer, written with his own hand, on the back of the memorial:—

Upon the above statement, I am inclined to think that the *Newfoundland creditors* will be entitled to the *whole* of the Newfoundland firm's estate. They cannot be supposed privy to any private relations between the house here, and the house in Liverpool.

But they looked to the trade here, and to the ostensible stock and property of that trade, for their security.

By "Newfoundland creditors" I do not confine the above observations to creditors *residing at this place*, but intend to include all creditors in Great Britain, Ireland, and Newfoundland, who advanced goods on credit to the house of *Ryan & Sons, at Newfoundland.*

ATTWOOD & HAYNES *against* JAMES & GEORGE LILLY.

1818.

February 10th.

A surety is discharged from his liability to pay the debt of another, by the party, to whom the debt is due, giving time to the principal debtor without the knowledge and concurrence of the surety. But in an action against both the principal and the surety, the Supreme Court will give judgment for the plaintiff against the principal debtor.

THIS action was brought to recover a large sum of money due by the defendant, *James Lilly*, to the plaintiffs, for goods sold and delivered to him; the payment of which had been secured by a bond executed by both the defendants. The material facts of the case are distinctly detailed in the following judgment, delivered by the *Chief Justice*:—

It is a clear and settled rule of law, in the interpretation of guarantees for the payment of the debts of others, that the person giving such guarantee shall not be bound beyond the express terms of his engagement, as they existed in the contemplation of the parties at the time such guarantee was given; and that, therefore, where the creditor gives time to the principal, *without the knowledge of the surety*, he discharges such surety.

Now, what are the facts before us? The defendant, *James Lilly*, being indebted to the plaintiff, and unable to discharge the debt without a sacrifice of the goods for which the debt was contracted, gave a joint bond with the other defendant, *George Lilly*, for payment *on or before the 20th day of December*, 1816.

It is an undisputed fact that *George Lilly* was merely a *surety*, and in no other way liable to pay the original debt. Various payments were made by *James Lilly*, from the date of the bond to the period of its becoming absolute; but a considerable balance still remained due at that time.

It does not appear in evidence that any direct communication was made to the surety, until *twelve months* after the bond became forfeited. Something like evidence seemed,

1818.

ATTWOOD & HAYNES v. JAMES & GEO. LILLY.

indeed, to grow out of *Waddell's* testimony, but that is completely rebutted by the testimony of *Wakeham*. But it does appear by the evidence of *H. Simms*, the plaintiffs' principal witness and confidential clerk, that the plaintiffs, in a communication with *James Lilly*, the principal, at which the surety, *G. Lilly*, was not present, agreed not to press for payment of the bond, which, in fact, amounted to extending the time for payment.

It is contended by *Simms*, on the part of the plaintiffs, that it is not possible to suppose, from the close affinity of the defendants, who are brothers, that *Gorge Lilly* was not privy to the indulgence which was shown to the principal, and did not accede to it.—But it is possible that he might have thought the plaintiffs, in giving time to his principal, were satisfied of his means of payment, when the extension of time was granted, particularly as intermediate payments had been made, nearly equal to half the amount secured by the bond; and it is equally possible that the debtor, upon the faith of the indulgence which had been promised, might have postponed the payments he would otherwise have made, and applied his funds to other purposes; but the Court cannot speculate upon events. The presumption is not strong enough to overturn the principle of law, raised as it is by the clear proof of the plaintiffs' own witness, that they did extend the time for payment, in a communication with the principal debtor, and that without the surety being made acquainted with such indulgence, or with the terms upon which it was granted.

I think, from the reasoning of the *Lord Chancellor*, in the case of *Rees & Berring-*

1818.

ATTWOOD & HAYNES v. JAMES & GEO. LILLY.

ton, (*a*) as applied to the case before me, that the giving twelve months for payment, beyond the period limited by the bond, has the effect of discharging the surety. This may be, and certainly is, a hard case upon the good nature of the plaintiffs; but it would be still harder if that good nature were to be exercised at the expense of the surety. Perhaps, as a matter of personal feeling, it was too much to require the surety to press a proceeding against his own brother; it would have been better to urge the payment of the debt at the time the bond became due. However, I cannot enter into any feelings upon the subject. This case must be conformable, in decision, to every other; and as the facts bring it within the rule of law which discharges a surety by the creditors extending the time for payment without the privity of the surety, I must determine that *George Lilly* is discharged, but the plaintiffs must have their judgment against *James Lilly* in the sum sued for. *

Against which judgment, so far as it released the said *George Lilly* from the said bond, the plaintiffs gave notice of an appeal to his Majesty in Council; and, within two days after, appeared and entered into the security required by law, for duly prosecuting the appeal.

(*a*) 2 Ves. Jr. 542.

* As this action was on *contract*, a judgment in favour of one of the defendants, and against the other, could not certainly have been given in any Court of Law in England; but this is only one instance, among a multitude, where the Supreme Court of Newfoundland has endeavoured to administer justice SECUNDUM BONUM ET ÆQUUM, without paying the slightest regard to the rules established in the mother country, respecting the *forms of action, joinder of parties, &c. &c.*

1818.

February 10th.

The parties to a deed, under which the property of an individual is conveyed to trustees for the benefit of his creditors, cannot set up such deed as an act of insolvency.

Exparte T. H. BROOKING and Others, in the matter of GRAHAM LITTLE's Insolvency.

PER CURIAM. This is an application to the Court to arrest the judgment obtained by *John & Robert Brine* against *Graham Little*, and to declare him insolvent; in proof of which a certain deed is exhibited, whereby *Little* appears to have conveyed away the whole of his real and personal estate and effects to trustees, for the benefit of his creditors. In compliance with the act, I directed a statement to be made of the debts due from *Little*, as well as a schedule of his property, to be laid before the Court; and it certainly does appear that he is not in a condition to pay twenty shillings in the pound.

But there is a previous question, whether the petitioners, being parties to the deed, are not estopped from setting it up as an act of insolvency, from a known principle of law, that no person shall be heard to aver against his own deliberate deed.

With respect to Mr. *Little* himself, it may be very immaterial whether his property is to pass out of his hands by a declaration of insolvency, or by the assignment under the deed of trust; but with respect to the creditors, it is very material; and, therefore, I am under the necessity of determining upon the deed as a matter of disputed right between the creditors. By the deed, *Little* conveys the whole of his real and personal property and effects to certain trustees, to be sold and divided amongst his creditors, according to the supposed rights of preference, for what were termed *current supplies*. The property was allowed, however, to remain in the hands of *Little* for a

1818.

Exparte,
T. H. BROOKING and Others,
In the matter of GRAHAM LITTLE's Insolvency.

limited period, for the purpose of turning it to a better account; and there was a clause for extending this allowance under certain terms, which not being complied with, and the period of indulgence having passed, the property becomes, of course, completely vested in the trustees, unless the deed shall be determined to be void.

Now what is there in the deed to vacate it? It conveys the debtor's property to all his creditors, according to what was then received as law; and he so conveys it, with the consent of all his creditors.

The law has provided rules for the distribution of insolvent estates; but it is merely in the cases where the parties do not adopt a different course of distribution amongst themselves.

For parties may enter into modes and forms of transmitting property, which does not interfere with the policy of law.

By *parties*, I mean *all* persons who are interested in the property; for a *single dissentient creditor*, who is no party to the deed, would be able to defeat it.

Now the petitioners in this case are parties to the deed; they executed it with their eyes open; and it will be too much for me to afford them relief against their own acts, to the prejudice of rights which are conveyed, and to which they consented by deed.

I shall, therefore, hold the deed to be a good and valid conveyance, and leave it to the trustees to carry it into effect (*a*); at the same time professing my readiness to afford the aid of this Court whenever it may be required.

(*a*) See the case cited in a note in the 2d T. R. 594.

1818.

February 11*th*.

JOHN WILLIAMS *against* THO. WILLLIAMS and Others.

Under a will by which landed property is devised to "A and her "heirs for ever," the eldest son of A (who dies intestate) is not entitled to the whole of this property as her sole heir, but must share it in common with his brothers and sisters.

THIS action was brought nominally to recover £120, as rent of a certain dwelling-house in St. John's. But the point which the plaintiff really sought to establish by it, was his exclusive right to the premises in question. The following is a short outline of the principal facts of the case:—

The maternal grandfather of the parties, *J. Monier*, by his will (which is admitted), among certain other dispositions of his property in this island, gave his house, gardens, and appurtenances in St. John's, to "*Mary Monier*, his daughter, and her heirs for ever." *Mary Monier* afterwards intermarried with *George Williams*, and by him had several children, of whom the plaintiff is the eldest. *George Williams* and his wife *Mary* both died intestate, and the plaintiff claims the sole right to the premises, as *heir at law*, and under the express limitation of the devise; whilst the defendants contend, that real property in *Newfoundland* has always been held to be mere *chattels*, and not subject to the *English law of inheritance*.

For the plaintiff, it was urged that, although real property in Newfoundland is considered as *chattels for the payment of debts*; yet, under the laws of England, which are the laws of Newfoundland, *for the purposes of succession*, it ought to be considered as *real property*. That by a bond intended to have been given by *John Monier*, in contemplation of the marriage of his daughter, it appears to have been the clear understanding of the family, that the property in question would descend to the plaintiff as *heir at law*. That supposing the custom of this island to

1818.

WILLIAMS v. WILLIAMS and Others.

be well founded, and universally understood, it must have been known to the testator. And that, therefore, by giving the property to the plaintiff's mother and *her heirs for ever*, the testator must have intended the word "*heirs*" to operate as words of limitation to the eldest son of his daughter *Mary*.

To these arguments the defendants answer, that the rules of real property as to succession are not in force, and never have been recognized in this island; and that, by an indorsement at the back of a certain *deed*, it appears that the mother of all the parties to this suit considered her property as equally divided amongst her children.

Per Curiam.—After diligent inquiries whether any, and what, rules of descent have been followed by the Courts in this island, I cannot find any record which throws the most distant light upon the subject. I cannot, however, regard the silence of the Courts as entirely without expression; and the inference that I should deduce from it is, that the law of inheritable succession, with its alluring rights and legal complications, has never been urged before the Courts of this island. However, as the question is now before me, and I am called upon to determine it, I shall endeavour to trace my own way through those first and general principles, which appear to afford the only safe conduct to a right decision of the case.*

* It appears to have been Mr. *Forbes*'s intention to have inserted his whole judgment upon this interesting case in the record; but, unfortunately, from some cause or other, it was never done; and all that can be collected from the record, in its present state, therefore, is, that the judgment was in *favour of the defendants*.

1818.

February 11th.

HUTTON, M'LEA & Co. *against* DENNIS KELLY.

Under the 49th Geo. III. c. 27, the Justices in Sessions have no jurisdiction in cases arising out of a demand for *bait*, where the demand exceeds forty shillings. [Such a jurisdiction is now, however, expressly conferred on them by the 5th Geo. IV., c. 67, s. 22.]

ON motion, this day, to quash certain proceedings which had taken place in the Court of Sessions, it appeared that *Butler & Grace*, boat-keepers, and dealers of *Hutton & Co.*, had been supplied with caplin bait, last summer, by *Kelly*, in payment of which they drew orders upon *Hutton & Co.*, which were refused, upon the ground that the drawers had no authority to draw them. *Kelly* afterwards brought his action in the Court of Sessions against *Butler & Grace*, for the amount of the debt; and having obtained a judgment, followed the proceeds of their voyage into the hands of the present plaintiffs, as the *receivers of the voyage*. It also appeared that an objection had been made, at the trial, to the *jurisdiction* of the *Justices* in Sessions; which was over-ruled, upon the authority of a *rule* framed by a former *Chief Justice*, for their guidance, and *expressly directing that the price of bait should be considered as wages, and rank as a preferable claim.* The same objection was now urged before the Supreme Court; and it was also contended, that, admitting the case to be within the jurisdiction of the Court below, yet the present plaintiffs were not parties to any engagement between *Butler & Grace*, and the defendant, *Kelly*.

Per Curiam. The defect of jurisdiction in the Court of Sessions to try an action for money due for bait, is so evident upon the face of the proceedings, that there can be little hesitation in determining the course to be pursued. But, perhaps, I owe it to the public to explain the reasons which compel me to depart from a rule of of practice

1818.

HUTTON, M'LEA & Co. v KELLY.

established by the supposed authority of this Court.

The Courts of Sessions in this Island are instituted by the Governor, in virtue of his commission from the Crown; and, in analogy to similar Courts in the mother country, they are invested with general powers as conservators of the public peace; but their authority does not extend to the trial of any *civil causes*, unless it be expressly given them by act of Parliament. Let us see, then, what power Parliament has conveyed. The statute of the 15th of the King authorizes the Courts of Sessions in this island to determine all differences concerning the wages of seamen; and also provides that all the fish and oil which might be taken and made by the hirers of seamen, should be liable, in the first place, to the payment of wages.—The Judicature Acts which have since passed, confirm this authority to the Justices of the Sessions, and extend it to the determination of all actions of debt under *forty shillings*. But here their civil jurisdiction terminates. If any authority, derived from the usage of the island, might be supposed to remain, it is completely annihilated by the clause which declares that no Courts whatever shall hold plea of any civil matter (other than seamen's wages, and debts under forty shillings) except the Supreme and Surrogate Courts. Now, money due for bait is certainly not wages; and the debt being over forty shillings, the authority to try it must be sought elsewhere. It is too clear to require observation, that the *Chief Justice* cannot delegate his judicial authority to other hands. The Judicature Act enables him to appoint a person during his absence to perform the ministerial functions of this Court, but with an express saving as

1818.

HUTTON, M'LEA & Co. v. KELLY.

to hearing or determining any matter of a civil nature; indeed, such a power of deputing a judicial power would have been contrary to the constitution of a British Court. The only ground upon which the rule contended for can be supported, is upon that clause of the Act which directs the *Chief Justice* to "*settle forms of process and rules of practice, for the conduct of suits and the dispatch* of business in the Court of Sessions." But a rule of *practice* is as essentially different from a rule of *law*, as *form* is from *substance*. The Act of Parliament renders fish and oil primarily liable for seamen's wages. A rule of Court extends this preference to boat-hire and the supply of bait. Surely this is not *expounding*, but *making*, a law; and the power which was strong enough to frame and enforce such a rule, by an easy exertion of itself, might have extended the law still further, or have repealed it altogether. It is an important part of the duty of the Supreme Court to watch over the proceedings of the other tribunals established within the sphere of its authority, with a view not only to the rights of suitors, but to the protection of the tribunals themselves; for it is well known that if an inferior Court exceed its jurisdiction, and an injury is occasioned thereby, the party has a right of action against its members. Under every view of this case, therefore, I must determine against the proceedings, and they must be set aside.

In the regular course of business, the plaintiff, *Kelly*, would be driven to a new action to recover the amount of the bills or the value of his bait; but as we are in the habit of attending less to the forms, than the ends, of justice, I shall take this opportunity of explaining what I apprehend to be the

1818.

HUTTON, M'LEA & Co. v. KELLY,

law upon the case. Bait-money is not wages; and no power but the magic of Parliament can make it so. All preferences of one creditor to another are contrary to the equal rules of justice, and in opposition to the very object and end of the bankrupt laws of all countries. I believe that the extension of preferences in this island, beyond the letter of the Act, has arisen from a humane disposition of the Courts to let in creditors whose demands were of a strong kind, but which, by not being considered in the first order of preference would frequently be lost altogether; and I am ready to do justice to the intentions of the Court; at the same time, I will freely state that, in my own apprehension, it was exercising a particular lenity at the expense of that general beneficence which belongs to the law, as a sy stem of even and regular justice.

While I sit in this Court I shall always regard preferences of payment amongst Creditors with a jealous eye; and I feel assured that I am borne out by the intentions of the legislature.

Much of the erroneous interpretation of our Insolvent Act has arisen from a supposition that it is a peculiar law, both in its application to this island, and in the character of its provisions. To the latter I cannot assent. Our Insolvent Act is nothing more than the application of that part of the maritime law of Europe which relates to ships and sailors to the fisheries, which, in their general features, bear a strong resemblance. For example, in the adjustment of the claims upon a ship, by the laws of Europe, the seamen have a right to be paid the full extent of their wages, while a plank of the vessel remains. Next in priority of claim, are materials, and those

1818.

HUTTON, M'LEA & Co. v. KELLY.

who have furnished necessaries abroad, who claim a preference amongst each other according to the recency of the date of their several bottomries; and, lastly, all other creditors alike. What is this but the law of Newfoundland applied to the product of a fishing voyage, instead of a ship—to supplies for such voyage instead of necessaries for a foreign voyage, and to the last supplier in preference to the one preceding, instead of the last security of bottomree? This application of the maritime law to the fisheries naturally suggested itself to the Courts at home, which used formerly to determine all causes which arose in this island. It was as naturally followed by the Court of Vice Admiralty, which afterwards entertained civil actions; and it remains to this hour the law of the island. In the case before the Court, I shall consider bait as a very necessary supply for the fishery, and, as such, it must rank with all other supplies. If there be a necessity for giving it a higher claim, recourse must be had to Parliament; and, in the mean time, I should recommend bait-suppliers to have a previous understanding with the supplying merchant, before they part with their bait, and not to risk the uncertainty of coming upon them at the close of the season.

In the matter of DOOLING & KELLY'S Insolvency.

1818.

February 12th.

Where some creditors had received a dividend and others had not, the Court directed, with the concurrence of the body of creditors, the payment of the same dividend to those creditors who had not already received it; and ordered the surplus of the insolvent estate, after the payment of such dividend, to be invested in the public securities in England, to abide the determination of an appeal then pending before the King in Council.

UPON motion, it was this day ordered, with consent of the appellant from the late order, or decree, of the Court in this case, that the creditors for the year 1815, who had not received either goods or money, should receive at the rate of 5*s.* in the pound out of the goods bought in by the trustees; *and further, that the balance be remitted to England, for the purpose of being invested in the public securities, to abide the issue of the appeal.*

And it was further intimated by the Court, that upon reconsidering the case of those creditors who had received goods in *specie*, at a supposed valuation, to the extent of ten shillings in the pound, upon the amount of their demands, *if satisfactory proof could be brought* that such goods, if sold at the time, would not have realized the value at which they were received, it would cause the Court to make an alteration in the order of distribution; and the Court was the more anxious to set this matter right, as it had been made to appear that the principal creditor, *Graham Little*, was present, and, indeed, a party to the resolution of the creditors, under which the division in goods was made. But as the matter was under appeal, the appeal had better be suspended until such proofs could be brought in.

On a subsequent day, certain proofs, by affidavits, being laid before the Court, that the goods which had been received *in specie* had not realized the amount at which they were valued; and that the creditors were, generally, of the same opinion, inasmuch as the majority of them had consented to re-

1818.

In the matter of DOOLING & KELLY'S Insolvency.

duce them from the original valuation of 10*s.* to 5*s*; it was ordered by the Court, that the first order be altered, as follows: after the word "lot,"—unless the persons receiving the same may be able to prove to the satisfaction of the trustees, (in case of difference to be determined by the Court,) that the goods have not actually realized, or been worth, the sums at which they were valued, in which case, they must be taken at, or as nearly as may be, the value they have realized.

February 20*th.*

ATTWOOD, HUNT, and WILSON, *against* Trustees of SAMUEL KOUGH & Co.

The person ordering an insurance is liable for the premium; and the insurers can sustain an action against him.

THE plaintiffs had effected, by desire of the insolvents, an insurance on some property sent from this country to Ross, in Ireland; and the payment of the premium was now resisted by the defendants, on the ground that the parties who were to receive the benefit of the insurance, were alone liable for the payment of the premium. This defence was, however, immediately rejected by the *Chief Justice*, who said:—

The main ground of defence to this action is, that the plaintiffs, in insuring the *Shamrock and cargo*, although they did it by the directions of the house *here*, yet they looked to the house *at home* for payment of the premium; and that as it was to the English house that the proceeds of the insured property went, so the insurers should look to those proceeds for the premium advanced for their security. But it is impossible for the insurers to follow the *property* for the purpose of recovering their claims for a premium. They look to the *persons* ordering

1818.

In the matter of DOOLING & KELLY'S Insolvency.

the insurance, unless in a case of mere agency, and even then they act upon the faith of the principal in reality, and may properly be said to look to the persons ordering the insurance—"QUI FACIT PER ALIUM FACIT PER SE."

Now there has not been a shadow of evidence to show that the plaintiffs looked exclusively to the partners in Ross to pay the premium. The letter which directed them to inform the house of the insurance being effected, might have gone farther, and desired they would *draw* for the premium; but, even then, if the premium had not been paid, they might have come back upon the house here, as having ordered the insurance without a hint that the insurers were not to look to them for the premium. Looking at the letter by which the insurance was effected by the plaintiffs, I cannot say that there is anything to discharge the house here from their liability for the premium; but, on the contrary, it is a general order, and the estate of the parties who gave the order must be primarily liable for the premium.

Judgment for plaintiffs, £210 7*s*. 6*d*.

WILLIAM LEGG *against* M'CARTHY & BANFIELD.

February 28*th*.

B, tenant for life, demises for years, and dies before the expiration of the period mentioned in the lease. The lessee continues in possession after the death of B, and pays rent to the reversioners. This does not amount to a confirmation of the lease, and only makes a tenancy from year to year. [See Woodfall's Tenants' Law, pp. 39 and 78.]

THE property which formed the subject of the present action, is a plantation at Carbonear, and the dispute between the parties grew out of these circumstances:

Henry Webber was in possession of the disputed plantation, and by his will, dated

[1818.

LEGG v M'CARTHY & BANFIELD.

in 1769, devised it to *Frances Tucker*, for her life, and, after her death, to her three children and the survivors of them. Upon the death of *Webber*, *Frances Tucker* succeeded to the property, under his will; and by lease, dated in 1776, leased the same to Dr. *Ferrers* for the term of ten years, with a singular clause, that upon the lessee's performing certain conditions therein expressed, respecting a part of the premises, he should possess and enjoy the remainder *as long as he or his assigns should think fit*. In 1787, Mrs. *Tucker* brought an action against *Ferrers* for holding over after the expiration of his term, and the Jury found, "that the principal part of the property, as leased, should be restored to the plaintiffs, and the remainder continue in possession of the defendants, subject to the payment of certain rents, and the performance of certain conditions." Two of Mrs. *Tucker's* children died in her life-time, and Mrs. *Tucker* herself in 1810. Her sole surviving child, *Henry*, continued for some time after her death to receive a yearly rent of £7 10*s*. for the premises now in possession of the defendants, under a conveyance to them from Mr. *Watts*, the representative of the late Dr. *Ferrers*; and in 1813 he, *Henry Tucker*, sold the same to the plaintiff, who seeks, by this action, to eject the defendant from the possession thereof.

The *Chief Justice* observed that two questions had been raised upon the foregoing facts: 1st, does the acceptance of rent by *Henry Tucker* amount to a confirmation of his mother's lease to Dr. *Ferrers?* And, 2dly, how far property adapted to fishing purposes can be considered liable to the laws of landlord and tenant? Upon the first point, he felt perfectly confident that the acceptance

1818.

LITTLE v. M'CARTHY BANFIELD.

of rent by *H. T.* did not amount to a confirmation of the lease, and only created a tenantcy from year to year. It was true that in the case of a lease by a *guardian* for a longer period than his guardianship, an acceptance of rent by the ward, would amount to a confirmation; because in that case the interests are one, and, therefore, what one does, and the other recognizes, must bind; but here the interests are different and opposite, and, consequently, a different rule must prevail. The 2d point, he added, could not properly be raised between *subject and subject*, and could only arise between the *crown* claiming after the determination of a life interest, and a *subject* claiming through the person whose interest was protected by the statute. It was not, therefore, at present, necessary for him to express his sentiments upon it, and he should give judgment for the plaintiff.

The trustees of GRAHAM LITTLE *against* DULLAHANTY.

April 20th.

The retention of title-deeds by the mortgagor, with the consent of the mortgagee, will prevent the mortgagee from setting up the mortgage against a *bonâ fide* purchaser for a valuable consideration, even though the mortgage had been recorded in the Supreme Court. But note, this was before the passing of the 5th Geo. III., c. 67.

THE question here raised was, whether the mortgagor, being permitted by the mortgagee to retain title deeds, does not invalidate the mortgage, as against a *bonâ fide* purchaser ignorant of such mortgage?

Graham Little sells to *Burnell Rutledge*, and *Burrel Rutledge* mortgages to *Little* as a security for payment of purchase money, but obtains possession of title-deeds, and there is no mention of the mortgage in the bill of sale to *Rutledge*.

Rutledge obtains a grant of other lands, and sells them, together with those purchased from *G. Little*, to one *Dullahanty*,

1818.

Trustees of G. LITTLE v. DULLAHANTY.

who is not apprised of the mortgage, and pays a full consideration. These facts were not denied. But it was contended that the mortgage to *Little* was recorded in *the Supreme Court*, agreeably to a rule made by the late *Chief Justice Tremlett*.

Per Curiam.---It appears that, in April, 1814, *Little* sold a plantation called "Gaden's Marsh" to *Rutledge*, for the sum of £200, and regular deeds of conveyance were given, together with the title-deeds of *Little*, to *Rutledge*; but as the money was not paid at the time of the sale, a mortgage was made on the same day by *Rutledge* to *Little*, and recorded in the books of the Supreme Court. About a year after this transaction, *Rutledge* obtained a grant of more land, and sold the whole premises to *Dullahanty* for £300, who paid the same, unconscious of the mortgage to *Little*. The vendor, *Graham Little*, in parting with the title-deeds, at the time that he sold the plantation, and thus giving *Rutledge* the means of committing a fraud by keeping out of sight any traces of a mortgage, would be precluded thereby from setting up his mortgage against a *bonâ fide* purchaser, ignorant of the mortgage, and it must have the same effect against his assignees. The recording in this Court is not sufficiently founded on law, to enable me to make that circumstance the basis of a decision different from what is held in England upon cases similar to the present.

Colonel FITZHERBERT *against* WILLIAMS & GILL.

1818.

May 2d.

THIS action arose out of some alterations in the arrangements of the church, under which the plaintiff had been deprived of a pew he had formerly enjoyed as Commandant of the Garrison; and the nature of the plaintiff's right to the pew seems to be clearly defined and settled by the *Chief Justice* in the following judgment:—

Per Curiam. At the first hearing of this cause, the Court expressed an opinion that the officer in command of his Majesty's land forces in this island, had a *right* to a seat in the pew occupied by him, before the removal of the organ into it, and not a mere *courtesy* at the hands of the churchwardens; and it entertained the hope that this opinion might have led to an amicable arrangement between the parties, and the appropriation of another pew less objectionable than the one which had been prepared for the commandant. As, however, the recommendation has not had the desired effect, I must proceed to discharge my duty in passing the judgment of the Court. It appears that the old church being in a state of dilapidation and decay, it was deemed proper to rebuild it by subscription, which is the only mode of raising monies in this island; but as the funds fell very short of the undertaking, an application was made to the Governor for assistance, who, upon representation to the crown, obtained a grant of the sum of £500 towards the completion of the church, which was effected in, or about, the year 1802. It does not appear that any *express* reservation was made to the crown of any parts of the church; but that certain pews were occu-

The Crown is as fully entitled to those parts of the church which have been successively occupied by his Majesty's servants, as any individual is to the pew he occupies. If, therefore, any public officer to whom the King has given the use of one of the pews belonging to the Crown be deprived of this *easement*, or obstructed in the enjoyment of it, by the churchwardens, such an officer may bring an action on the case against them; but the Governor, as the King's representative, may dispose of the government pews as he thinks proper.

1818.

FITZHERBERT v. WILLIAMS & GILL.

pied from the opening of the church by the officers of the crown; and, amongst others, the central seat in the gallery, which is now occupied by the organ, was appropriated to the Governor, with whom sat the commanding officer of the forces; the officers of the navy having the next pew on his right, and those of the army on his left. Lord *Gambier* appears to have been in the government of this island at the opening of the church; but disliking the situation of the pew in question, he took a private seat in the body of the church, and the commanding officer of the forces continued to occupy the first pew, without interruption, from the year 1802, until the erection of the organ, within the last few months. During the administration of Sir *John Duckworth*, about the year 1811, the church was extended, and in consideration of the further sum of £250, subscribed by the crown, through his hands, a new pew was fitted up for his accommodation near the pulpit, and is the one at present used by the Governor. This last pew was given for a new consideration, and nothing was said or understood as to its being in exchange for the one originally occupied by him. In the course of last year, the proprietors of the church being desirous of erecting an organ, the church-wardens consulted the late Governor as to its situation; and it being considered that the pew occupied by Col. *Fitzherbert*, as commandant, was the fittest for the purpose, his Excellency was pleased to direct that it should be taken in exchange for the singing-gallery, a pew used by the singers on the left side of the gallery. The church-wardens, however, consulted the Colonel, who stated that he had no objection to remove; but it must be expressly upon the faith of another pew, equally well adapted

1818

FITZHERBERT v. WILLIAMS & GILL.

to the station he filled, being prepared for him. It is to be lamented that something more definite had not been arranged between the parties, and that the pew which was intended for him had not been more particularly pointed out and approved at the time. The Colonel states that, in consideration of the sacrifice he had made, and the convenience which had been afforded the church, he was entitled to expect every liberality on the part of the proprietors, and their representatives, the church-wardens; and I do certainly agree with him in the propriety of that expectation. The pew, however, which was taken in exchange, was given to the officers of the navy, and the one occupied by them transferred to the Colonel, a pew in size something less than the one he had resigned, and subjected to sounds certainly not *by distance made more sweet*. Such is the state of facts before me, upon which I am called upon to determine the right which is claimed. But there is a preliminary question: Is this Court competent to determine such right?

As between the church-wardens and the colonel, had he been dispossessed by them of a seat belonging to the crown, I could have indemnified him for any disturbance in the quiet enjoyment of possession. But in this case there has been an *exchange* between the governor, as representing the crown, and the church-wardens; by which exchange, the pew occupied by the colonel has passed to the general rights of the church, and the pew called the singing-gallery has been transferred to the crown; for I hold, that as all property in the church is in virtue of subscription, and as the crown has subscribed very liberally, the crown is as fully entitled to those parts of the church which have

1818.

FITZHERBERT v. WILLIAMS & GILL.

been successively occupied by his Majesty's servants as any individual can be to the pew which he occupies. But, independently of the crown, no right can be claimed in the pews belonging to the crown; they must be held like the assignment of barracks and other accommodations immediately afforded by the crown, at the discretion of His Majesty, and are entirely a matter of private arrangement by those under proper authority from him. Recommending the commanding officer and the officers to that source for relief, I must determine against the present claim to an indemnity from the church-wardens.

July 9th.

JNO. LYNCH *against* CATHERINE COUGHLAN.

"ACTIO NON ACCREVIT INFRA SEX ANNOS" is a good plea in Newfoundland to a debt due, on simple contract, more than six years before the commencement of the action.

THE only interest which this case is capable of exciting, arises from its being the *first* on record in which Mr. *Forbes* held that the statute of limitations was a part of the law of England applicable to the circumstances and condition of this island. In deciding it the *Chief Justice* said:—

The cause of this action being one to which the statute of limitations applies, in *part*, I must begin with *limiting the time* for which the demand for wages may be sustained to *six years from the time of serving out the writ*. Of these six years eighteen months must be deducted (according to the *agreement* proved by the plaintiff's witness, and confirmed by the defendant's witness, viz., that plaintiff was to have his victuals, clothes, and boarding, in lieu of wages), leaving *four years and a half*, to which, I think, under the evidence, he is entitled to wages, at the rate of £20 per annum, liable

to deductions for such articles of clothing and other articles (except usual meat and drink allowed to all servants about a house) as the plaintiff has been actually supplied with by the defendant, who must produce an account thereof, beginning in the spring of 1812, and ending in the fall of 1816; and deliver a copy of the same to the plaintiff before the next court-day, unless the parties should previously come to an arrangement among themselves upon this point.

1818.

LYNCH v. COUGHLAN.

WILLIAM DAWE *against* PETER FADDY & JOHN CONNELL.

September 7th.

In an action of trespass for an assault, the Jury assess *several* damages against the defendants.

IN this action, which was for an assault and battery, a special jury returned the following verdict:—

"The Jury find *John Connell* guilty of an assault and battery. Damages £5, with half costs of suit.

"*Peter Faddy* guilty of aiding and abetting an assault and battery. Damages £10, with half costs of suit."

And the Court gave judgment accordingly against the defendants. *

* The verdict in this case claims attention on three grounds:

1st, Because the Jury have assessed *several* damages for a *joint* trespass.

2dly, Because they have found one of the defendants guilty as a principal in the *first*, and the other as only in the *second*, degree. And,

3dly, Because they have given much higher damages against the *principal in the second*, than they have done against the *principal in the first*, degree.

With respect to the first point, it was certainly holden in *Lowfield* v. *Buncroft*, 2 Stra. 910, and has ever since been admitted in Westminster Hall to be good law, that where the defendants plead jointly in an action of trespass,

1818.

September 14*th*.

Rent received by a general merchant, as agent to the landlord, is not entitled to a preferable claim in the event of the agent's insolvency.

WILLIAM NEWMAN *against* Trustees of TREMLETT & Co.

THE circumstances of this case are sufficiently explained in the following judgment:

Per Curiam. There is not evidence before the Court to sustain the present action. It appears that *Tremletts* were the agents of the plaintiff, and received the rents upon his property in this island.

That they received various sums in the year 1817, which they applied to the purposes of their trade; and witness states that he *intended* to appropriate the balance of an account due to his house from that of *Newman & Co.* to the repayment of the sums he had so applied; but that being pressed by the Sessions for servants' wages, he drew the balance out of *Newman & Co's.* hands, and appropriated it to the payment of wages. How can this be called an appropriation of a particular sum to the payment of the plaintiff? The *specific monies* which he received for the plaintiff, he spent as soon as he received. He afterwards determined to apply a debt due himself, to the repayment

the damages cannot be given *separately* against them; yet at a period not very long before the decision in *Lowfield* v. *Bancroft*, Lord *King* did take a verdict in a precisely similar case (that of *Lane* v. *Santeloe*, 1 Stra. 79), where the Jury gave *several* damages; and I think it will readily be admitted that the *earlier* decision furnishes a rule more applicable to the state of this country, and the course of proceedings in our Courts, than the latter one.

On the second point it may be observed, that, though, technically speaking, there can be no accessory in trespass (*Rex* v. *Jackson*, 1 Lev. 124), yet there may be a distinction between the principals.

And, on the last point, the verdict may be justified by the consideration that it is perfectly consistent with natural justice, that a rich man who aids and abets an assault should be mulcted in higher damages than the poor man who commits it at his instigation, or by his command.

1818.

NEWMAN
v.
Trustees of TREMBLETT & Co.

of the plaintiff. He changed his determination before he had done so, and applied it otherwise. His insolvency followed some days after; and at the date of the insolvency, which is the true time to which such a claim for preference must always be referred, there was no appropriation of any monies, debt, or security whatever, to the demand of the plaintiff.

It is hardly necessary to say, that rent received by a general merchant, in the capacity of an agent for the landlord, forms in itself no claim to priority of payment, and, unless particularly set apart, merges in the general mass of the insolvent's effects.

JOHN SQUARE *against* MATT. MOREY & Co.

September 14*th*.

A and B are partners in trade; the first residing in England, and the other in Newfoundland. B draws a number of bills, on partnership account, upon A, who accepts them, but afterwards refuses to pay them. With a knowledge of A's intention to do so, and, in fact, at his particular desire, C. purchases the bills, and then brings his action in Newfoundland against A & B.—Held that he is entitled to recover upon them.

THIS was an action to recover the sum of £3,713 16*s*. 0*d*. The circumstances attending it are all particularly adverted to by the *Chief Justice*, who said:—

This is an action to recover the amount of certain bills of exchange, which were drawn by the defendants in favour of various persons, in the years 1814 and 1815, and came, in the course of negotiation, to the hands of the plaintiff, by whom they were presented at the place appointed for payment, and were refused; consequently, it falls upon the defendants to excuse themselves from a liability apparent upon the face of the transaction. Two objections are made, one goes to the merits of the action, the other, if allowed, would stop it at the threshold of the Court. It has been stated that there is a suit pending in England for the same cause which is now before me. If this were proved, I should certainly consi-

1818.

SQUARE v. MOREY & Co.

der it as an abatement of the action; but the parties have had sufficient time, not only since this case was first brought before the Court, but since the objection itself was raised, to have produced something in the shape of proof, whether the suit said to be pending on the other side of the water is for the same cause, and between the same parties, as the present,—in short, what that suit is. To say merely that there is a suit between the parties, and to say no more, is "pleading historically," as Lord *Hardwick* expresses it, "without any averment or certainty which Courts of equity and law both require." I must, therefore, dismiss this plea, although with reluctance; for as the parties are all in England, it would surely have been more advisable to adjust their difference there. The principal defence is upon the merits of the case. And it is sufficiently brought to the notice of the Court by the evidence on the part of the plaintiff, who has travelled a little further than was necessary into detail, how he came to take up the bills in question, and why he has brought his action here. The holder of a bill of exchange, is always presumed to have come fairly by it; and where it was originally given for value, the want of consideration can hardly be averred by the drawer against the holder; who, if the bill be dishonoured, has his choice of action against all, or any of the parties, without assigning his reasons for pursuing one of them in preference to another. But, as the plaintiff has thought fit to enter into the private history of his case, it is open to the defendants to take advantage of anything which may arise out of it, to defeat the action; and, certainly, it is a case very singularly circumstanced, in which one of the defend-

1818.

SQUARE v MOREY & Co.

ants determines before-hand to protest bills, for which he was, *prima facie*, liable as the partner of the drawer, and fixes this liability by accepting them; and the plaintiff, with a full knowledge of this determination, comes forward, at his request, and takes them up, avowedly for the purpose of their being protested and sent back for recovery to this island. Such a transaction might be all very lawful and correct, but it is certainly very suspicious; and if it had rested here, I should have felt myself called upon to suspend the judgment of the Court, until the defendants should have an opportunity of proceeding by some course in the nature of a cross-bill, to probe the case to the bottom. But the circumstances set forth in the plaintiff's affidavit, must have been sufficiently in the knowledge of the defendants, to have enabled them to have put him to his answer; or, at least, to have produced proof of the fraud which has been set up; and I cannot, at this late season of the year, leave the case open to such a proceeding, without throwing it into another year, and departing from the system of *summary justice*, which is particularly enjoined upon the Court by the act of Parliament under which it sits. I must, also, bear in mind, that the *law* (5th Geo. II., chap. 7), which allows the affidavit of parties interested in England to be evidence in the colonies, has, in this instance, furnished the personal testimony of the plaintiff directly negativing any presumption of his not being the real party to this action. He swears distinctly and expressly, that the sum demanded on account of the bills, *is justly due and owing to him;* and in this statement he is corroborated by the admission of the defendant, *Prideaux*, who goes on to affirm,

1818.

SQUARE v. MOREY & Co.

that he had no effects of *Matthew Morey & Co.* in his hands, as it would seem, for some time before the date of the bills, and that he had given positive orders to his clerk to refuse any of their bills which might be presented for payment; and he did so, because he was desirous that the sums for which the bills were drawn, should be paid; but as there were no effects in England to meet them, that they should be paid out of the property in Newfoundland. It was competent to the plaintiff to take up bills so circumstanced; and he might lawfully do so with the view of befriending one party, provided it was not done to defraud and injure the other. Nothing in the shape of fraud has been proved. Any suspicion which might be raised upon the affidavits produced, is cleared away by the affidavits themselves; and as there were no effects in the hands of the drawees to meet the bills at the time of their being drawn, it has not been made to appear in what way the defendants have sustained an injury. It does not appear to me, therefore, that the defence can be supported upon these grounds; and with respect to the remaining objection, that the defendant, *Prideaux*, is a partner of the plaintiff in the bank at Kingsbridge, that fact is not proved; and if it were, I do not see how it could affect the present action, which is founded entirely on a distinct transaction.

Under all the circumstances before the Court, I shall give judgment in favour of the plaintiff in the amount demanded; recommending the defendants, if they are dissatisfied with the decision, to appeal to England, where they will be enabled to supply any deficiency of evidence, and to correct any errors of this Court.

1818

October 1st.

Where there are two leases of the same property, the trustees, in case of insolvency, may hold to the one and reject the other.

Exparte WILLIAM HALY, Esq. in the matter of JAMES JOHNSTON'S Insolvency.

HUTCHINGS leased certain ground to *Thomas Williams*, who *underleased* part thereof to one *Johnston*, for a certain term of years, having a few months less to run than *Williams's* own lease.

Hutchings died, and the ground leased to *Williams* devolved upon Colonel *Haly*, who, by deed, covenanted to extend *Johnston's* term for ten years *after the expiration of the lease to Williams;* and *Johnston* also covenanted, *during his lease from Williams*, to erect certain buildings on the premises.

Johnston is become insolvent, and the trustees desire to dispose of the first lease to *Johnston*, but intend to give up the *extended* lease, or rather *lease covenanted to be extended* by Colonel *Haly*. Colonel *Haly* prays that they may be obliged to dispose of both together.

Per Curiam. The trustees have a clear right of choosing whether they will take both of the insolvent's leases or not. Now, supposing they gave them up, Mr. *Williams* will be entitled to the residue of his term, free from any after-engagements of *Johnston* with Colonel *Haly*. The only question then is, can the trustees retain the first lease, and give up the second? I think they can; for, in the first place, by so doing they may benefit the insolvent estate, and cannot place Colonel *Haly* in a worse condition than he would be in were they to give up the lease to Mr. *Williams*.

But upon the general question, I think the assignee of the first term would not be liable to covenants reserved with a new party in a new deed, and with reference to a new es-

1818.

Exparte, W. HALY, Esq. in the matter of J. JOHNSTON'S Insolvency.

tate, not yet in being, and not even to commence, at the expiration of the first, for the residue of Mr. *Williams's* term will intervene, and the property actually change masters before the new estate, upon which the covenant is reserved, is to take effect.

I must, therefore, decide that the trustees may elect and dispose of the one lease, discharged from any covenant in the other.

November 11*th*.

A person who, since the year 1685, has built and made a house, stages, and other conveniences for the fishery, is entitled peaceably and quietly to enjoy the same.

The KING *against* THOMAS ROW.

UPON a full hearing of this cause, the *Court* gave the following judgment :—

This is a proceeding on the part of the crown, to abate a fence lately run by the defendant across a part of the water-side on the south of this harbour, and claimed by him as private property; but which, it is contended, is a public cove, or landing-place, and as such has been used, time out of mind, by all His Majesty's subjects, and particularly for his naval-yard. It is brought by the Crown, as the guardian of the rights of the community, and not as the sovereign claiming an exclusive property in the soil. I shall, therefore, abstain from entering into the general question, as to what is real property in Newfoundland; a question which has been carefully avoided by all my predecessors, and which I am not disposed to invite. Whatever may be the quantity or quality of real estates in this island, it is certain that the statute of *William* authorises any subject to make a fishing establishment on any part of the shore which had not, within a given period, been used by the fishing ships; and quietly to use and enjoy the same for his fishery.

1818

The KING v. Row.

The defendant rests his case principally upon this statute; and if the facts of it bring him within the act, he certainly has a right to enclose the place which the law has exclusively entitled him to hold. The case before me depends upon its facts, and I shall, therefore, begin with the defendant's evidence, as first in the order of time.

It is stated that, in the year 1768, the defendant, or his predecessor, having occasion to erect a fishing-room on the South Shore, and desirous of ascertaining how far it was necessary to keep from the naval yard, was informed by the governor that he might approach as near as twenty feet of the eastern boundary. This information he received in writing, and caused to be indorsed on what is called a grant, from the same governor, to build other fishing-places. In the following year, 1769, there is a similar instrument, confirming the defendant in the possession of the place in which he then carried on his fishery. These instruments, which can hardly be considered operative as royal grants, are of use, however, as evidence to show the first intention of the parties, and the probable time of possession; and I must own it as my impression upon them, considering the situation of the place in question and its acknowledged convenience, indeed its actual connexion with the defendant's rooms, as forming part of the front of his flakes, that the defendant most probably took possession of the place according to the intention of the governor in 1768. Following the course of evidence, it appears that for the last twenty-nine years, the defendant has occasionally erected what is called a "summer flake" over the disputed space of ground; that the last flake was built in the year 1811; since which pe-

1818.

The KING v. ROW.

riod it has been used more particularly for hauling up boats, for which the defendant had a greater occasion, in consequence of having reduced his number of barking vessels. So far the evidence of the defendant goes to support a long and peaceable possession of a place actually used in, and essential to, his fishing establishment.

On the part of the Crown it is stated that, in 1804, a survey was taken of the several fishing-rooms in the harbour of St. John's, and, among others, the defendant's is laid down in the plan, in which the space in question is not included, but appears as an open cove. But this plan in itself, however, made under very high sanction, cannot bear down positive testimony, directly contradicting any presumption which may be collected from it. The statute giving the title which is now claimed, requires no registration of property to make it valid; possession peaceably acquired, and use in the fishery, are the best title-deeds which can be produced in Newfoundland. The evidence of Mr. *Holbrook*, on the part of government, is too recent to meet the statements of the defendant's witnesses. He proves that one of the King's anchors was laid upon the disputed ground, in 1812. But with what view was it laid there—as a boundary of property?—It was for the purpose of hauling up a merchant ship which had arrived in sinking condition, and required to be immediately run ashore. The mere fact of putting down an anchor for such a purpose, and leaving it there, proves nothing. It is a circumstance capable of explanation from the recency of its date; and it has, I think, been explained away in the very intention for which it was originally laid down, namely, not as a mark or boundary of property, but as the means of

1818.

The KING v. ROW.

aiding a ship in imminent danger.—Mr. *Holbrook* goes on to say that he always knew the cove to be used as public; but his experience does not go back for more than six or seven years; and it appears that what he considered as a right, was frequently complained of by the defendant as a trespass. If the place in question had been public, it seems natural to suppose that it would have been easy to prove it so by the testimony of many witnesses, whose length and locality of knowledge would have placed the matter beyond the reach of doubt. As it is, I am of opinion that the defendant's case is within the protection of the statute of William; and I must, therefore, determine, in the words of the *Act*, that the defendant having, since the year 1685, built and made a house, stages, and other conveniences for fishing (which appear to have included the space in question), is entitled, peaceably and quietly, to enjoy the same to his own use, without any disturbance whatever.

PETER LAHY *against* FRANCIS TREE.

November 26th.

If an independent planter gives a servant in the fishery an order upon a merchant for the payment of his wages, and the servant takes from the merchant a bill of exchange which is afterwards protested, the planter still continues liable to the servant for his wages.

THIS action was brought to recover the sum of £5 14*s.*9*d.*, amount of servant's wages, under the following circumstances.

Lahy was shipped by the defendant for the summer of 1815, for a certain sum; and at the close of the year, took an order on *Shannon & Co.* for balance of his wages, which he received from them in a bill of exchange, and which bill was protested.—Defendant contended that he was discharged under the authority of the case of *Meany* v. *Pynn**; but plaintiff insisted that

* Ante p. 56.

1818.

PETER LAHY v FRANCIS TREE.

defendant was an independent dealer, employed his servants upon his own responsibility, and sold his fish to whom he liked; and, therefore, that the decision in that case was not applicable to the present.

Upon these facts the *Court* adjudged, that, by the 15th Geo. III., the employer was obliged to pay the one-half of servants' wages in *money, or good bills of exchange upon Great Britain or Ireland.* That the defendant, acting for himself, as an independent employer, and not as the agent of any particular merchant or receiver, was, of course, bound to follow the directions of the statute. He had not paid money, nor had he paid bills, and, therefore, he would be liable to the servants, unless it could be considered that giving an order for bills was tantamount to giving bills; in which case he became party to the bills, and must be considered as guaranteeing their being good. The defendant was liable to the plaintiff for the amount of his wages, agreeably to the provisions of the *act.* But, inasmuch as it had been made to appear that the first fish and oil had been sent to *Shannon, Levingston & Co.* to meet the order for servants' wages; and as the statute expressly made "the fish and oil subject and liable, in the first place, to payment of wages," the defendant is entitled to take the benefit of the clause, and claim upon *Shannon & Co's.* estate as for servants' wages of the year 1815.

1818.

ELIZABETH CARRELL *against* WILLIAM CARSON.

December 7th.

THIS action was brought to recover one year's rent of premises, situated in water-street; and the defence to it rested on two grounds. First, that the house for which the rent was claimed, had been consumed by fire, and, therefore, that the lessee's obligation to pay rent was at an end, *under the custom of this town.* Second, that the ground upon which the house formerly stood, had, since the fire, been appropriated to the use of the public, and now actually formed part of one of the streets. To establish these two points, the defendant called

Thomas H. Brooking (sworn). Witness, as one of the attornies for the plaintiff, had conversation with the defendant; and it was the *opinion* of both, that *the fire having destroyed the premises, had cancelled the lease.* An account was stated by the defendant, and given to witness, charging himself with rent *up to the day of the fire* (the rent was payable every 20th October); and had the money then been offered, witness would have *accepted it*, and considered the lease at an end.

Geo. Lilly (sworn). Witness drew the lease in question. He *intended the lease to operate merely so long as the house was in being.* It was *generally understood that a fire extinguished the lease*, and, therefore, there was no *express clause* to such effect.

Cross-examined. Considered that if the premises were burnt, it avoided the contract altogether, and that the landlord would have a right to re-enter, although the lessee should wish to retain the ground.

James Simms (sworn). Confirms the state-

Where, after a house had been destroyed by fire, the ground on which it stood was converted into a public street, and the acts of the lessor's agent also amounted to "something very like an acceptance of the surrender of the lease," the lessee is discharged from his covenant to pay rent. [See the case of *J. Broom* v. *Preston & Stabb*, decided in the Supreme Court, 13th August, 1825.]

1818.

CARRELL v. CARSON.

ment that it was the opinion of all persons in this town, that a fire *put an end to the tenantcy*. That he has been in the habit of making many leases, and knows this was the prevailing understanding.

In pronouncing judgment for the defendant, the *Chief Justice* said:—

The lessor's agents (who executed the deed) having done that which amounts to something very much like *an acceptance of the surrender of the lease*; and also the ground on which the house stood, being actually converted into a street; so that the defendant could not use the ground, or rebuild on it, if he wished to do so; I think that this action cannot be sustained.

A. H. BROOKING, Esq., *against* CHARLES H. BYRNE and R. JOB.

December 7th.

In a case where the commissioners of the customs had expressed a disinclination to enforce a bond given by a party who had been guilty of an infraction of an act of Parliament, under circumstances which negatived every presumption of *fraud* on his part; the Court considered the bond as cancelled.

THIS was an action to enforce the penalty of a bond, under the following circumstances. The defendant, *Byrne*, master of the ship *New Century*, arrived at this port some time since, from Liverpool, with a certain quantity of bread on board, consigned to the other defendant, *Job*. The vessel and goods were regularly cleared by the custom-house at Liverpool, with the exception of 500 bags bread, for which there was no cocket. The plaintiff being doubtful as to his power to admit the said bread to entry without the regular cocket, and at the same time, believing that the cocket must have been left behind, as it could have been had, as a matter of course, at the time of clearance, took a bond from the defendants in his own name, conditioned for the production of the cocket. It turned out, however, that the cocket had never been

1818.

BROOKING v. BYRNE & JOB.

taken out, and the present action was brought to enforce the bond.

There was a letter from the commissioners of the customs laid in evidence, by which it appeared that they had expressed a disinclination to proceed against the parties.

The *Court*, having heard the respective parties, gave judgment, in substance, as follows:—

This is an action on the equity side of the Court, to enforce the penalty of a bond given for the production of a document from the custom-house at Liverpool, as to the whole of the bread which was imported into the island without a cocket, having been laden in England, pursuant to the statute 4th George III. The defence that this statute was not imperative, and did not cause a forfeiture, was not tenable. The act provided remedies at several stages; first, in forbidding the clearance of all goods not laden in England, for the colonies. Secondly, in making any goods whatever, liable to seizure, *as forfeited*, as soon as they arrived, without a proper clearance, within two leagues of a colonial coast. It fixed the limit at which the forfeiture accrued, and the seizure might be made at any time after. [Vide *Lockyer* v. *Offley*, 1 Term, Rep. 252.]

That the objection as to the bond, being conditioned to perform an impossibility, by producing what never was in being, was a mere quibble. The custom-house at Liverpool might have given the document required, which would have satisfied the bond. But as the commissioners of the customs had signified a disinclination to proceed on the bond, the Court must consider *them as virtually exercising the power vested in them by the* 51 *Geo. III.*; and as there was a total absence of all fraud against the revenue, the Court would consider the bond as cancelled.

1818.

December 9th.

P. C. Le Geyt Esq. *against* Miller, Fer- & Co.

Upon an application from the Deputy-Collector of G. H. Duties, accompanied by a threat of attaching the fish belonging to several dealers of the defendants, if the demand were not complied with, the agent of the defendants agrees, in writing, to pay the duty of 6d. per mensem claimed from all the fishermen employed by the defendants' dealers; and, in pursuance of this agreement, draws a bill upon the defendants for the amount thereof, which is refused payment by them. Held, that the plaintiff could not recover for more than the sum which had been actually stopped and detained by defendants' agent from the fishermen on account of the duty. [See the decisions which were given in the Supreme Court in 1826, in several important cases growing out of the question as to the liability of fishermen in this Island and the Labrador to the payment of the G. H. duties.

THE facts of this case will be satisfactorily collected from the following decision upon it:—

Per Curiam.—This is an action brought by the plaintiff, as collector of Greenwich Hospital duties, to recover the sum of £42 13*s.* 7*d.* upon a bill of exchange, drawn under the following circumstances:—

The defendants are merchants of this island, extensively engaged in issuing supplies for what is called the *shore fishery*, which they carry on at Bay Bulls, by means of an agent. In the month of September, the deputy collector of Greenwich Hospital demanded of the agent, *Stevenson*, a written engagement to pay the duty of *6d.* per month, for all the fishermen supplied by the defendants; stating that unless this proposal were complied with, he should be obliged to *attach their fish*. To this demand, *Stevenson* at first objected, and urged the hardship of paying money for persons who were in debt to his principals for their supplies; but being assured by the deputy-collector that his instructions (which I am to infer, were to attach the fish,) would be carried into execution, he consented to pay the money; and on the 29th of October following, drew a bill of exchange upon the defendants in St. John's, for the sum demanded. This bill was presented for acceptance, but refused, and the present action is brought to recover the amount. It is admitted by the defendants that their agent was authorized to draw bills upon them, and, therefore, no

1818.

LE GEYT v. MILLER, FERGUS & Co.

objection is raised upon that ground; and it was also admitted on the first hearing of this case, that the sum of £28 9*s.* 1*d.* had been deducted from the wages of the shipped servants, and that sum had been ordered to be paid into Court. But it is contended, that in respect of the residue of £14 4*s.* 6*d.* there was no consideration for the bill which was given; and that as against the payee, who is the present plantiff, the defendants can avail themselves of the want of consideration as a legal defence to the action.

It is unquestionable law, that the want, *or insufficiency*, of consideration, may be given in evidence to reduce the damages upon a bill of exchange in the hands of the payee, whether the bill be given for a debt claimed from the drawer himself, or upon his collateral undertaking for another, which is the case in the present action. The act of Parliament under which the duty is demanded, directs it to be paid "*by the masters, commanders, and owners of the vessels*," subject to its provisions. If, therefore, it were payable in the present case, it was by the boat's masters whom the defendants supplied, and the latter can only be made liable by an express undertaking. It appears by the bill of exchange, that they did undertake, through their agent, for the payment of the hospital money demanded of their dealers; and the consideration for that undertaking, was the forbearance on the part of the deputy-collector to attach the fish upon the rooms. How far the process of attachment could have been legally taken against the respective dealers, where the causes of action were all considerably under twenty shillings, it is not necessary to inquire. The process itself is unknown to the common law, and owes its existence to the 49th of the King,

1818.

LE GEYT v. MILLER, FERGUS & Co.

which limits it, however, to cases where the cause of action exceeds £5, and is sworn to by the party. It is equally unnecessary to determine how far the persons on whose account the duty has been demanded, and who are all stated to be boats' masters and their children, or sharemen, employed in open boats along this island, may fall within the meaning of the act. The Court is in possession of an opinion of Sir *Philip Yorke*, that all persons whatever, engaged in fishing, are liable to the duty; but it cannot help thinking, from the unqualified language of that opinion, that the exceptions contained in the 10th Anne, chap. 17, and which are there confined to open boats on the coasts of Great Britain and Ireland, had not been extended to the colonies, at the time that opinion was given; and it is the more inclined to believe so, as Sir *Philip* had been many years attorney-general, before the passing of the 2d Geo. II. Indeed, the case put for the opinion of that great lawyer was upon the construction of the statute of Anne, and it is hardly supposable that a subsequent statute, passed so recently, and for the express purpose of extending the provisions of the former act to the plantations, should have been overlooked, if it had been in being at the time. The case before the Court turns principally upon that part of the clause of the last-mentioned act, which directs the duty to be paid by the *masters and owners* of the vessels subject to its provisions, and for that purpose authorises them to deduct the payment from the wages, shares, or other profits of the persons liable to the duty, *if such persons shall be entitled to any wages, shares, or other profits.* If, therefore, the persons on whose behalf the duty was demanded, were not entitled to any shares,

1818.

LE GEYT v. MILLER, FERGUS & Co.

there was no original cause of action against the masters of the boats in which they were employed; and, consequently, there was no consideration founded upon forbearance. In order to determine this point, it will be proper to take a cursory view of the relation of suppliers and fishermen, as established by the usages and law of this island. It has been continually held by this Court, that the supplier of necessaries for a fishing voyage, has a *lien* upon the catch of fish, for the amount of his suppliers. In the case of *Cunningham, Bell & Co.* v. trustees of *Crawfords & Co.*, this right was traced, beyond any positive law, to its foundation in the necessary connexion of the parties. Experience has proved that the very existence of the sedentary fishery depends upon this principle; for it is the sole foundation of the credit, and, consequently, of the employment, of the greater portion of the fishermen of the island. The 49th of the King, is little more than a directory application of the same principle to the distribution of insolvent estates; and it is guarded with so much strictness by the Courts, that a judgment at law cannot be executed upon the productions of any voyage, until the current supplier has been satisfied.

By the list of persons, whose names affixed to the several accounts demanded as Hospital dues, have been exhibited to the *Court*, it appears that they were all *boats'-masters* and *planters*, who took their supplies from the defendants, and employed their own families, or engaged other persons, in a joint adventure in the fishery, to share any profits which might accrue at the end of the season. These are what are commonly called sharemen; and they differ from hired servants in this important parti-

1818

LE GEYT v. MILLER, FERGUS & Co.

cular, that, in the latter case, the wages are ascertained, and the duty imposed by parliament attaches immediately; while in the former, it depends upon the contingency of the voyage, whether any profits will arise, and, consequently, any share arise, out of which the deductions can be made on account of Greenwich Hospital.

It appears that at the time the demand was made by the deputy-collector, he was informed that some of the persons were in debt for supplies, but in consequence of his threatening to attach the fish, in order to avoid expense, the defendants agreed to pay the money. Now, supposing that he had proceeded by attachment, or any legal course, could he have come at the fish until the lien of the supplier was satisfied?—I am of opinion that he could not, consistently with the law of the island, uncontradicted, or, rather, confirmed, as it is by the latter provision of the Act of Parliament.

In every view, therefore, which I have been able, to the best of my judgment, to take of the case, I am of opinion that the amount of damages should be limited to the sum paid into Court, together with the costs.

In the case between COWELL & MACBRAIRE.

1818.

December 9th.

Injunction granted by the Supreme Court to restrain an agent from paying over to his principal a sum of money received by him in satisfaction of a judgment in favour of his principal, where it appeared, from circumstances not known to the defendant at the time of trial, that the plaintiff ought not to have the benefit of that judgment.

SIMMS moved for an injunction to restrain Mr. *Thomas Bulley*, the agent of the plaintiff, from paying over to the plaintiff the proceeds of a bill of exchange which had been given him by the defendant in satisfaction of a judgment delivered in the plaintiff's favour by this Court; and he urged these facts in support of his motion:—that it had, since the trial of this action, been discovered that the premises, for the rent of which the judgment was given, had been insured in England to their full value, and the amount of the insurance paid to the plaintiff; and that part of the ground on which the house formerly stood had been taken by the public, to widen the street.

Under these circumstances the *Court* granted the injunction, and ordered it to be served on Mr. *Bulley*, in England.

MEAGHER & SONS *against* HUNT, STABB, PRESTON & Co.

December 11th.

A special jury find, that before the passing of the 49 Geo. III., c. 27, the custom of receiving a merchant's bill in payment of a debt due by him, was general; but that since that period it has not been so.

THE following account of this case is almost a literal transcript of the *Chief Justice's* notes, made during the trial:—

Action to recover the sum of £75 11*s.* for goods sold and delivered.

Plea, tender of *a bill of exchange*, drawn by defendants on their house in England.

(Case submitted to a special jury.)

The sum demanded was admitted, and the only question was, whether *by the usage immemorially established and followed* in this island, a bill of exchange is a *legal tender?*

A great number of witnesses were exa-

1818.

MEAGHER & SONS v. HUNT, STABB, PRESTON & Co.

amined in support of, and against, the special custom set up as the defence.

Charge. State the case; question of local custom; *law of customs;* take a view of the English law, in respect of *legal tenders*—not good unless in the lawful current coin of the realm; even *bank notes* not lawful, unless *expressly* made so by *act of Parliament.*

Probable origin of the *local practice* of giving bills.

1st.—No circulating medium. 2dly.—The circumstance of the first fishery being transient, and the *proceeds* not being realized until they got to England, where, indeed, the *contracts* usually originated and ended. 3dly.—In the statute 15th George III., the employer is allowed the alternative of paying the servant either in money or in bills of exchange, payable in England or Ireland.

But the very passing this clause, negatives the argument that bills were a *lawful* tender before. However, it may account for the origin and continuance of the practice of paying by bills.

But, whatever may be the *origin*, the questions now for the jury are, viz.:—

Is there a fixed and *universal custom* among merchants upon the issue? and what is the custom?

This question, confined to merchants and dealers in this island.

Opinion, upon the general question, whether bills of exchange are a legal tender in all cases; *that it is not universally so;* but the question more properly resolves itself into this—

By the general understanding of merchants, in the contracts of buying and selling, it is considered as the condition of sale, unless the contrary be expressed at the time, that

1818.

MEAGHER & SONS v. HUNT, STABB, PRESTON & Co.

the goods sold are to be paid for in a bill of exchange. In all contracts of mere indifference in the eye of the law, and such as are not contrary to public policy, the *intention* of the parties must govern the *interpretation of the terms*, and if they are not expressed at the time, Courts and juries must collect that intention from the usage of the place, as being presumptively in the knowledge of the parties, and implied in their contract.

Strong fact in support of such custom, that there is *no circulatory medium in this island.*

Notice, proclamation as to dollars, and briefly observe upon it, as not constituting anything more than an expression of the conventional value of which they would be taken and paid by Government.

How, then, can payment be made? *Court* not aware of any means except by bills of exchange.

Supposing, then, the usage to exist that, in the absence of specific agreement to the contrary, *bills of exchange* are to be the mode of payment, *then come the questions—What bills?—Whose bills?*

Upon this point, some difference of opinion among the witnesses, as to the usage, whether the bills *are to be approved* by the creditor, *or are to be the debtor's own bills.—This I apprehend to be the pivot of the case.* Opinion of the *Court*, under the evidence, that the *bills must be of the parties' own drawing or indorsing.* The credit was given upon the faith of the solvency of the debtor; and unless that solvency be shaken by some fact or circumstance which intervenes the credit given and the bill offered, *the taking such bills may be only an extension of the term of credit.*

The whole case resolvable into this ques-

1818.

MEAGHER & SONS v. HUNT, STABB, PRESTON & Co.

tion: Is there such a usage as, in the absence of express agreement, may be called in to expound the presumptive intentions of the parties, that the bills of exchange of the party to whom the credit was given must be taken in payment, without the creditor being considered as having the right of approving or disapproving the same?

The Jury returned the following verdict:

"The Jury find that the custom of receiving, as a payment, a merchant's own bill, was general, previous to the passing of the act of the 49th of the King, when the property of the party remaining in the country was a security, and would be applied to the payment of the Newfoundland creditors, prior to any others; but that subsequent to that period, the usage of receiving a merchant's own bill has not been invariable."

December 12th.

In the absence of *express* agreement among merchants, it is one of the *implied* conditions of sale, that payment is to be made in bills of exchange, *to be approved or rejected at the discretion of the party to whom the payment is due.*

MEAGHER & SONS *against* HUNT and Others.

ON this day, a motion was made by the defendants for a new trial, upon the ground of the verdict being contrary to evidence, and void, for uncertainty; but it was refused by the *Chief Justice*, who said:—

The simple fact for the consideration of the jury, was this:—Is there such a custom in this island, as that the vendor of goods is bound (unless the contrary be expressed), at the expiration of the term of credit, to receive the purchaser's bill of exchange in payment? The Jury have found that such a custom did prevail before the passing of the 49th of the King, which altered the law in respect of the preference given to Newfoundland creditors, upon Newfoundland estates; but that since that statute, the cus-

1818.

MEAGHER & SONS v. HUNT, STABB, PRESTON & Co.

tom had not been invariable; leaving it to the Court to determine, whether, upon the fact so found, it could be considered as a custom having the force of the law. It is one of the necessary requisites of a custom, that it should be *continued;* any interruption to it as a custom, causes a temporary ceasing, and thereupon renders it void. Now the jury have found the time since which the alleged custom ceased to be observed; and it becomes the easy province of the *Court* to say, that it wants one of the requisites of a legal custom, and is therefore void.

Upon a matter of so much importance to the mercantile community, it may not be amiss for the *Court* to explain its view of the law, as it may now be considered as settled. It is this: *that in the absence of express agreements between merchants, it is one of the implied conditions of sale that payment is to be made in bills of exchange, to be approved or rejected at the discretion of the party to whom the payment is due.*

JOHN BROPHY *against* ATTWOOD & HAYNES.

December 12th.

Unless some act be done by the holder of a guarantee, *as an extension of the time limited for payment, without the knowledge of the surety,* the mere neglect by him to take active measures to enforce payment from the principal debtor will not relieve the surety from his liability to pay the debt.

THIS was an action to recover the sum of £364 sterling, upon the following guarantee:—

Mr. JOHN BROPHY,

Sir,—We hereby guarantee to you the payment of whatever just and lawful sum of money is now due to you from *William Casey*, one-half this fall, and the other half the ensuing fall of 1814, on condition of your making over to *Thomas Duffy* all your

1818.

BROPHY v. ATTWOOD & HAYNES

right, title, and interest in the schooner *Jane, William Casey*, master.

Pro ATTWOOD & HAYNES, HENRY SIMMS.

St. John's, October 25, 1813.

Lilly, for the plaintiff, states, that *William Casey*, the principal, being indebted to the plaintiff, as a *security* for the payment, gave a mortgage upon the schooner *Jane*; but the parties having referred their accounts to arbitrators, who could not come to a *determination; and Casey, wishing to dispose of the schooner*, got the defendants to guarantee the payment of such balance as should be *found due by the arbitrators*. That no arbitration was ever made; that the principal died; and that, in consequence, this action was brought.

Produces accounts between *Brophy* and *Casey*, from 1807 to 1812, by which a balance is claimed of £369 11*s*. 9*d*.

Also produces a paper, which is admitted, by which it appears that the defendants actually received *two hundred and thirty pounds* for the sale of the schooner *Jane*.

Simms, for defendants, states that they did *not receive the sum of* £230 *for their own benefit*. But that *Casey*, wishing to dispose of the *Jane* and *buy another vessel*, the defendants acted as his brokers, or agents, in selling the schooner *Jane* for £230, and buying another for him for £300, which was *registered* in his *(Casey's)* name, but was *lost* in 1815, in coming from an outport to St. John's.—He also produces a paper, by which it appears that, in 1816, the balance claimed by *Brophy* was only £268 10*s*. 8*d*..

Per Curiam. This guarantee was given under circumstances particularly favourable to the plaintiff. He was already in posses-

1818

BROPHY v. ATTWOOD & HAYNES.

sion of a schooner, as a security for his demand; and that security he relinquished at the express request of the defendants, when they gave their own guarantee instead of it. It is, besides, a strong presumption of some money being actually due from *Casey* to *Brophy*; although, the parties not agreeing as to the amount, it was referred to arbitrators to adjust. The arbitrators were dilatory in their proceedings, and could never be brought to make their award; in the mean time *Casey* died. Nothing then remained to be done, but to carry the case before a competent tribunal to determine the sum due from *Casey* to plaintiff; and unless the defendants can show something which has occurred, since they gave their guarantee, to relieve them from the effect of it, they were bound to pay the amount adjudged to be due.

It is contended, that there have been *laches* on the part of the plaintiff, in not enforcing his demand in the life-time of *Casey*. But it was necessary that the amount should be determined before he could enforce payment; and it does not appear but that he endeavoured, as much as he could, to get the award from the arbitrators. The delay was theirs, not his; and it has not been attempted to show that he gave any indulgence to *Casey*, by extending the term of payment, or otherwise. Besides, mere neglect of active diligence to enforce payment from the principal, will not discharge the surety (*a*). There must be some positive act done by him, some extension of the time limited for payment, without the knowledge or consent of the surety, to relieve the latter from his agreement. It was on this ground,

(*a*) 6 Ves. 734.

1818.

BROPHY v. ATTWOOD & HAYNES.

that the action brought by the present defendants against *Lilly*, was decided, and it is in this that it differs from the case now before the Court.

I am of opinion, that the guarantee is a good subsisting demand against the defendants, to the amount of *Casey's* debt to the plaintiff. In estimating the sum due from *Casey*, I am guided by the amount given in by the plaintiff to the defendants in 1816; and which, in consequence of the confusion caused in their papers by the great fire, was mislaid, and could not be found to be used by them at the first trial.

Judgment for the plaintiff, in the sum of *two hundred and sixty-eight pounds ten shillings and eight-pence sterling*.

Assignees of RYAN & SON *against* trustees of RYAN & SONS.

January 11, 1819.

Where trustees, under a composition-deed, had distributed part of the property that came into their hands among the Newfoundland creditors at large, and retained the remainder in satisfaction of their own claims as creditors, the *Ch. Justice* held, that the assignees under a commission of bankruptcy in England, could not recover the amount of those payments from the trustees.

AFTER having several times heard the parties, the *Chief Justice* now delivered judgment in nearly these words:—

This is an action brought by the assignees of *Joseph Ryan*, under the English commission of bankruptcy, against the trustees of the estate of *Ryan & Son*, appointed, by deed of composition, at Newfoundland, for the recovery of *Joseph Ryan's* interest in the partnership property of *Ryan & Sons*.

It appears that the parties were concerned in business, which they carried on in Newfoundland and at Liverpool, under the firm of "*Ryan & Sons*;" that *Joseph Ryan* also carried on some business on commission, on account of the concern, but not otherwise connected with the course of the reciprocal trade carried on between Liver-

1819.

Assignees of RYAN & SON v. Trustees of RYAN & SONS.

pool and Newfoundland; that in consequence of embarrassments, *Joseph Ryan* entered into a composition with the principal creditors at Liverpool, in February, 1817, by which he agreed to pay the English creditors a dividend of six shillings and eightpence in the pound, by three instalments, out of the funds and effects of the Liverpool branch of the firm.

The creditors of the Newfoundland branch, hearing of this arrangement, became pressing for a settlement of their demands, and by a deed of composition, dated at St. John's, 26th May, 1817, *Timothy Ryan*, for himself and his partner, *Joseph Ryan*, assigned all the funds and effects at Newfonndland to the defendants, in trust, for the benefit of all and every other the creditors of the said *Timothy Ryan*, and his said partners, under the firm aforesaid, for goods sold and delivered them in the island of Newfoundland aforesaid, or any other transaction with them within the said island, in equal proportions, ratably and proportionably.

In pursuance of the last-mentioned deed, the trustees proceeded to collect the effects of *Ryan & Sons* in Newfoundland, and distribute them as far as they would go, when some of the creditors at Liverpool, not having come into the arrangement there, and the others not receiving the promised dividend, *Joseph Ryan* was declared bankrupt, and his effects and interests transferred to plaintiffs as assignees.

As the respective branches at Liverpool and St. John's transacted business under the same firm, and seem to have been identified, in a great measure, by the course of their dealings, it would have been right had the English creditors considered them as forming but one house, and under the same

1819.

Asignees of RYAN & SON v. Trustees of RYAN & SONS.

liabilities, to have taken a commission of bankruptcy in February, 1817, against *Joseph Ryan* at Liverpool, and to have followed it up by a declaration of insolvency against *Timothy Ryan* in this island. But, instead of doing so, the greater part of them entered into a deed, in its operation tending to place the creditors of the two branches in a distinct point of view in relation to the respective estates. The Newfoundland creditors taking up the case in the same view, receive an assignment of the Newfoundland effects through the hands of trustees.

Under these circumstances, whatever might have been the true light in which the two branches should have been considered, I do not see how the trustees can be charged for what effects they have actually distributed, even supposing the deed of assignment void, as giving an undue preference, or from the want of a sufficient power in *Timothy Ryan* to bind *Joseph Ryan* by deed. Yet the defendants are at least to be considered as the agents, acting by the direction, and under the eye, of one of the partners having possession and control over the partnership effects in St. John's.

It is not proved that the defendants have *any*—or rather, it is proved that they have *no*, effects remaining in their hands; and, therefore, they must have judgment. With respect to such parts as they have *distributed*, and to such as they have *retained*, in satisfaction of their own demands as creditors, I think, under a full view of the whole circumstances of the case, as they now stand, I shall best satisfy the ends of justice by leaving the proceedings of the trustees undisturbed.

DEPUTY-SHERIFF of Harbour Grace *against* THOMAS PYNN.

1819.

January 14th.

Where property was taken by the deputy-sheriff in execution, to an amount far exceeding the amount of the judgments, and was afterwards sold at auction, without due notice of the sale, the *Court* refused to compel the party against whom the judgments had been given to deliver up the title-deeds to the purchaser, on the application of the deputy-sheriff.

UPON a rule to show cause why the *Court* should not compel the defendant to *deliver up the certificate of registry* of a schooner called the *Lark*, which had been sold by the plaintiff under divers executions from the Surrogate Court at Harbour Grace, —The defendant now appeared, and showed for cause:

That several judgments were given by *default* against the defendant, to meet which he had offered to deposit monies, until he could show, under a writ of inquiry, that the sums demanded were not due to the full amount.

That the whole of the judgments amounted to little more than £100, and that defendant had abundance of property in his house to meet them; but that the Deputy-Sheriff attached a valuable schooner (for which the defendant had paid £600), and advertised it for sale the *next day*, when a friend of the defendant intended to have brought it in, but it was sold before he got to the auction for the sum of £400.

Per Curiam. Enough has appeared to satisfy this Court, that the present is not a case in which it will interpose. The insulated facts of the property taken in execution being so much greater in value than the judgments recovered, and advertised one day to be sold the next, would be sufficient to call forth this determination of the Court.

Sales under process of law are compulsitory on the party, when they are regular; but they must be strictly regular to be legal; and they should be so fair, open, and above board, as not to admit of the suspicion of

1819.

DEPUTY SHERIFF of Harbour-Grace *v.* THOMAS PYNN.

fraud or connivance. Without offering any opinion upon the case, whether it may not have been perfectly *fair*, I am free to say that I do not think it *regular;* and, therefore, I must deem *the sale void*, and refuse the intervention of this Court to give the relief which is demanded.

January 22d.

THOMAS MEAGHER & PATRICK MORRIS *against* TIMOTHY FLANNERY.

The notice to a tenant to quit, must be given *before* the expiration of the term, to entitle the landlord to double value on the tenant's holding over after the expiration of the Term. [But see 8 East 358, referred to in the following note on this case.]

ACTION to recover the sum of £65, under the following circumstances :—

The defendant was tenant of one *Barry*, deceased, at £35 per annum, for a term which expired on the 1st October, 1816.—Before the expiration of the term, *Barry* died, and *James Macbraire* became his personal representative, and, as such, entitled to the residue of *Barry's* own term, which expired on the 1st October, 1817. Defendant held over after his term had expired, and *Macbraire*, by note in writing, dated *25th October*, 1816, gave him notice to quit, or "he should proceed as the law directs." Nothing, however, was done to dispossess the defendant; and, subsequently, at his request, the plaintiffs became guarantees to *Macbraire*, for the payment of *whatever rent might be due from defendant to Macbraire*, for the year commencing the 1st October, 1816, and expiring that day twelvemonths. Under this engagement they have since paid, or otherwise accounted with, *Macbraire*, for the sum of £65 (being £30 more than the rent reserved by the lease from *Barry* to the defendant); and the present action is brought to recover from the defendant the money so paid by them on his behalf.

1819.

MEAGHER & MORRIS v. FLANNERY.

Per Curiam. On the 25th October, 1816, it appears, by a note laid in evidence before the Court, Mr. *Macbraire* notified the defendant "to quit the premises immediately, or he should proceed as the law directs."—This notice is dated near a month *after the expiration* of the defendant's term; and, therefore, the statute giving double rent, which has been held to require a *previous* notice, does not apply to the case. What, then, *does the law direct?* Why, an ejectment, which is not brought; and the action is resolved into one for use and occupation, for the time held over the lease, the value of which must be collected from evidence; and as the same premises were let in the following year, 1818, for a new term at £40 per annum, I incline to think that sum a fair equivalent for the preceding year. But I shall leave the case open to proof of any specific agreement, or understanding, as to the exact sum to be paid.

On a subsequent day, the *Chief Justice* declared that he still retained the opinion he had formed on the first hearing of this case; and that, as the evidence which had since been laid before him convinced him that the rent reserved for the year 1818 formed the best criterion of the value of the premises in 1817, he should hold the defendant liable to pay the sum of £40 for his use and occupation of them during that year. *

* As this case appears to have been brought more than once under the consideration of Mr. *Forbes*, and to have engaged a good deal of his attention, I cannot easily persuade myself that he has taken an erroneous view of the law applicable to it. Yet, upon a very careful comparison of the facts of it, with those of *Cobb* v. *Stokes*, 8 East, 358, I confess they do seem to me to bear a *perfect resemblance* to each other in all their material points.—"NON TAM OVUM OVO SIMILE." And, certainly, the decision of the

1819.

January 22d.

CONNICK *against* DOOLING & Co.

A supplying-merchant who has been deprived of the proceeds of the voyage, on the faith of which the supplies were issued, by the fraudulent conduct of the planter, may support an action, in the name of that planter, against the party who misapplied the property which ought to have been delivered to the merchant.

ACTION to recover two years' rent of a fishing-room, on the French Shore, and sixty quintals of fish which were caught by plaintiff, and were to have been delivered to *Shannon, Levingston & Co.*, but were clandestinely received by the defendants, and fraudulently delivered to their suppliers, *Stuarts & Rennie*, to the prejudice of *Shannon, Levingston & Co.* who are the real parties in this action.

At the conclusion of the evidence on both sides, the *Court* stated the case to be of so much importance, as a *precedent*, that it should require reference to the books of *Shannon, Levingston & Co.* to see the state of the accounts between that house and the plaintiff, and what balance had become due to them that year.

On the following day, plaintiff's agent attended and laid a statement, as required by the *Court*; by which it appeared that plaintiff, in that year's dealings alone, had incurred a balance of debt amounting to £558 5*s.* 4*d*; whereas the defendants had a credit upon the balance of their account with their suppliers, *Stuarts* & *Rennie*, of £138.

This statement being admitted, judgment was delivered as follows:

Per Curiam. This action is for two principal items; one for two years' hire of part of a fishing-room on the French-shore, charged at £12 per annum; the other for sixty quintals of fish, said to have been made by the plaintiff, and smuggled, as it is

Court of King's Bench in *Cobb & Stokes*, is directly at variance with Mr. *Forbes's* judgment, and altogether repugnant to the principle upon which he professes to have founded it.

1819.

CONNICK
v.
DOOLING & Co.

called, on board a schooner of the defendant, *Dooling*, instead of being delivered to *Shannon & Co.*, the plaintiff's suppliers. The value of the rooms has been variously stated by the witnesses. I incline to think that the charge is not out of the way, supposing the rooms to be in tolerable order; and, therefore, I shall allow the first year's rent as a compensation for repairing the room, and admit the charge for the second, at the rate of £12.

With respect to the *smuggling transaction*, the two principal witnesses, *Edmund Dunphy* and *James Conners*, are completely in contradiction. *Dunphy*, who was in charge of *Connick's* room, swears that sixty quintals of fish were put on board *Dooling's* schooner, commanded by *Conners*. But *Conners* as positively swears, that all the fish brought round by him was from *Dooling's* flake, and no part whatever from *Connick's*. The transaction is discreditable to the plaintiff, who comes forward in the character of a dealer; confessing, by his action, an attempt to defraud his suppliers. Did the matter, therefore, rest between these parties, I should refuse the interposition of this Court, upon the principle, that "IN PARI DELICTO, MELIOR EST CONDITIO POSSIDENTIS." But I am aware that the *representatives of the suppliers* are the *real parties* to this action. The case rests entirely upon evidence; and as the evidence is contradictory, it becomes the duty of the Court to weigh it with a careful hand, and determine to which side the balance of credit belongs. To me it appears, that the defendants did receive the sixty quintals of fish from *Connick*, with the knowledge that he was indebted for his supplies, and that it was with the view of defrauding his merchants. The situation in which *Dunphy* was placed, as

1819

CONNICK v. DOOLING & Co.

master of the plaintiff's voyage, his age, and the clear manner in which he gave his evidence, convince me that he could not be deceived, and that he spoke the truth. His testimony is also corroborated by many important circumstances, such as *Connick* having first brought round a quantity of *Dooling's* fish, which he delivered to *Stuarts & Rennie*, for which *no freight was charged*. Why should this very proper charge have been omitted? By the circumstance, related by Mr. *Beenlen*, of *Connick's* demanding money of *Dooling*, in his presence, which, although he denied owing, he consented, however, to pay in bread; and by the important fact upon the face of their respective accounts of that year, that *Connick*, who fished at the same places, and on the same room, as *Dooling & Co.*, should fall in debt to his suppliers £548, while *Dooling & Co.* were in credit to the amount of £138.

Upon the whole case, I am satisfied that the defendants did receive the fish in question, and that justice requires an example to be made of this fraudulent combination between planters, to deceive their suppliers.

Judgment for plaintiffs £61 14*s.* and costs.

1819.

January 25th.

BAINE, JOHNSTON & Co. *against* ALEXANDER CHAMBERS.

PER CURIAM. The plaintiffs are merchant-suppliers for the fishery, and advance necessaries to dealers at the outharbours of this island, for which they receive fish and oil in payment. They supplied, among others, *Froud & Sons* of Trinity Bay, last summer, to a considerable amount, but receiving from them little more than one-half of the value of their advances; and hearing that their fishery had been productive, they caused an inquiry into the cause, and learnt that they had put off part of the proceeds of their voyage to the supercargo of a certain schooner, which had been sent round, by the defendant, to Trinity Bay, for the purpose of obtaining fish and other produce in exchange for provisions and goods.

It appeared in evidence, that the defendant was not a supplier of *Froud & Sons*; that he had sent a schooner to Trinity Bay, in October last, and directed his supercargo in general terms, to barter goods for fish, who conceived he might deal with any person that offered; and under this impression, received thirty-five quintals of fish from *Froud & Sons*, without asking any questions about their suppliers, or the state of their accounts, or supposing such inquiry necessary.

Under these circumstances, the plaintiffs brought this action for the recovery of the value of the fish received by the defendant, for which they contended he was liable, *under the usage and law of the fishery*. The defendant, on the other hand, maintained that he had a right to purchase from any person who was in possession of the commodity sold; and as he paid full value for

The town of St. John is a market overt; and, therefore, the lien of the supplying merchant upon the produce of the voyage is divested by a *bonâ fide* sale of such produce in *this town*. Secus in the *outharbours*, which are *not markets overt*.

1819.

BAINE, JOHNSTON & Co. v. CHAMBERS.

the fish in question, he was entitled to retain it. And he further insisted that it was not only a usual traffic to barter for fish at the out-harbours, but it was a great easement to planters to be enabled to sell at their own doors, without the risk of water-carriage, or the expense of freight.

It is certainly the right of the owner of any goods to dispose of them in any way that he pleases; but the gist of the case before the Court is, who were the owners of the goods in question? and what is the force and extent of that lien upon the actual or supposed existence of which, the merchant who advances the means of prosecuting the fishery principally relies for his payment? This is a question of the greatest consequence to the trade and fisheries of this island, as at present conducted; for it is well known that they are, for the most part, carried on by means of necessaries furnished at the commencement of the fishing-season, to persons who are seldom possessed of any capital of their own, upon the faith of receiving the proceeds of the voyage in payment for the supplies. It is a system of credit founded in good faith; and it becomes the duty of the *Court* to cement this necessary confidence between the parties, and to guard it with vigilance from infraction by others.

It has always been held that the regular supplier of necessaries for a fishing-voyage has a *specific interest* in the fish caught, to the *value of his supplies*. It is a local usage growing out of the course of conducting the fishery, and was probably adopted from the maritime law of lien upon a ship, for necessaries found and labour performed upon a foreign voyage (*a*). In the case of *Cunning-*

(*a*) See the case of Kelly *v*, Hutton & Co,

1819.

BAINE, JOHNSTON & Co. v. CHAMBERS.

ham, Bell & Co. v. Trustees of *Crawford & Co.*, this right was deduced from the necessary connexion of the parties. In a more recent case it was held, "that the supplier of necessaries, had a lien upon the fish for the amount of his supplies; that the 49th of the King was a directory application of the same principle to the distribution of insolvent estates; and that a judgment at law was subject to the preferable claim of a current supplier" *(b)*. The Courts have gone so far as even to attach the person of a planter endeavouring to evade this vital principle of the fishery.

Now, what are the facts before the Court? The plaintiffs were the regular suppliers; the defendant supplied nothing. The plaintiffs are paid in produce to the amount of half their advances, and must lose the remainder; while the defendant receives part of that very fish which was caught by their means. The defendant states that he was not aware of the plaintiffs being the suppliers of *Froud & Sons*; but if this excuse be sufficient, there is an end of the law; for the party who means to set it up, has it always at his command; he has only to ask no questions, and he may be assured the other party will not volunteer a discovery. I am willing to believe that the defendant has acted under a misapprehension of the case; and I dare say he conceived he was perfectly at liberty to purchase fish from any person who offered it for sale. In this town, to which a great number of independent planters and others resort, for the purpose of selling their produce and buying provisions, it would be going too far to say, that the

(*b*) Le Geyt, Receiver of Greenwich Hospital, *v.* Miller Fergus & Co.

1819.

BAINE, JOHNSTON & Co. v. CHAMBERS.

bona fide purchaser of fish, would be liable to refund.

In some cases he has been called upon so to do, by the sessions, for servants' wages; but that was contrary to the opinion of this Court, which, by analogy to legal usage at home, regarded this town as a *market overt*, an open and customary place of sale; in which it would be impossible to trace the private history of every boat-load of fish which may come to market; and the publicity of sale should protect the fair purchaser. But the same reasoning does not apply to the out-harbours; they are unusual places of sale; and from their being so, the purchaser takes upon himself the risk of receiving fish, in which another has a property, and, consequently, of refunding.—*He may buy fish at an out-harbour, but he must buy it subject to all existing liens.*

In determining that the defendant must account to the plaintiffs for the fish he has received of *Froud* & *Sons*, I feel satisfied that I am sustaining a very essential principle; for who will be found to advance supplies upon so precarious a thing as a fishery, if, besides the uncertainty of the elements, and the fluctuations of foreign markets, he is laid open to the total loss of his supplies, by his dealers being allowed to sell to any persons who may offer to buy the produce of the voyage; that very produce upon which the supplier principally relies for payment, and which, in fact, is chiefly created by his means? For mere personal labour constitutes but a small portion of the necessary *material* for a fishery.

Judgment for plaintiffs.

ALEXANDER FITZGERALD *against* WILLIAM DAWE.

1819.

February 11*th.*

ACTION to recover £6 6*s.*, amount of the passage of a servant, alleged to have been stopped in the hand of defendant to the use of the plaintiff, who had previously paid the amount to Messrs. *Baine, Johnston & Co.*, the owners of the vessel. After several evidences had been examined, and the parties heard, the *Chief Justice* said:—

In this case, the *Chief Justice* recognized the statute of frauds (29 Car. 2, c. 3), as applicable to this Country.

There is no proof of the money being actually *stopped* by the defendant to the plaintiff's use, so as to make it an *original* obligation on his part to pay the money; and, therefore, the plaintiff's case is merely a *collateral* undertaking, and falls within the statute of frauds; and as there is no agreement *in writing*, in compliance with the directions of the statute, there must be *judgment for the defendant.*

DUGGAN & WHITE *against* JOHN F. TRIMINGHAM & Co.

February 15*th.*

ACTION of account; disputed charges made by defendants against plaintiff as follows:—

A.—Commission on advancing £335 for purchase of a certain schooner, 5 per cent, 2 September—£17 15*s.*

B.—Ditto on sale of schooner to *Pemberton*, 2 March—£20.

C.—A puncheon rum, *said not delivered* —£27

D.—Short received of *Mr. Macbraire* for freight due plaintiffs—£1 14*s.*

E.—Short received of *Pemberton* for sale of schooner—£23 13*s.*

A commission of 2½ per cent. is all that an agent is entitled to on the purchase and sale of property for his principal, in the absence of any express agreement between them on that point. And a general agent is not responsible for the solvency of the purchaser. It is sufficient that the purchaser was in *good credit* at the time of sale.

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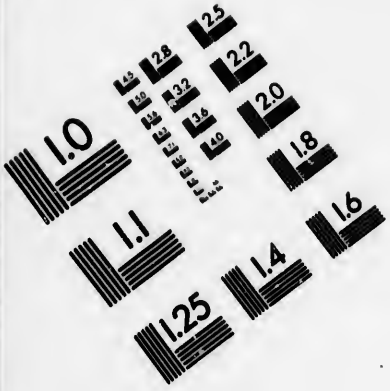

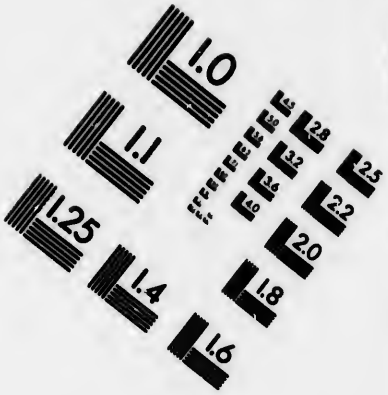

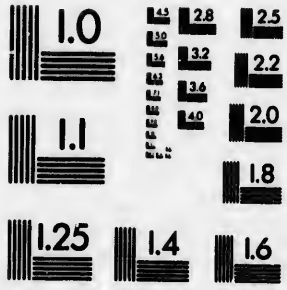

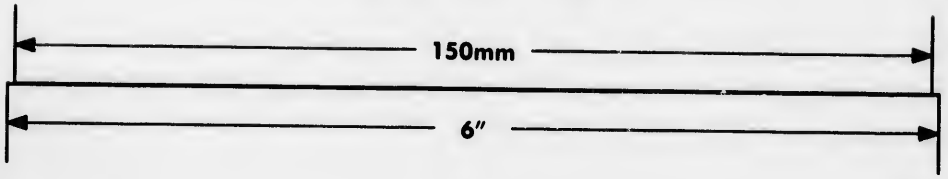

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1819.

DUGGAN & WHITE v. J. F. TRIMINGHAM & Co.

Several witnesses were examined on each of the points in controversy between the parties, and the *Chief Justice* then delivered the following judgment:—

The commission of 5 per cent. on purchase, as well as 5 per cent. on sale, is an unusual commission, and must be limited to two and-a-half per cent., instead of 5, as is the usage of such transactions in the absence of particular agreements. It is admitted that the defendants held a security upon the schooner, which was also insured; and, therefore, there was no such great risk as was sufficient to warrant unusual interest. But as there was money due from plaintiffs to defendants, when the latter demanded the purchase-money of the schooner, in addition to what was before due them, I think they are fairly entitled to legal interest from the time of purchase up to the sale in March.

The objections to the two next items of the account have not been sustained; and as the defendants had merely acted as general agents in selling the plaintiffs' schooner, without warranting the stability of the purchaser, and as it appears that *Pemberton* was in credit at the time of purchase, and, it is known, became in difficulties in the fall of the year, before the balance of £23 was paid, no blame or negligence can be imputed to the defendants on that account; and that sum also must stand.

1819.

April 1st.

JOHN F. TRIMINGHAM & Co. *against* JOHN & ROBERT BRINE.

ACTION for arrears of rent of a certain piece of ground and house, situated below Church-hill, let to the defendants for ten years, from October, 1811, and occupied by them as a butcher's shop.—Premises destroyed by the fire of November, 1817.

It was proved that *Simpson*, one of the plaintiffs, gave directions, during the fire, *to pull down the shop occupied by defendants*; and it appears very *probable* that, had not the shop been pulled down, it would have taken fire; and, in such case, plaintiffs' stores must have been burnt down, as the shop joined them.

It was admitted that this case could not have been conscientiously brought before a Court, *unless the defendants had continued* in the occupancy of the premises after the fire; and further, from that circumstance, it was argued that he had waved his equity, and elected to retain the ground.

Per Curiam. This case addresses itself so strongly to the equity of the Court, that unless more direct and unequivocal proof can be laid before it of a positive election of the defendants to retain the ground on which the shop stood, after the fire, beyond the mere time necessary to remove the wreck of their property, I should incline to think it against good conscience. The defendants' shop was built by them at considerable expense; it adjoined the large and valuable stores of the plaintiffs; it was cut down during the fire, partly with the assistance, and by the orders, of one of the plaintiffs, and, *principally*, to save the plaintiffs' own stores, which must have been entirely destroyed if

The mere holding of ground for a short time after the house erected upon it had been destroyed by fire, for the purpose of removing the wreck of the property, will not deprive the tenant of his right to surrender the lease under the custom of this town [See *Broom* v. *Preston & Stabb*, decided in the Supreme Court, 13th August, 1825.]

1819.

J. F. TRIMINGHAM & Co. v. J. & R. BRINE.

they had taken fire. Of this there can be little doubt, looking at the position of the respective premises; therefore, let this case lie over for a day or two, for the plaintiffs to bring more convincing proof, if any they have, of the fact of defendants' retaining possession after the fire, as tenants under the lease; otherwise, judgment, in the nature of a perpetual injunction, will be given for defendants.

April 15th,

On this day, upon the failure of the plaintiffs to adduce farther proof, a judgment, as above stated, was entered against them.

HOYLES & Others *against* JOHN BLAND, Esq., High Sheriff.

[This case is given *verbatim* from Mr. *Forbes's* notes, or minutes, of the trial.]

April 15th.

As the King's Bailiff, the High Sheriff may justify pulling down a building erected on land belonging to the Crown, under a license from the Governor, *revocable at pleasure*, if the party who erected the building refuse to remove it, after having been regularly desired to do so.

ACTION for forcible entry, and pulling down a certain building used as a covering, or house, for a public fire-engine.

The declaration contained two counts: first, under stat. 8th Hen. VI. c. 9; and the second at common law, for a trespass, *quare clausum, freget*, &c.

PLEA. Defendant admitted the fact of entering and pulling down the building, and set forth, that the *place* on which the trespass, &c. was committed was a *public ships'-room*, authorized, by statute, to be granted, or disposed of, by the Governor. That the defendant, as sheriff and bailiff of the crown, entered on the same for the purpose of removing a house, or shed, which was placed there, without right or license duly had to such effect; and that he did so remove the

1819.

HOYLES & Others v. BLAND.

same in a peaceable manner; and that is the trespass complained of. It appeared, during the trial, that the *locus in quo* was, in fact, part of a ship's room, and that permission had been given, by the then governor, in 1805, for an engine-house to be placed on it, *removable at pleasure*. In the fire of 1816, the house was removed, and the building, which was lately removed by the defendant by order of the present Governor, had been since erected as an engine-house.

OUTLINE OF CHARGE.

Place, a *Ships'-room*.—Surveyed 1804.—License of governor in 1805 for a temporary building, on wheels.—Act of Parliament 1811.—Allotment of place as custom-house, in 1812.—Fire in 1816, and old house *removed*; *replaced shortly after*.—Fire in November, 1817, and other place assigned as custom-house; and place in question disposed of, under *Act of* 1811.—Notice to plaintiff in February last, and consequent order to take steps to remove the house erected on Ships'-room.

State nature of action.—Define trespass at common law.—*Forcible entry a statutable trespass*, and also renders party liable to *indictment*. But this difference, that in *action* at suit of party, *defendant may show a right of entry and possession*; but in indictment, which goes to the public injury, without reference to the rights of parties, violence cannot be justified.—*Hawkins, vol. 2, p. 29*; *3d Term Rep. 295—6.*

As this is a private action, therefore, and capable of *justification*; and as a justification goes to the question of title, necessary

1819.

HOYLES & Others v. BLAND.

to take a review of the case with reference to *title and right of entry*.

Place upon which engine-house stood was *ships'-room*. [See statute 51, Geo. III., and chart therein referred to.] As such ships'-room, incapable of private appropriation, even by license from the Governor.—*Statute Wm. III. and 15th Geo. III.*

Statute 51st *Geo. III.* proves its being so, as that statute was made to allow its being disposed of.

So far, complete proof that the *property* in the *soil* was in the Crown, and, consequently, of any *building* which was fixed upon it.

Necessary for defendants to show some *license*, or some title to possession, at the time of the *alleged* injury; for if they had no title of any kind, they have sustained no injury.

Governor *Gower's* permission, *in* 1805, void, *ab initio*; but even the license that was given was destroyed at the removal of the house, built agreeably to such permission, on the fire of February, 1816.

The plaintiffs were, indeed, *in the possession of the place;* but their was no tenantcy under the crown; they were permissive occupants, but *not tenants at will, entitled to notice to quit.*

Nature of tenantcy at will, entitled to notice.—A *yearly tenantcy*, determinable at the will of either party; but a *strict tenantcy at will*, not entitled. However *possession* may be sufficient as against a *third* party, or *wrong-doer*, it is not sufficient against the *party entitled.*

Here then was neither title in law, nor in fact, as *against the Crown.*

Let us see how far against the *Sheriff. Sheriff, bailiff of Crown*, and entitled, *ex offi-*

1819

HOYLES & Others v. BLAND.

cio, to take possession of lands for the crown.—See 1st *Black. Com.* 343. A servant may justify acting under order of the party entitled to the right of entry.—*Argent* v. *Durrant*, 8 T. R. 406.

Where the Crown is entitled by matter of *record*, it may enter without office, or preparatory proceeding.

Not necessary to go into the great powers of the Crown, as they are difficult to reconcile in theory with the practice of the present day. If the Crown had *a present right of entry*, the Sheriff, as the public bailiff, was justifiable in entering, in the same way as a private individual would have been justified, acting under the direction of another individual lawfully entitled to entry; and the house, being a fixture, belonged to the Crown, and was liable to the same consideration as the ground upon which it stood.

Observe, generally, upon the power and duty of a Sheriff, and responsibility as a high officer of the Crown; to which the law imputes not only no *wrong*, but an incapacity to do wrong. If the Sheriff abuses his trust, and dishonours the name of his master, he is doubly liable *as an individual, and as a public officer* abusing his trust.—*See 2d Inst.* 205—6. Sheriff acts at his peril; and if the crown have not a complete right and title of entry, he is a *trespasser, however high the orders under which he may act*, and liable to an action at suit of the party injured. And even if the Crown have the right, yet if he enter with force, and without the solemnity of lawful proceeding, he is liable to a criminal prosecution.

Upon the whole, the action is not maintainable; and the only question for the jury is, whether the engine-house stood upon the ships'-room at the time it was removed

1819.

HOYLES & Others v. BLAND.

by the *Sheriff,—which is no question at all.* And the jury cannot but find a verdict for the defendant, under the evidence before the Court.

The Jury retired, and, in a minute or two, returned a verdict for defendant—"*Not Guilty.*"

HOYLES and Others *against* JOHN BLAND, Esq., H. S.

April 19th.

THE plaintiffs in this action now moved the Court to grant a *new trial*, on the ground, that the building in question, on (*a*) which the trespass (as laid in the plaintiffs' declaration) was committed, was the property of the plaintiffs, in that degree which entitled them to remove the same from the *locus in quo*, or the soil whereon it stood.

That the plea of *liberum tenementum*, set up by defendant, extends only as to right of soil.

That the declaration of plaintiffs comprises a count *de bonis asportatis;* and that proof of such carrying away was laid before the Court and Jury at the trial.

That such presumed proof (being found satisfactory to the Jury) would establish an excess of damage beyond what could be justified under the defendant's plea.

That this part of the case was not, by the Court, sent to the Jury for their consideration, as the plaintiffs deem it should have been, according to the case of *Fox* v. *Oakley* and others (*b*); but that the charge of the *Judge* went to the effect of *totally* exclu-

(*a*) *Woodfall's* Landlord & Tenant, 523
(*b*) *Penton* v. *Roberts*, 2 East, 88.

1819.

ding the Jury, under the whole of the case, from returning *any other verdict than* "*Not Guilty.*"

In the matter of JANE MORRIS's property.

April 22*d.*

Where the property in dispute between the parties appeared to be part of a *ship's-room*, the Court stopped all further proceedings.

AN injunction having been obtained to stay the payment of the rents upon certain property claimed under a decree of this Court, until the case is finally heard; a petition to dissolve the same was this day made, on the part of the widow and children of the late *Richard Undry.*

John Jermin, Ann Angel, George Rogers, and *Jane Chafe,* were examined, to prove that the spot of ground now in dispute, upon which certain houses are now built by persons holding the same under leases, granted them by the late *Richard Undry,* had been given to him by his late mother, *Jane Morris,* some years previous to her death, and that he had built a small house on part of the ground on which he lived at the time of his mother's death.

Broom, jun. in support of the injunction, calls *Ann Mathews,* who was sworn, and partly examined; *when Mr. Chancey here stated, for the information of the Court, that all the property in question is included in the ships'-room called "Darkess's," authorised by the act 51st George III., to be disposed of by the Governor.*

Per Curiam.—It is useless to proceed further with respect to property standing upon *ship's-rooms,* as defined by the statute 51st George III. Let the matter stand over for the present. I shall cause the Governor to be informed of the case, in order that measures may be taken to protect the rights of the Crown.

1819.

In the matter of JANE MORRIS's property.

As there is said to be other property than that on *ship's-room*, Mr. *Chancey* will make a sketch of the whole, upon paper, distinguishing between such property as is, and such as is not, upon public ground, and lay it before the Court on Monday morning next.

April 20th.

HOYLES & Others *against* JOHN BLAND, Esq., High Sheriff.

New trial refused; and the grounds of such refusal stated in full by the *Chief Justice.*

ON the 19th of this month, *Simms*, for the plaintiffs, moved for a new trial, on the ground that the *defendant had used unnecessary spoliation* in removing the engine-house, which was proper consideration for the *jury*; but that by the direction of the judge, no such point of evidence was left for the jury; and cited 2 East, Rep. 88.

But the motion was rejected by the Court, for the following reasons:—

The first count, for forcible entry, will not admit of any doubt. The issue is always upon the *title*, and not the *force*; Vin. ab. title, "forcible entry"—article, "issue." As to the second count, the Court is of opinion that, from the nature of the building, and the license under which it was originally put up, while the plaintiffs were in possession of it, they might have removed the same without being liable for the value, or subject to any action on that account; and, even after they were put out of possession, that the materials of which the building was composed properly belonged to them; and, consequently, had the defendant exercised any wanton violence in removing them, he might have been liable for the injury he might have done. But the case was not

1819

HOYLES & Others v. BLAND.

rested upon this ground at the trial; no proof whatever was adduced as to any *asportavit* by the defendant, or any unnecessary injury to the materials in taking them down.

There was a carpenter employed for the purpose of removing the building. He says he was obliged to cut it to pieces, as it could not be removed entire; and after it was taken down, that the materials were carried away, not by, or with the consent of, the defendant, but by some of the people of the town. Now, the plaintiffs had been notified to *remove* the building; they not only *neglected to do so*, but virtually refused, and contended for a right to continue until ejected by process of law.

It was this supposed right which constituted the main ground of the plaintiff's case at the bar; although the Court is aware that that ground was rather ostensibly taken for the purpose of eliciting the sense of the Court upon the power which has been exercised, and even claimed as a right, of the Sheriff's pulling down houses by order of the government of the island, than under any serious belief of its being sufficient to sustain their case. Upon this the Court sufficiently declared its opinion to the Jury. As the minor point was not urged at the trial, and the only evidence bearing upon it went to negative unnecessary force in taking down the building, or any *asportavit* by the defendant; and especially as the materials could have been but of little value from the time of their being originally put; I think I shall do most justice, by *refusing a new trial.*

1819.

June 8th.

Application to the Court to enforce payment, through the means of attachment, of a debt due by an absent party who had become insolvent, and absconded from Halifax. [See post.]

WM. & HENRY THOMAS *against* the Owners of the Sloop *Acadia*.

PROCEEDING *in rem* under the statute 49th Geo. 3, c. 67.

CASE.—The sloop *Acadia*, *John Peters*, master, sailed from Halifax, N. S., for St. John's, in the island of Newfoundland, in the month of December, 1818; and arrived on the 19th of the same month, a good deal damaged in her sails and rigging, and struck on the north head, at the entrance of the harbour. The cargo was discharged; but the severe season of the year not allowing the necessary repairs to be made to the hull, until the spring of the following year, 1819, and the vessel not being sea-worthy until such repairs were made, the supercargo wrote to the owner at Halifax, and in the mean time, to prevent unnecessary expense, sent the crew to Halifax, on the 28th December. In February last, the supercargo received a letter from *William Kidston*, of Halifax, who had a bottomree-bond upon the sloop *Acadia*, that the owner, *Joseph Farquhar*, being insolvent in his circumstances, had departed from Halifax, and recommended the supercargo to obtain a freight and return to Halifax; and mentioned that *William Cullen*, of St. John's, would supply a certain proportion of salt, sufficient to ballast the vessel. The plaintiffs were the consignees of the *cargo and vessel*, and have paid the necessary disbursements, amounting to £90 9*s*. 6*d*, and after deducting freight received at St. Johns, are still in credit to the amount of £47 17*s*. which sum they proposed to *William Cullen* to pay them, but which being refused by him, and they having no means of repayment, now demand.

1810.

W. & H. THOMAS v. The Owners of the Sloop ACADIA.

The Court took time to consider the case; and on the following day, the *Chief Justice* desired that particular evidence should be laid before him as to the actual insolvency of *Farquhar*, and his having absconded from Halifax; and, also, of the powers delegated by him to the supercargo.

JAMES CLIFT *against* H. J. HOLDSWORTH.
In Error.

June 10.

The Supreme Court has an appellate jurisdiction, even in cases where the judgment of the Court below is *under* £40. (But see *Hunters* v. *Horneman*, decided in the Supreme Court, 29th May, 1823.) The service of an attachment upon property is a *sufficient* notice to the owner of that property of the pendency of a suit relative to it.

ON this day, a certain judgment, given by the Surrogate Court at Ferryland, was brought under review of this Court.

The judgment was under £40.

Lilly, for the party in whose favour the judgment had been given, objected, in the first place, to the jurisdiction of the Court; contending that the power given it by the 49th Geo. III., c. 67, of reviewing the judgments of the Surrogate Courts, was expressly limited to judgments for sums *exceeding* £40, and could not, consequently, apply to this case where the amount of the judgment was *under* £40. But should the opinion of the Court be even against him on this point, he next *insisted* that the judgment ought to be affirmed upon the *merits* of the case, which he shortly detailed.

Simms, for plaintiff in error, stated, that the main objection to the proceedings below, was the *want* of service of process upon the party to the cause.

That the plaintiff in error, who was the administrator of *Shannon's* estate, *was never served with process*, but a writ of attachment issued against the estate *in rem*, without noticing him as the defendant, and was served upon the salt; and that the cause was heard

1819.

CLIFT v. HOLDSWORTH.

and determined without his being present to defend it, or having even had any regular notice of the trial. The plaintiff in error, had, indeed, *heard* through a *private channel*, that the salt had been attached, and meant to have defended the suit, but before he could take the necessary measures to do so, it was decided; and the salt sold at a season of the year when it was necessarily sacrificed, and had yielded at least ten pounds less than its value.

In delivering judgment, the *Chief Justice* said:—

It seems to me impossible that the objection which has been raised to the jurisdiction of the Court in this case can be well founded. This Court was expressly constituted by act of Parliament, "The *Supreme* Court of Newfoundland;" and, as such, by analogy to the Supreme Courts of England, it had an universal control in all causes, and over all Courts, within the boundaries and subject-matter of its jurisdiction, unless it were *ousted by express words*. The act of the 49th of the King, was, in many particulars, merely *affirmative* of its general authority. Thus it allowed appeals in all cases from the judgment of the Surrogato Courts, when the cause of action exceeded £40, to the Supreme Court; and in all cases from the Supreme Court, when it exceeded £100, to the King in Council. But it did not require this affirmative clause, to give either an appellate jurisdiction. By the *common law*, the King in Council is the fountain of appeal from the Supreme Courts in the colonies, and by the same *common law*, those superior Courts have appellate jurisdiction from the inferior Courts. It is part of the constitutional law of the land that there must reside somewhere a

1819.

CLIFT v. HOLDSWORTH.

supreme juridical authority to watch over the proceedings of all inferior tribunals, and to keep the scales of justice even and uniform. The same principle forms a part of the law of every civilized state in the world. Were it otherwise, there would frequently be conflicting decisions, which must introduce a positive difference in the rules of justice—"ALIA LEX ROMÆ ALIA ATHENIS." So that a suitor would be sure to gain a cause in one Court which he would be as sure to lose in another; and that without the possibility of redress, if the judgment happened to be under a certain sum. But, to bring this hypothesis to a practical test, suppose an action to recover the possession of a valuable plantation in this island, and that judgment is given on one side or the other, which judgment is not satisfactory; will it be said there is no power to appeal to, because the judgment is not "for a sum exceeding forty pounds?" Yet, if the fifth section of the act be the *only* basis to rest an appeal on, the consequence would be, that an appeal to the Supreme Court, or from thence to the King in Council, could not be brought; and thus a property worth £10,000 might be adjudged in a summary way, without a chance of revision or appeal.

Having disposed of this preliminary objection, his Honour added, that he felt no difficulty whatever in affirming the judgment below upon the facts of the case, as the attachment of the property was sufficient notice, and it became the duty of the parties to have appeared in the Surrogate Court within a reasonable time, and defended the action.

1819.

June 12th

The supercargo of a vessel belonging to a person who had become insolvent, and absconded from Halifax, is competent to defend the owner in an action brought to recover monies expended on such vessels.

Wm. & H. Thomas *against* the Owners of the Sloop *Acadia.*

ON this day, some witnesses were produced and examined on the several points upon which the *Chief Justice* had expressed a wish, in the 9th instant, to obtain further information. His honour then observed, that he considered the owner as sufficiently represented by the supercargo; and that as the debt was distinctly admitted by him to be due, the plaintiffs were clearly entitled to a judgment against a party who appeared to have absconded from Halifax, as an insolvent debtor. The nature of the debt, which gave the plaintiffs a lien upon the vessel, furnished, the *Chief Justice* added, a strong argument in favour of the plaintiffs' claim to the relief they sought.

July 27th.

An award set aside, because the arbitrators admitted, upon *verbal* proof, an agreement which the statute of frauds requires to be in *writing*.

Gosse, Pack & Fryer *against* Charles Kelly.

THIS case had been submitted to arbitrators, under a rule of court, who had given in an award, which the defendant now sought to set aside, on the ground that an agreement, which the statute of frauds required to be *in writing*, had been admitted upon mere *verbal* proof by the arbitrators, who had also formed their judgment *entirely* upon such agreement. Upon this statement of facts, which was admitted on both sides, the *Chief Justice* declared that the award was altogether void.

COWELL & another *against* MACBRAIRE.

1819.

August 9th.

Upon a new trial, the *Chief Justice* held that the destruction of the premises by fire entitled the lessee to surrender the lease, although he had, in the former trial, given the lessor judgment for a year's rent due and payable after the house had been burned.

THE plaintiffs were tenants, in common, of a certain plantation in this town, which they leased in September, 1809, to the defendant, for the term of seven, fourteen, or twenty-one years, at the yearly rent of £150. The leases were drawn in the usual form; the lessor covenanting for quiet enjoyment, and the lessee to pay rent, and also to keep the premises in repair (destruction by fire, &c. excepted.) It also appeared that one of the lessors had insured a small amount on her interest. In November, 1817, the houses were burnt down; and, in June following, the defendant, who resides in Scotland, caused notice to be given that he considered the lease to be at an end. The plaintiff, *Cowell*, brought her action for the recovery of a year's rent after the fire, and obtained judgment.

The Court afterwards, entertaining doubts of the propriety of that judgment, granted a new trial; and the two lessors having joined in one action, the case was this day finally determined.

Per Curiam. The *Court* was taken by surprise at the first hearing of this case, and relied altogether upon the authority of *Pender* v. *Ainsley* & *Rutter*, 1 Term Rep. 312, as decided by Lord *Mansfield*. Upon comparing that case, however, with the reasoning of the Lord Chancellor in *Browne* v. *Quilter*, Ambl. 619, it appears that the two Courts did not entertain the same view of the liability of the tenant where the property was destroyed by fire; the one holding that the lessee was bound by his covenant to pay rent, although he received no benefit from the lease; the other, that the landlord be-

1819.

COWELL & another v. MACBRAIRE.

ing bound by his covenant to protect the tenant in the enjoyment of the property, an eviction by fire was as much an interruption of that enjoyment as if it had been occasioned by any other event; and that in such a case equity ought to relieve.

It is a little singular that a point which must have been frequently raised, should remain unsettled to the present time; for the cases since reported will be found to be as numerous on one side of the question as the other;—the Law Courts holding the tenant to the rigour of his covenant; and equity releasing him, under considerations too slight to admit of any reconciliation of principle.

Feeling myself bound by the decisions of the English Courts, wherever they are clear upon the case, I cannot say but I am rather glad to be released from the trammels of authority in this, and enabled to receive evidence of the *usage of the place*; because I entertained an opinion, upon the first trial, that the law was one way, and the practice the other.

It is proved by all the evidence which has been laid before the Court, that after the destructive fires in 1816 *and* 1817, *the tenants, whose houses had been destroyed, exercised the discretion of surrendering their leases. The same practice was observed after the fire which is stated to have happened about forty years ago; and this, in fact, has been invariably observed,* without a question, until it was first raised in this case. It is also stated by Mr. *Lilly*, who has practised many years as a notary public in this town, and has prepared a great number of leases, that, although it has been sometimes suggested, it was never thought necessary, to introduce any express exception against the payment

1819.

COWELL & another v. MACBRAIRE.

of rent after the destruction of the property by fire, because it was universally received and acted upon that such an event left the tenant at liberty to surrender.

Had the English law upon the point been less doubtful than it is, this Court ought not to hesitate upon the case as it now stands in evidence; for COMMUNIS ERROR FACIT JUS. I shall, therefore, let this judgment follow the usage of the place, sanctioned, as it is, by the decisions in equity.

Judgment for the defendant.

The KING *against* PATRICK KOUGH and another.

August 23d.

ON this day, *Coote*, on behalf of the Crown, and *Simms*, on the part of the defendants, being present, the *Court* pronounced the following judgment:—

An *adverse* possession of land in this country for *sixty* years, is a bar to the rights of the *Crown*. And the same kind of possession for *seventy* years, will deprive the Crown of its right of *entry* upon those lands.

It appears by the facts which have been laid in evidence, or admitted in argument, before the Court, that the piece of ground forming the subject-matter of the present proceedings, was, upwards of sixty years ago, in the possession of one *James Howell*, and has ever since continued in the occupancy of himself, or of other persons claiming under him. It also appears that the ground lies at the back of the Ordnance Yard, and falls within the provisions of a certain *order* made by the local government in the year 1766. It would seem that, in consequence of certain alleged abuses, the permission which had been formerly given to the soldiers of the garrison to build huts upon the vacant ground adjacent to *Fort William*, was at that time revoked by the Governor; and that six houses, which had

1819.

The KING v. KOUGH.

been left undemolished by the French, after the evacuation of the fort (among which was the one then standing upon the ground in dispute), were, as the order relates, suffered to remain in the possession of the respective occupants, upon their undertaking not to sell liquor to the soldiers, and that the house should be removed at their decease. How far the parties in possession agreed to hold upon such terms, is nowhere mentioned; but there is a short note, preserved among the records at the Government-office, which refers to the permission given to *Howell*, and states that a similar indulgence was afterwards continued to his widow.

Pursuing the history of the case agreeably to the order of its dates, it appears that some years after the above transactions, a part of the ground which had been occupied by *Howell*, was taken into the ordnance-yard, by the mere act of the officer then in command of the department, and the residue was left in the peaceable possession of the parties, and has so continued, without any dispute or question as to the title, until the present proceedings were instituted on the part of the Crown.

It might be proper, also, to notice, that in the year 1804, the Governor, having it in contemplation to dispose of certain *ships'-rooms* situated in St. John's, caused a survey and plan of the town to be made, in which plan the ground now claimed is laid down and numbered as *private* property.

Upon these facts, a presumptive title is set up, on behalf of the Crown, to the ground in question; and the defendants are called upon to show the title upon which they claim it. On the other hand, the defendants rely upon the length of their possession, and require that a complete title for the

1819.

The KING v. KOUGH.

Crown should be made out in conformity with the statute of James. The nature of the defence imposes upon the Court the necessity of determining, *in limine*, a very important question of law, viz., *how far the subject can claim any property whatever in the soil of this island*; and *whether the statutes for limiting the rights of the Crown in real actions can be considered as applicable here?*

We are informed by Mr. *Reeves*, in his History of Newfoundland, that the question of property had often been agitated, but never finally determined. Mr. *Fane*, the law-adviser to the board of trade, had, indeed, gone so far as to admit something like a *life-interest* in the party in possession of the land; and from a series of direct questions which were afterwards put to Sir *Philip Yorke*, the Attorney-General, it was hoped that such information might be extracted from that great lawyer as would lay this interesting question at rest. The Attorney-General, however, never answered the points which had been referred to him; and they remained, says Mr. *Reeves*, to be discussed in after-times.

It is not easy to assign an adequate cause for the disinclination shown at that day either to admit or to deny the right of real property in this island. The statute of William had then passed, and whatever might have been the former policy of prohibiting a sedentary fishery, it was virtually abandoned by that law. Of all evils in society, *uncertainty in the law is amongst the greatest*, and there cannot be any uncertainty more distressing than that *of the right by which a man holds his habitation.*

This island is one of the few possessions which were originally acquired to the Crown of England by the right of occupancy; and

1819.

The KING v. KOUGH.

it is liable to all those considerations which apply to that species of colonization. The right to the soil rests in the King, as the Sovereign of the state, by whose means the possession is supposed to have been acquired, and is, in fact, maintained. In all the other plantations this right is preserved to the Crown, and in virtue thereof, royal grants and other alienations are made; but in this island it has been conveyed away to the exclusive uses of the fishery. It is this circumstance which has created the peculiarity in the tenure of the soil in Newfoundland, and caused all the difficulty in the discussions about property. The *statute* of *William* throws open all the shores, rivers, and other convenient places for the fishery, to all His Majesty's subjects in common, but with an express saving of the private rights of individuals. The act recites, that since the year 1685 several inhabitants had possessed themselves of rooms and places which had before belonged to fishing-ships, and directs that all such rooms shall be restored to public use. The inference, then, would naturally follow, that such as were possessed before the year 1685, were not to be disturbed. But the act goes on to declare, in *express terms*, that all such persons who, since the year 1685, have built, or at any future time shall build, or make, any rooms or places for fishing, "shall and may peaceably and quietly enjoy the same to his or their own use, without any disturbance from any person or persons whatever."

The statute of William does not define the quantity or quality of estates; but it fully recognizes the right of *quiet possession*, which supposes property of some kind; and in this it is confirmed by the *statute* passed in 1811, for sanctioning the sale of the *ships'-rooms*,

1810.

The KING v. KOUGH.

which directs such rooms to be "granted, let, and possessed, *as private property, in like manner as other portions of land in Newfoundland.*" In the statute for confirming the existing treaty with the United States, the right of *settling* upon such parts of the island as the Americans are permitted to use for fishing, is reserved to His Majesty's subjects; and it is also agreed that, after such settlement, the Amerians shall no longer use them without the permission of the inhabitants or *proprietors*. By a decision, also, of this Court, affirmed by the Regent in Council, so late as last May, the right of private property in the soil of this island is *judicially acknowledged*. But it is unnecessary to multiply instances, or to look further than the statute of William, which is, at this moment, the *great title-deed of all the valuable fishing establishments* in this island, and which creates a facility of acquiring and transferring property in Newfoundland, altogether unknown to any other portion of the King's dominions. It is to be observed, however, that the statute of *William* only relates to such parts of this island, as are actually *available to the fishery;* the other parts remain within the power of the Crown to grant away, or to retain, at pleasure. Several written instruments, in the nature of grants, from different Governors, have been laid in evidence; and, among others, a grant from Admiral *Edwards* to *Winter*, of a piece of ground adjacent to the one in question, and, also, within the boundaries of Fort William, as described in the order of 1766. These instruments do not bear date earlier than the year 1757, but they refer to others of a much earlier time; and one in particular recites a grant as having been made by

1819.

The KING v. KOUGH.

patent in the reign of Charles II.* It cannot be denied that there is a great number of existing grants at the present day, and that the rents arising from them form one of the principal sources of the revenue. Since, therefore, the Governors of the island have, from time to time, made grants of those parts of the island which remain within the disposal of the Crown, the laws which apply to Royal grants, and the interests derived, or presumed to be derived, under them, must necessarily follow. It is the common law of the plantations, that the laws of the Mother Country extend to them as far as they are applicable. The 49th of the King—the Act under which this Court holds its jurisdiction—especially directs me "to determine all suits of a civil nature according to the laws of England, so far as the same can be applied to Newfoundland." *This Court has always considered the statutes for the limitation of actions between subject and subject, to apply here; and I must own that I do not see any reason why those limitations which the wisdom of Parliament has thought necessary to apply to dormant claims of the Crown, as well in respect of the remedy by information, as the duration of right to lands, should not apply also.* I know that in other colonies, which are not provided with express local laws, they are enforced; and, until my humble judgment shall be corrected by the wisdom of the Superior Court, I must hold them to be operative in this. Considering, therefore, the statute of *James*† to apply to the

* See the notice of a Royal Grant, in *Reeves's* History of Newfoundland, p. 62, which appears to have been made in 1723; and, also, Lord *Baltimore's* Grant.

(†) The 21st Jac. I. C. 14. There were indeed, *three* Acts passed in the twenty-first year of the reign of King James the First, *viz.*, 21 Jac. & C. 2; 21 Jac. I. C. 14;

1819.

The KING v. KOUGH.

case before me, I must try the title now set up for the Crown by its own strength, since the defendants have shown an undisturbed possession of more than *twenty years*. The evidence to support the paramount title of the Crown, consists merely of an order and memorandum found among the records of the Government-office, which are supposed to affect the present case, either by bringing the ground in question within the boundaries of Fort William, or by raising a presumption that the occupancy of *Howell* was only permissive at the date of the order. Could either of these points be established, or even corroborated, by other evidence, it would have an important bearing upon the case; but, unsupported as they are by any regular proof, and completely at variance with the fact of the boundary of the fort, as it is recorded in the government chart of 1804, I cannot safely consider the unsupported *dictum* of an order as conclusive upon a point which would involve in its consequences a pretty large section of the town, and disturb the rights of individuals to an alarming extent.

and 21 Jac. 2, C. 18; having, each of them, the *quieting the possession of lands* as an object. But it is certain that the 21 Jac. 1, C. 14, is the chapter here referred to by Mr. *Forbes*; and his doctrine upon the interesting question raised in this cause may, I conceive, be shortly comprised in these two propositions:—

1st. That *twenty* years' undisturbed and adverse possession of lands in this country by a subject, will bar the Crown of a right to *enter* on those lands, and compel the Crown to establish a strictly legal title to them, by force of the 21 Jac. 1. C. 14.

2d. That *sixty* years' undisturbed and adverse possession of lands in this country by a subject, will furnish him with a *complete and perfect title* to those lands, even *against the Crown itself*, under the 9th Geo. III. c. 16.

It should, however, be borne in mind, that this doctrine does not apply to such lands as, by the 10th & 11th of William III., c. 25, are exclusively appropriated, and particularly dedicated, to *the use of the fisheries*.

1819.

The KING v. KOUGH.

If the limits of Fort William be correctly described in the order issued by Capt. *Palliser*, they must include not only the ground in dispute, but also the ground which, it is proved, was afterwards granted by Admiral *Edwards* to *Winter*. It is not very easy, however, to believe that the Governor of the island could be brought to give away the public fortifications; and it is more natural to suppose that the order itself might have been founded in misinformation. That the tenantcy of *Howell* was permissive, we are left to infer from a loose note in the Government-office, without anything like an acknowledgment from *Howell* himself to that effect, or without its being known to the witnesses, who were his neighbours, and might naturally be informed of such a circumstance. The ground has been continually under the eye of the Garrison; and, as has been stated, and not denied, has more than once been the subject of treaty between the proprietors and the Ordnance. In the meantime, it has openly passed from hand to hand, without any question as to title, and has been purchased by the present possessors for a full consideration. Feeling every disposition to uphold the rights of the Crown, and, at the same time, doing justice to the liberal manner in which the present claim has been brought on, I think it has been proved that the defendants have had a possession of the ground for upwards of sixty years, without any acknowledgment of tenantcy, and that they are within the protection of the Act for quieting estates against dormant claims of the Crown.

JOHN RYAN *against* W. & H. THOMAS. 1819.

August 31*st*.

Twenty years' undisturbed possession of a cove will enable the party who has had such possession to sustain an action against a wrong-doer.

THE parties held conterminous parts of the sea-shore; and the plaintiff left, on his side, a cove, or space of shore and water, without erecting any building thereon.—The defendants built wharf at the extremity of their boundary, and yet insist on making use of the cove which the plaintiff had left for his own use. The right to this cove formed, therefore, the sole subject of the present action. Several witnesses were examined, upon whose testimony the *Chief Justice* declared—

That the plaintiff having been in the possession and occupancy of the premises for more than twenty years, *had a good title until the contrary be made out on the part of the crown, or the public.* That the occasional use which had been made of the water lying over the cove, by the defendants, did not *amount* to such an interruption of the plaintiff's possession as would destroy his title, or found a claim in defendants to use it in common with plaintiff as a matter of right. That it had appeared, in another case, that it was not unusual for persons living adjoining to each other to allow the use of water which was not immediately wanted; but that it would shake the fonndations of all property to suppose such an *indulgence* could grow into a *right*. And that, therefore, leaving the public rights to be pursued in such way as may be deemed proper by parties concerned, he should determine this case in favour of the plaintiff; though, as no notice had been given to defendants to discontinue the use of the water, the damages, or rent, for the use and occupation must be merely nominal; and each party must pay his own costs.

1819.

October 30th.

The *Chief Justice* reversed the judgment of the Surrogate Court, founded upon the verdict of a Jury, where it appeared that there was *no evidence whatever* to sustain the verdict.

PARKIN & ANDERSON appellants,
and
BONNELL and Others respondents.

THIS was an appeal from the Surrogate Court at Harbour Grace.

It appeared, from the transcript of the proceedings in the Court below, that, on the 19th of January last, *Bonnell* and partners sued out a writ of damages against *Josiah Parkin* and *Richard Anderson*, to recover the sum of £168 17*s.*; and that the cause was submitted to a special jury, who found by their verdict, "that the defendants should pay the plaintiffs eighteen pounds seventeeen shillings for expenses; the sum of forty pounds for disappointment, or damages; and all costs of Court.

After hearing the parties, the *Chief Justice* decreed, that so much of the judgment below as adjudges the sum of £18 17*s.* to be due to the plaintiffs by the defendants "*for expenses*," together with the costs of action, should be affirmed; but that so much of the same as adjudges the further sum of £40 "for disappointment" should be reversed; the same having been found by the jury *without any admission* on the part of the plaintiffs, or *any evidence whatever laid before them relative to it*, and contrary to the charge of the Surrogate, pointing out such entire want of evidence.

ANDREWS *against* ANDREWS.

1819.

November 4th.

Oral testimony of the contents of a will which could not be found, admitted by the *Chief Justice*; and judgment given by him according to the directions of the will so proved.

ACTION to recover the possession of a certain plantation situate at Port-de-Grave. Several witnesses were examined, from whose testimony it appeared, that the party under whom the plaintiff claimed, had been in possession of the property in dispute for more than twenty years, and had often been heard to say that he had made a will, and therein devised this property to the plaintiff.

Upon this evidence the *Chief Justice* decided, that the room should belong to the plaintiff, agreeably to the supposed will of *William Andrews*. But that, from the length of time which had been suffered to elapse, all questions of rent should be laid out of the case, and the judgment should be merely for possession of the property.

MICHAEL DUNN *against* ROBERT BROOKS.

November 15th.

The decision of a cause postponed by the *Chief Justice*, under an expectation that a bill was in progress in Parliament, the provisions of which were to be *retrospective*, & would, consequently, bear upon the question now in dispute.

ACTION of trespasses; damages £80, and to recover possession of certain premises in St. John's.

Simms, for plaintiff, states, that in June last, the plaintiff took a lease from the defendant of certain property in St. John's, on condition of his paying the arrearages of rent due from the former tenant, and also future rent. That plaintiff had paid the arrearages, and was in possession, when the house was burnt down in July last. That the plaintiff himself was at the *Labrador*, carrying on his fishery, when the fire took place; and that his wife, on being applied to, said she could do nothing until her husband's return. But that, notwithstanding this declaration on her part, the defendant

1819.

DUNN v. BROOKS.

took possession of the ground then lying vacant, and still holds it against the will of plaintiff, who never offered to surrender, and considers his lease as still subsisting.

Lilly, for defendant, admits the fact of the lease to the plaintiff, and the destruction of the premises by fire; and further states that the ground which forms the subject-matter of the present dispute, would be materially affected by the provisions of the bill, which was said to be now under the consideration of Parliament, for widening and improving Water-street. The *Chief Justice* then said:—

The letter of the law, *as it now stands*, is with the plaintiff, who has a right to retain his lease if he likes to do so; but it is within the knowledge of the Court, that a bill *expressly framed* to meet this and similar cases, has been laid before the board of trade, approved by their lordships, and officially announced by the secretary of state for the colonies, to the Governor of this island, as on its way to Parliament, for the purpose of being passed into a law; and, if it should pass, I also know that it will have a *retrospective* operation, and must make any decision of to-day, contrary to law this day four months.

All I can do at present, is to let the case stand over for future judgment, when the fate of the bill will be known, and effectual justice done between the parties.

WILLIAM NEWMAN *against* THOMAS MEAGHER and Others.

1819.

November 22d.

The destruction of premises by fire releases the lessee of such premises from all the covenants contained in the lease, if he thinks proper to surrender it, under the custom of this town.

THIS was a summary proceeding in covenant, for the purpose of compelling the defendants to rebuild certain houses and tenements situated in this town, and which were destroyed by the fire which consumed a considerable part of the town on the night of the nineteenth of July last.

The parties considering the case sufficiently raised for the consideration of the Court, by their written statements and admissions, the same came on to be heard this day; when, after having attended to the arguments which were urged on both sides, the *Chief Justice* delivered the following decision upon it:

From the documents which have been laid before the Court, and the admissions of the parties, I collect that the houses and the other buildings which form the subject-matter of this action, were leased by the plaintiff to *Andrew Thomson* and *Alexander Hill*, by deed, dated in 1801, for the term of twenty-one years, at the rent of £250 per annum, with a general covenant on the part of the lessees to repair, and without any reservation against fire. That after some intermediate assignments the premises came to the defendants as assignees (in fact at least), and were in their possession at the time of the fire in July last, when they were entirely consumed. Objections have been raised to the liability of the defendants, upon the grounds of informalities in the conveyance to their immediate assignors. It is not denied, however, that they were in possession of the original lease, and paid rent to the plaintiff, agreeably to its provisions; and it may be the less necessary

1819.

NEWMAN v. MEAGHER and others.

to go into these objections, as I feel myself bound to determine this case upon the same principle which has governed the decision of this Court in similar cases.

In the case of *Bulley* and *Carson*, it was proved by a very full examination of witnesses, who, from their long residence in this island, must be presumed to have acquired a competent knowledge of its local usages, that the lessee of a house has a right to surrender his lease in the event of *its being destroyed by fire*. This point was again brought before the Court in the case of *Cowell* v. *Macbraire*, and established to its entire satisfaction. Indeed, as a point depending upon its facts, the Court could not but feel, from the manner in which the parties produced their witnesses, and appealed to the concurrent testimony of every person casually in attendance upon the Court, that it was too clear to be disputed, that the lessee of a house, upon its being burnt down, and no express provision being made against such a casualty, has a right to surrender his lease, and discharge himself from all future liability under its covenants.

I am fully aware of the course of decision in England upon the question, and that there the lessee would be bound to rebuild under his general covenant to repair (*Bullock* v. *Dommett*, 6 T. R. 651.) But there would be nothing repugnant to law in the lessee's guarding himself against such liability by an express exception against fire; and it is every day's practice for him to do so in England. If a general understanding prevail here, to the same effect, I see no reason why it should not have the same force in determining the intention of the parties, as a *specific provision* in the lease would have.

In the case before me, the lessee covenant-

1819.

NEWMAN v. MEAGHER and others.

ed to repair; there is certainly a plain distinction between *repairing* and *rebuilding*; and the Courts, in determining for the first time, that a covenant to perform the one, extended to the performance of the other, must certainly have so determined upon the principle of such being the intention of the parties to the covenant; and, by the same rule, they would have made a contrary decision, if that intention had appeared otherwise. Indeed, the *intention* of parties is the only just criterion in determining contracts which do not interfere with positive laws.

The law of landlord and tenant, with their various rights and liabilities, as observed in England, is very imperfectly understood in this Island. Deeds have most commonly been drawn from old precedents, by persons unskilled in the law, and, consequently, unaware of the technical force of what they copied. It is, besides, the constant practice here, to let houses to the utmost extent of their value. If the tenant be liable to rebuild, he must insure the buildings; and, from their being situated in a wooden town, closely built, in a country requiring fires all the year, and without any further legal provision for extinguishing fire than if such a casualty were not within the scope of human probability, the insurance must necessarily make a large addition to the rent. These are circumstances of radical difference between houses situated in England and this island, which cannot but be taken into account in collecting the intention of parties to a lease; and, considering them all, together with the general understanding which prevails in the place, I hold this case to be within the local custom; and that the defendants, having tendered their lease imme-

1819.

diately after the fire, are thereby discharged from the covenants contained in it.

BAINE, JOHNSTON & Co. *against* COSNARD & JANVRIN.

December 3d.

A person residing abroad sends a vessel to this island, and gives instructions to an agent, resident here, to procure a cargo of fish for her; directing him, at the same time, to apply the balance then due from such agent to the payment of the cargo of fish, so far as the same would go, and to draw bills upon him for the residue. Acting under these directions, the agent purchases a quantity of fish from some merchants, who were not only aware that he was acting as an *agent*, but seem, also, from the whole course of dealing in the transaction, to have looked upon the *principal* as the party to whom the credit was given. As respects that part of the price of the fish which was to be paid in *bills*, there can be no doubt but that the seller of the fish may sue the foreign principal for it; and though, as regards the other part of the price, the agent was guilty of a breach of his instructions, yet as the fish was shipped on board the vessel of the principal under the expectation that he was to pay for it, and is actually now there for his benefit, the *Chief Justice* held him also liable to pay the seller for it, since he was clearly bound either to do so, or to return the article.

ACTION to recover the sum of £1,500 for goods sold and delivered.

The defendants, being resident beyond the seas, the *Court* inquired if any person appeared to the action on their behalf. Whereupon, the master of the ship *Leicester*, which, together with the cargo therein laden, had been attached in this case, came before the *Court*, and stated that he had certain instructions from the defendants touching his voyage to this country, and prayed the advice of the *Court*, whether he was authorized or not to make a legal appearance to the action. The master then produced his instructions; and it appearing that he, together with *Peter Lemessurier*, a resident of this town, was authorized by the defendants to purchase a cargo of fish, and draw bills for the amount; and as this action was for the amount of the cargo of fish procured under such instructions, for the use of the defendants, and now actually laden on board their ship, and attached in this cause, the *Court* considered the captain competent to appear and defend the action; whereupon

1819.

BAINE, JOHNSTON & Co. v. COSNARD & JANVRIN.

the master appeared, and denied the cause of action.

John Boyd, for himself and partners, explains the nature of the case, and calls several witnesses to support his statement.

Simms conducts the case for defendants, and contends that they purchased the fish from *Lemessurier*, and have nothing to do with his agreements or purchases elsewhere. To prove the usage of the place, with respect to purchases and sales by commission-merchants, some witnesses were produced and examined.

Per Curiam.—Upon the facts which have been laid in evidence, the question raised for the consideration of the Court is, how far the defendants are liable to the plaintiffs for the value of a cargo of fish delivered by them on board the defendants' ship; and whether *Lemessurier*, who contracted for such cargo, is to be considered, in reference to the plaintiffs, as a *principal*, or an *agent* of the defendants. In a few words, to whom was the credit given?

The principle of law is very clear, that where one person contracts with another on behalf of a third party, and discloses that fact at the time, he is not generally liable on such contract. But the loose manner in which agreements are frequently managed, and the consequent difficulty of ascertaining the real intentions of the parties, make the *application* of the principle not quite so clear; and this is precisely the difficulty in the case before me. The distinction between *commission-merchants* and other *agents*, which is sought to be established upon a suggestion which fell from one of the judges in the case of *Paterson* v. *Gandasequo* (15 East. 62), is not founded on the authority of that case, nor in anything which will bear the name

1819.

BAINE, JOHNSTON & Co. v. COSNARD & JANVRIN.

of *principle*. Surely, a merchant residing abroad may pledge himself through his agent here. The general disinclination of foreign merchants to do so, may afford a presumptive proof of the probable intention of the parties, in estimating the evidence of the case, but nothing more. The particular facts in proof before the Court are, I think, sufficient to conduct it to a right conclusion, without the necessity of recurring to such sources as the usual or accidental occupation of an agent.

It appears that some time before the arrival of the defendants' ship, the plaintiffs were apprized of the intention of the defendants to send her to this port, and they informed *Lemessurier* of it. In fact, they had been offered a share in the agency jointly with him, and had declined it. This is certainly very much like proof that they knew the defendants as the real parties in the transaction of the *Leicester*, and knew, also, that *Lemessurier* was merely an *agent*. *Lemessurier* appears, by his evidence, to have had no doubt that they knew him to be such, although it is not expressly so stated in the notes which passed between them in the contract for the purchase of the *Leicester's* cargo. He says, indeed, that he considered himself as the purchaser of the cargo. But the question is, not what he *regarded himself*, but in what light *he was regarded by the plaintiffs*. After *Boyd* had declined loading the ship upon *Lemessurier's* first application, the master spoke to him in person, and was informed that he could then get a cargo of fish at fifteen shillings per quintal. He, thereupon, communicated with *Lemessurier*, who wrote to *Boyd*, and inquired his terms; and, being informed what they were, he desired him to

1819.

BAINE, JOHNSTON & Co. v. COSNARD & JANVRIN.

consult the *master* before he gave a definitive answer. Are these like the acts of a merchant acting for himself in a transaction with another merchant of this town? Is it the act of a resident principal contracting for himself? But there is one other fact which appears to me to be conclusive that *Lemessurier* was regarded by the plaintiffs merely as the agent of the defendants; and it is this: After *Lemessurier* had agreed with them for the two thousand quintals of merchantable fish, *Menie*, the master, agreed with *Boyd* for a *farther quantity* of Madeira fish, to complete the *Leicester's* cargo; and he agreed without noticing *Lemessurier* or mentioning anything as to the mode of payment, which he admits, however, was to be by bills on London, in the same way as for the other parts of the cargo. What am I to infer from this to have been the understanding of the plaintiffs all along, but that they were loading a cargo of fish for the defendants, to be paid for by bills of their providing?

The Madeira fish was either sold to the defendants, or to the master, or to *Lemessurier*; *Lemessurier* disclaims all connexion whatever with this part of the transaction; and it is proved that he was neither consulted by the master, nor had any communication with *Boyd*. It is hardly to be presumed that it was sold to the master upon his personal credit; and we are forced to conclude that it was delivered upon the credit of the defendants, and upon the faith of receiving those bills which they had authorized the master to draw in payment on their correspondents in London. It was to these *bills that the credit was really given*; they are the connecting link between the plaintiffs and the defendants throughout the whole transaction, both with respect to the fish

1819.

BAINE, JOHNSTON & Co. v. COSNARD & JANVRIN.

supplied through the master and through *Lemessurier*. Between the two I can see no substantial distinction. The facility with which the plaintiffs agreed to furnish an additional quantity of fish, at the bare word of the master, whom they did not know, is a pretty strong proof that they looked over to principals, whom they did know; and that they were governed by an understanding, which, although it is not made to appear by express testimony, derives a presumption at least from its absence. Had they known less of the defendants, it is probable they would have been more particular in the terms of their agreement, both with *Lemessurier* and the master. When *Lemessurier* applied to *Fergus & Co.* for a lading for the *Leicester*, *he named his principals*, and pledged *their credit*. as an inducement to them to furnish it; and if, as he swears, he cannot recollect expressly doing the same to plaintiffs, it is because he considered they *were fully apprized of his character as agent, and of the principals for whom he acted.*

The defendants have placed a good deal of reliance upon the delivery of the receipts for the parcels of fish as they were shipped on board, to *Lemessurier*; but the clerk of the plaintiffs, who was called by the defendants, swears that the receipts were delivered in the usual course of business, and without the knowledge of *Boyd*, who is the only one of the plaintiffs now in the island. As soon as *Boyd* was informed of the circumstance, he said there was no occasion for passing over the receipts, and they were, consequently, retained. All this took place *bonâ fide*, and before there was any apprehension of difficulty on account of *Lemessurier*. If, therefore, there be such an invariable custom as is set up by the defendants, the inference which

1819.

BAINE, JOHNSTON & Co. v. COSNARD & JANVRIN.

would be drawn from it to fix the property in *Lemessurier*, by the receipts being passed to him, is rebutted by the fact of the passing of the receipts being afterwards countermanded. Why should they have been so countermanded in this particular case? But supposing that all the receipts had been passed by *Boyd* to *Lemessurier*, and detained by him, I cannot see how that circumstance could have varied the case;—the receipts are merely acknowledgments by the master of the quantities delivered on board the ship, and it is as essential that an *agent* should be furnished with these particulars as the *principal* himself. There is a difficulty, however, in the case, which suggested itself at the opening, and I am not clear that it is now entirely free from it. Upon looking at the instructions of the master and *Lemessurier*, I am of opinion, that they have *exceeded the authority* which was given them. *Lemessurier* was directed to furnish fish to the amount of the balance of account due from him to the defendants, and bills were only to be drawn for the *residue* of the cargo. *Lemessurier*, it appears, had intended to furnish to such amount from his own means, and was in the act of doing so when his intentions were suspended by his insolvency. The fish, however, has been *delivered, and is now on board the defendants' ship*. For so much as they have received through the *authorized acts* of their agents, they are *certainly liable*, and they are bound either to *return the supplies*, or to *pay for it*. As the case is at present situated, I think the plaintiffs are entitled to judgment for the full amount of fish delivered. At the same time, I shall be happy to afford any equitable relief in the power of the Court, under the peculiar circumstances of the case.

1819.

December 11th.

PATRICK DOOLEY *against* BURKE & HACKETT.

The supplying merchant of a planter is liable to pay the wages of the servants of that planter, to the extent of the value of any fish and oil which may have come to his hands as the produce of the voyage, if he know, either *actually* or *presumptively*, that the servants who make the claim upon him were in the employment of the planter.

PLAINTIFF was a servant of one *Morrissey*, a planter, and recovered judgment against *Morrissey* in the Court of Sessions, for the balance of wages due in 1817.

Defendants were suppliers of *Morrissey*, and received his fish and oil. This action was brought upon the *judgment*, for the purpose of following the fish and oil into defendants' hands, under the 15th Geo. III.

Defendants state that they only received £45 for supplies issued to the amount of £100; and contend that having received fish in payment for supplies advanced, they are not liable to account for the same. It was also contended that the plaintiff was not known to defendants as a servant of *Morrissey*; but upon the latter point there were some witnesses examined, by whose testimony it was proved to have been known to defendants that *Morrissey* had two servants, and that the plaintiff was one of them.

Per Curiam. The practice of following fish and oil, as it is called, under the 15th Geo. III. has been carried beyond what the framers of that law probably intended.—There is an opinion, which has found its way among the *records* of the Court, given by Lord *Alvanly* and Baron *M'Donald*, when they were law-officers of the Crown, that the servants' lien upon fish and oil for his wages cannot be traced into the hands of a *bonâ fide* holder for a full consideration; and this opinion is given with a latitude which might warrant its application to the *merchant* who receives the produce *in payment of his advances* upon the voyage.

The usage of the Courts, on the contrary,

1819.

DOOLEY v. BURKE & HACKETT.

has always been to consider the fish equally liable to the servants in the hands of the merchant, or in those of the immediate hirer. Upon the whole, I am rather inclined to think the practice of the Courts right as applied to the regular receiver, although it has sometimes been carried too far.

The correct interpretation of the law must, in a great measure, depend upon a practical knowledge of the subject to which the law is intended to be applied; and, although I should always bend to the superior wisdom of English lawyers upon a point of *English law*; yet, I should hesitate in yielding implicit deference upon a matter of a *mere local character*.

In the case of merchant and planter in this island, there is an intimacy of connexion approaching to identity. If the servant is to lose his lien, upon the removal of the fish from the planter's room, he must interpose legal process to arrest it; and the Court has had abundant experience of the ruinous consequences of such a proceeding. If I can collect that the merchant-receiver is privy to the shipping of the servants, or is cognizant of the fact of their being shipped, I shall hold the fish and oil received by him to be still liable to the wages of the servant. But the case must be *bonâ fide*, to entitle the servant to this interpretation of the law; he must be, *actually* or *presumptively*, known to the merchant, and there must be a total absence of all fraud. The merchant has a right to inform himself of the number of servants, and amount of wages. If he neglect to do so it is his own fault; but if he exert the right, and if any servant be kept back, or falsely represented, the servant must take the consequences upon himself.

In the case before me, I am of opinion,

1819.

DOOLEY v. BURKE & HACKETT.

that the plaintiff was not unknown to the defendants as a servant on the room which they supplied; and as there is no proof of fraud against him, he is entitled to receive the balance of his wages from the defendants, as receivers of the voyage.

January 1st. 1820.

GEORGE HEATH and Others *against* ROBERT KEAN.

If objections to the decrees of the Courts in this country were allowed to prevail merely on the ground of *informality* in the course of proceeding, more than half the titles to property in Newfoundland would be unsettled. A decree, or judgment, therefore, which has been regularly entered, and not appealed from, will always be respected and enforced.

FROM the following decree, the facts of this case, and the questions to which they gave rise, will be easily collected and understood.

Per Curiam.—This is a summary proceeding by petition and answer; the petitioners setting forth their claim to three undivided sixths of certain plantations in this island, as tenants in common; and praying that partition may be made, and possession given to the parties respectively entitled to the same: and the respondents denying the rights of the petitioners to any part of the property in question, and praying that the matter may be dismissed.

The only question in the case, is the *legal title*; the *facts* are not disputed; but for the sake of perspicuity, it may be as well to take a cursory view of the principal grounds upon which the petitioners rest their case.

William Kean, the elder, was the common ancestor, from whom all parties derive their claims. By his will, which is dated in 1772, he gave his plantations in Newfoundland to his two sons, *Benjamin and Robert, to be equally divided between them.* He afterwards goes on to specify certain conditions, upon which his eldest son, *William*, was to *share equally* with his brethren, or be

1820.

HEATH & Others v KEAN.

excluded: but by a codicil, which was added in the following year, the testator revoked the disabling conditions of his will, and gave *William an equal share* with *Benjamin* and *Robert*.

Upon the decease of the testator, his three sons took possession of his estates in this island, and divided the profits. In 1785, *Benjamin* conveyed half of his third to *Robert*, and died some time after, leaving a will, by which *George Heath*, one of the petitioners, was appointed his executor. *William*, the eldest son, died in 1786, leaving a widow, who is since deceased, and a daughter, who is the other party to this petition. So stood matters in the year 1792, when proceedings appear to have been instituted in the Supreme Court of this island, for the purpose of adjusting the rights of parties claiming under the will of *William Kean*, the elder. The order of the Court of 1792, which is recorded among the proceedings of the Court, recites that disputes had arisen, and that the claims and titles of the respective parties could only be settled in England, where they resided; and directs the rents to be brought into Court, to be thereafter paid over to such parties as should make out their titles to the same, or any part thereof. Whether any decree was made, does not expressly appear; for there is no record to such effect among the proceedings of the Court. But there is an order of 1794, which mentions a *decree* as having been given in the Supreme Court, by which the property in dispute was *settled and divided in sixth parts &c.* Upon these facts a preliminary question is raised—how far this Court can proceed to hear a case which has already been determined? and I have no hesitation in saying, that if that fact

1820.

HEATH & Others v. KEAN.

can be satisfactorily made to appear, I should not hear it at this remote distance of time. It is difficult, at the present day, to collect what was done in the Court so early as the year 1792, the second year of its institution. The Judge who presided, came to Newfoundland only for a few months in the summer, and held his Court, as it were, *velis velatis*, without a professional clerk, or an office to register his proceedings. To expect regularity under such circumstances, would be to look for that which I should certainly not find. But it must not be forgotten that *justice* is the first object of all Courts; *forms* are only the *means* by which that object is attained. To disregard the proceedings of Courts in this island, merely for informality, would be to unsettle half the titles in it, and to sacrifice the ends of justice to its forms. Were the present, therefore, a case in which I could arrive at the fact of any decree having actually passed the Court, I should not feel myself authorised to review it.

But upon carefully looking at the proceedings, I cannot arrive with any degree of certainty at that fact. The order of 1792 is, certainly, not a decree, or anything which can have the effect of a decree. It expressly suspends the payment of rents, until the rights and titles of the several claimants to the property in dispute were proved. The order which was made in 1794, certainly alludes to a decree; but no such decree is to be found; and I am inclined to think, from the loose and untechnical manner in which the latter order is worded, that it was framed under an erroneous view of the preceding order, and that no decree, or anything having the effect of a decree, upon the rights of the parties, has ever been given upon the case.

1820.

HEATH & Others v. KEAN.

I have entered fully into the reasons which induce me to entertain the case upon the will of *William Kerr*, because I am desirous of preventing any misconception from causing it to be drawn into a precedent hereafter. Upon the merits, I do not see the least ground upon which the respondent can rest his case. The testator, *William Kean* the elder, gave his Newfoundland estates to his three sons, "equally to be divided between them." These words, in a will or devise, are not disputable; they are established by the whole current of authorities, to create a tenantcy in common; and they are repeated so many times in different parts of the will, as to exclude any presumption whatsoever, of being used unadvisedly, or conveying a technical meaning different from the intention of the testator. It is, therefore, adjudged, that the petitioners are entitled to certain shares of the estate of the late *William Kean* the elder, viz.:—*Martha Kean* to one-third, and *Geo. Heath* to the half of one other third; and that the same be divided, and possession given, according to their respective rights.

1820.

January 6th.

HUNT, STABB, PRESTON & Co. *against* PETER LE MESSURIER.

The landlord of *premises not particularly dedicated to the purposes of the fishery*, has the same remedies for the recovery of rent due for such premises as a landlord in *England* would have: but where the property for which rent is claimed is merely a *fishing plantation*, or establishment, the rent will be considered, in the event of insolvency, [as *current supply*, and paid ratably with other demands of that class. [See *Chancey* against *Brooking*.]

ACTION to recover the sum of £210, for two half-years' rent of a dwelling-house, stores, wharf, and premises, in St. John's, due first of May, and 1st December, 1819.

The case was submitted to the judgment of the *Court*, upon the following statement of facts conceded, on both sides, to be correct.

The defendant is a *general merchant*, resident upon the premises, the rent of which is, by this action, sought to be recovered; and was, at the suit of several of his creditors, declared insolvent in the Supreme Court, on the 30th November last, under the statute 49th George III.

Before the declaration of insolvency was pronounced, the plaintiffs issued an attachment, on account of rent due the *first of May* last, against the goods and effects of the defendant; and an officer was charged with, and had the custody of, the goods, property, and effects of the defendant, then *lying in and upon the premises* in question; and immediately after the insolvency was declared, the plaintiffs issued a second attachment for the *rent due first of December*, and which attachment was executed upon the property of the defendant then in the *house*, *stores*, and *premises* in *question*, in like manner as the first attachment had been executed.

The second attachment was issued by the plaintiffs subsequent to the publication of the [defendant's insolvency;—the plaintiffs considering such measure requisite, or, at least, a safe course to take, in order to secure them in that lien, which, as the land-

1820.

HUNT, STABB, PRESTON & Co *v.* LE MESSURIER.

lords of the premises, they held over the effects then lying within such premises for rent in arrear; and of which lien they contend they are not divested by the property of the defendant passing, by the operation of the law of insolvency, into the possession of the trustees of the defendant's insolvent estate.

The defendant has, during the current year, carried on a trade in the fishery at Burin; and has also supplied planters and fishermen in the manner that is usual with merchants in this trade to supply such persons.

The stores, &c. of the premises in question have been employed in the defendant's general business as a merchant; and, in particular, he has made profitable use of the same as a commission-merchant, receiving goods and merchandise into the same stores to vend on commission, charging, over and above a commission on the sale of such goods, a per centage also upon the said goods for storage of the same, after the rate of two-and-a-half per centum.

Of the property and effects laid under attachment for rent as aforesaid, besides the household goods and effects in the dwelling-house, and other goods and merchandise of the defendant in the stores, there was a quantity of goods received by the defendant, and lodged for sale on commission as aforesaid; all which goods were attached to pay the said rent.

The trustees of the said insolvent estate being desirous to make sale of the whole of the said effects, it was mutually agreed between the said plaintiffs and the said trustees that the said attachments should be raised, and the trustees be allowed to sell off the said goods and effects without prejudice to

1820.

HUNT, STABB, PRESTON & Co. v. LE MESSURIER.

the lien of the plaintiffs, or their rights in respect to the said attachments for rent.

The value of the goods attached by the said plaintiffs, in manner above-stated, was of the amount of one thousand pounds and upwards; and both attachments were duly executed upon the said goods before any other attachment was served on the same in any other suit.

Per Curiam. Upon the case stated, I am of opinion, that the landlord is entitled to his rent out of the assets of the insolvent estate. But lest this decision may be misapprehended, I shall state the *grounds* upon which it is formed. The bankrupt acts in England have vested the effects of the bankrupt in the assignees, as fully and extensively as the 49th of the King vests the effects of an insolvent in his trustees in this island. Rent in arrear is held to be excepted out of the bankrupt laws at home, whenever there are goods upon the land or in the house, and there is a *distress for rent*. Distress is an ancient remedy, by which the landlord is entitled to detain the goods upon the land until the rent is paid; the assignees succeed to all the rights, and for the rent, to all the liabilities of the bankrupt, among which liabilities, is a distress for rent.

I see no reason why the same rules should not apply to property held in this town, where such property is not immediately engaged in the fishery, which is the case with the premises in question. But where the property, for which rent is demanded, consists of a *fishing plantation,* it has been usual to consider that as a *current supply;* and the general convenience of the fishery, as well as the good sense of the thing, seems to warrant such interpretation. In such case the landlord *cannot distrain,* and *need* not *dis-*

1820.

HUNT, STABB, PRESTON & Co. v. LE MESSURIER.

train; he cannot enlarge his remedy, but he cannot lose it by the removal of the goods before the rent becomes due. His claim for rent is as for a *current supply*, and must rank with other creditors for necessaries for the fishery, *pari passu*. It is, therefore, adjudged that the plaintiffs are entitled to full payment for all the *rent in arrear at the time of the insolvency*, to be computed up to the day of payment, agreeably to the lease; after *such day* the demand is merely *ratable*.

Trustees of BENNING & HOLOHAN *against* BROWN, HOYLES & Co.

January 6th.

The trustees to an insolvent estate can compel the receivers of the produce of the voyage to contribute *ratably*—*i. e.* in a proportion compounded of the *amount of the supplies they have issued*, and the *value of the produce which has fallen into their hands*, to the payment of the *servants' wages*.

THIS action was brought under the following circumstances:

Benning and *Holohan* carried on a fishery at *Ferryland*, and took up supplies upon credit from several merchants in *Ferryland* and *St. John's*. In the course of the season they put off several parcels of fish to such merchants; and in consequence of their affairs becoming embarrassed at the close of the season, they were declared insolvent, under a writ of attachment, in *St. John's*.

The defendants were one of the mercantile houses which had supplied *Benning & Holohan*, and received fish *before* their insolvency, which they have passed to their credit in payment for such supplies.

The trustees, having paid the *servants' wages*, now call upon the defendants to contribute to the payment of *such wages* in proportion to the fish received.

It appeared in evidence, that a writ of attachment, issued at the suit of the servants, from *the Sessions Court*, had been served, in September last, upon certain fish of *Benning*

1820.

Trustees of Benning & Holohan v. Brown, Hoyles & Co.

& Holohan, at the defendants' wharf; and that one of the defendants informed the officer who served the process, that *he would be accountable for the fish brought round.*

The servants had previously applied to the *Surrogate* at *Ferryland* to secure their wages; and on the delivery of part of the fish to suppliers there, security was given for the wages of two fishermen. It was to obtain similar security on the fish brought to St. John's, that the servants had attached it in the Court of Sessions in September.

Per Curiam. The 15*th George III.* is worded as strong as language can make it, that *all* the proceeds of a fishery shall be *first liable for servants' wages*; and I cannot lose sight of the fact, that it was in consequence of the fish and oil going away from the rooms in payment of the master's debts, and the servants finding nothing to pay them, that the legislature framed the law in question. In this case, it appears that the servants had nothing to look to but their industry; that they applied to the *Surrogate* of *Ferryland*, when they found part of the fish and oil going off to creditors, and obtained security for the payment of certain proportions of their wages; and that they actually followed the fish received by the defendants to St. John's, and asserted their demand for wages *before it was delivered.* I think, therefore, that, both by law and the acts of the servants, they had a subsisting *lien* upon the fish delivered to the defendants, and, consequently, that they (the servants) *would* be entitled to their wages upon it.

The only remaining question is, how far the *trustees* can stand upon the *claim of the servants?* They have paid the servants to the full, and are equitably entitled to stand in their place, and call upon

1820.

Trustees of BENNING & HOLOHAN v BROWN, HOYLES & Co.

all who have received fish and oil, *subject to lien for wages at the time of receiving*, to contribute ratably for wages; were any other rule adopted, the servants would have it in their power to *elect* on whom they would claim, and *exercise a most arbitrary discretion over the receivers of fish and oil.* This must not be; the *law* makes *all liable*, and *equity apportions* the liability *between all the parties.*

CONARD and Others *against* DANIEL DRISCOLL and Others.

January 27th.

A prohibition granted by the Supreme Court to restrain the prosecution of a suit instituted in the Vice Admiralty Court, for the recovery of a compensation for services rendered to a vessel in distress in the harbour of Bay of Bulls.

THIS was a case of *prohibition.* The plaintiffs suggested to the Court, that the defendants had commenced a suit in the Court of Vice-admiralty, against the schooner *Active* and cargo, and that the cause of such suit was for salvage, or a compensation for assistance rendered the schooner while at anchor, within the *harbour of Bay of Bulls*, and not within the jurisdiction of the Admiralty. A rule to show cause why a prohibition should not issue having been granted on a former day, the case now came on for hearing before the *Chief Justice*, who afterwards delivered his sentiments upon it in nearly the following words:—

The Courts of Admiralty are regarded by the common law of England as foreign Courts, proceeding by the rules of the civil law, and determining by principles unknown to the laws of the land. The jurisdiction of such tribunals was once an object of great and, perhaps, in the early periods of our juridical system, of proper vigilance on the part of the Courts of common law. But the little jealousies which formerly agitated the

1820.

CONARD & Others v. DRISCOLL & Others.

judges have long since been laid at rest. The limits of the Admiralty jurisdiction are now too well ascertained to be easily mistaken; and they are, moreover, guarded from excess by an anxiety no less observable on the part of the *Admiralty* than of the Courts of common law. The jurisdiction of Courts is, in fact, a part of the constitution of the country; and it is not easy to imagine that any judge of the present day would encroach upon the boundaries assigned him by the constitution, merely to enlarge the sphere of his personal authority.

As the present application for a prohibition is rather novel in this Court, it may be as well to take a summary view of the law as it now stands, in reference to this case. The 13th of *Richard* II. ordains, that the Admiralty shall not meddle with anything done within the realm, but only with that which is done *upon the sea;* and the 15th of the same King, after noticing the frequency of complaints against the encroachments of the Admiralty, declares that of *all contracts and things done within the bodies of counties, as well by land as by water, the Admiralty* shall have no jurisdiction, but that such contracts &c. shall be tried and determined by the laws of the land; except in certain cases of death and maim in great rivers below the bridges. In the construction of these statutes, it has been determined, that all *havens* and *ports* are within the county. Lord *Coke*, in commenting upon them, says, that it is no part of the *sea* where one may see the land on one side from the land on the other. But with every deference to this great authority, this definition appears to be too large, and too dependant upon the accidental height of the surrounding land to form a just criterion. It would seem to be more con-

1820.

CONARD & Others v. DRISCOLL & Others.

sistent with the good sense and liberal spirit of the present day, to consider the *locus in quo*, with reference to its use and mode of occupancy, either as a place of frequent resort and ordinary transactions between man and man; or as one visited only occasionally, and not essentially connected with the business of the neighbouring land. But whatever may be the truth in the abstract, it is not necessary to the present case, which is clearly not within the jurisdiction of the Admiralty. The transactions all took place within a *harbour of the island*, a *port of entry with the custom-house*, and a *place of considerable trade*.

It is suggested, however, that as the remedy sought in this case can *only* be obtained against the *vessel itself*, so the *Admiralty alone* can afford that remedy. But the Supreme and Surrogate Courts of this island have, also, the power of proceeding *in rem*; an attachment of the thing, is the ordinary commencement of their proceedings; and there is, besides, another course of remedy, more easy of access to the parties, and expressly created for cases similar to the one before the Court, viz.—*the statutes relating to salvage*. The 12th of *Anne* directs, that upon the application of the master of any ship or vessel in danger of being stranded or run on shore, the officers of the police and the customs shall summon as many men from the neighbourhood as may be necessary for the assistance and preservation of such vessel in distress; and, also, shall require from all the commanders of ships of war and merchant vessels near the place, the assistance of boats and men, under the penalty, in case of refusal, of one hundred pounds. And for the encouragement of those who may aid in the preservation of

1820.

CONARD & Others v. DRISCOLL & Others.

ships in distress, the Act goes on to direct that the *salvors* shall be entitled to a *reasonable reward*, to be paid by the master or owners of such vessel within thirty days after the assistance rendered; and in case of disagreement as to the *quantum*, to be adjusted by three neighbouring justices of the peace. This Act is expressly applied to all the British *dominions*; and by a recent statute, 53d Geo. III. its provisions are extended to cases where the assistance sought is by the immediate application of the master to the parties, without the intervention of any officer of the customs. It is stated that these statutes have never been applied here; it may be so; but if this were the first instance, I should feel no hesitation in applying them. Here is a vessel which, on the way to this port, meets with bad weather, and puts into a neighbouring harbour to refit. While the master is on shore the wind freshens, and the vessel drives to the opposite side of the harbour. Perceiving her danger, he applies to the officer of the customs for advice, who refers him to the defendants. The first question asked is, what will you give? Fortunately, in this particular instance, some understanding appears to have taken place between the parties, and the vessel was relieved from her difficulties. But suppose that the defendants had refused to go to the assistance of this vessel, was there no way of compelling them? Surely, laws which are only in affirmance of the common offices of humanity ought to be applied, if they can be found applicable.

I am of opinion that these statutes are in force in this island, not so much from the technical word "dominions" used in the first Act, as because I hold them to be essen-

1820.

CONARD & Others v. DRISCOLL & Others.

tially connected with the moral duties of mankind, and with the security of the trade and prosperity of this island. It is important that the inhabitants of this maritime colony should know that they are bound to assist vessels in distress by the positive injunctions of the law, and that they are punishable if they refuse it; and it is proper, also, they should be informed that while the legislature enjoins this duty, it gives them a right to remuneration, and provides them with a remedy far more easy, and less expensive, than any Court of justice whatever could afford. I am of opinion, therefore, that this is a fit case for a prohibition, in every point of view; but as the Judge of the Vice-admiralty is at this moment absent, and the case is unusual, to prevent misapprehension I shall say a few words as to the authority under which this process is awarded. Prohibitions are high prerogative writs, issuing from the King's Supreme Courts to some other Court which is supposed to exceed its jurisdiction. In every country a power of this sort must be lodged somewhere; and in the colonies it is exercised by the superior Courts in the same way that it is at home. In the case of *Le Caux* and *Eden*, Lord *Mansfield* mentions it as of acknowledged practice; and among *Chalmers's* collection of opinions upon cases of colonial jurisprudence, there is a very full opinion of Mr. *West*, then counsellor of the Board of Trade, expressly upon the point. The Court of Vice-admiralty at Massachusetts Bay had complained to the Lords of the Admiralty of prohibitions granted by the provincial judges, in derogation, as they conceived, of their authority; and the Lords of the Admiralty addressed a memorial upon the subject to his Majesty's Council, by whom

1820.

CONARD & Others v. DRISCOLL & Others.

the complaint was referred to their official adviser. Mr. *West's* opinion is conclusive. After noticing the statutes of *Richard*, as not introductive of new laws, but declaratory of what the common law was before, he says, "I am of opinion that they are in force in the plantations; for let an Englishman go where he will, he carries as much law and liberty with him as the nature of things will bear; but to show *that it is impossible there should not be a power of granting prohibitions*, wherever the common law is extended, your lordships will need only to recollect the inconvenient and absurd consequences that would follow were it not so; for should the Court of Admiralty in New England, take upon itself to hold plea of *freehold*, or to take cognizance of *actions* of *debts*, *&c.*, what remedy has the subject to vindicate his right to that inheritance which he has, of being judged by the common law? If there is no power of granting *prohibitions*, remedy he has none—to the King and Council he cannot appeal, for that is irregular. From the sentence, therefore, of a Vice-admiralty Court abroad, he must appeal to the High Court of Admiralty at home. I submit to your Lordships to determine how far it is absurd to suppose the law should afford the subject no other remedy." Fortified by such an opinion of one of the legal advisers of the Crown, by the dictum of Lord *Mansfield*, and by what my own experience enables me to say is the unquestionable practice in other colonies, I think the relief which is prayed is within the power of this Court, and, therefore, that a prohibition should go to restrain the defendants from proceeding any farther in the Vice-admiralty Court.

CUSTEEN & BURK *against* THOMAS DANSON.

1820.

February 10th.

A supplying merchant receives an order from his dealers or partners in the fishery, upon a party who owes them money, and afterwards accepts from the party on whom such order was drawn, a bill of exchange upon England for the amount thereof. The bill is protested, and the drawer thereof becomes bankrupt. Under these circumstances, the Court held, that the debt of the dealers was *extinguished* by the merchant's taking the bill upon England in satisfaction of the orde they had drawn in his favour.

THIS case having been ordered to lie over for consideration, the following judgment was now delivered upon it :—

The plaintiffs entered into partnership in the spring of 1816, and fitted out a schooner for a sealing voyage. They took supplies to a considerable amount from the defendant; and upon their return from the ice, they offered him their seals; but some difference arising as to the price, the plaintiffs, thinking they could get more than was offered by the defendant, at St. John's, brought them round and sold them to *Ryan & Sons*, at the stated price, payable one half immediately, and the other in the ensuing fall. The bills received on the delivery of the seals were endorsed by the plaintiffs, and passed over to the defendant, by whom they were remitted to England and received. The plaintiffs continued to deal with the defendant, and took up supplies from him for the *cod-fishery*, which they intended to carry on at the Labrador. It appears, upon reference to the account exhibited, that before the sailing of the plaintiffs on their summer voyage, they had taken up supplies to the amount of more than £200; and being so in receipt, they drew an order on *Ryan & Sons* for the *balance* of money due for the seals, in favour of the defendant. This order is unfortunately lost, and is said to have been destroyed by the fire of November. It must, however, have been drawn before the *thirteenth of June*, as on, or about, that day, the plaintiffs sailed for the Labrador.

The order was accepted by *Ryan & Sons;* and on the 15th of October they drew a set

1820.

CUSTEEN & BURK v. DANSON.

of bills, in favour of *Thomas Danson*, for £169 9*s.* 3*d.*; which bills were remitted, and returned protested, and gave rise to the present action. Upon general principles there could be no question in the case. Where the holder of a bill, or order, takes another bill from the drawee, it is considered a legal satisfaction of such first bill, and completely discharges the drawer. I am aware, however, that, in this island, the customary mode of payment is by bills of exchange on Great Britain; and it is this custom which raises the only point in the present case. It certainly might so happen that a party entitled to receive bills from a particular house at the usual period of payment, might give an order for such particular bills; and, in the event of the bills being dishonoured, the question might be fairly raised, how far the party receiving such bad bills would not have a right to consider them as a nullity, and retain his demand against the person who gave the order to receive them. Cases of this sort must depend entirely upon the *intention of the parties*; and in the case supposed, it might be presumed to have been the intention of the parties, that the holder of the order should stand in the place of the drawer, and receive the bills in his name, and with the same remedy over, as if he had received them from the first party: such a case might happen; but I have no proof to warrant a conclusion that such is the one now before me. The order of the plaintiffs on *Ryan & Sons* is unfortunately lost. Was it a general order to receive so much in the usual way? or was it a specific order for the identical bills given to the defendant?

It is a question of evidence, which I can only gather from general presumptions; and

1820.

CUSTEEN & BURK v. DANSON.

presumptions are against the defendant. Such an order would have been *particular;* it would have been the subject of previous arrangement; and some record, or notice, would have remained of it; but none whatever is to be found, except the party's own note in his books, which, of course, cannot be received. Besides, the defendant's taking the bills in his *own name,* causes a strong presumption against such previous arrangement. I cannot possibly speculate upon what might have been the state of the case, had the plaintiffs drawn in favour of other parties. The bills might have been circulated in the island, and become the subject of set-off, on payment, or arrangement with the drawers, in many ways. Neither can I suppose that the defendant acted as the broker, or agent, of the plaintiffs, who were largely his debtors at the time the order was drawn. It is true it was supplies; but they might have exercised the discretion they had used before, and sold their fish to other parties, as they did their seals. As the case stands, the plaintiffs being indebted to the defendant, and giving him an order for a large sum, not equal, however, to the existing debt, and the defendant giving up such order, and taking bills in his own name from the drawee, unexplained by any positive agreement, I think I am bound to hold that the case is not taken out of the general principle, and that the plaintiffs have a right to consider this as a *payment.*

1820.

February 21st.

DUGGAN & MAHON *against* JONAS BARTER.

The custom of this town, which enables a tenant to surrender a lease, after the destruction, by fire, of the premises which formed the principal subject-matter of it, does not supersede the necessity of his making the surrender by *note in writing*, agreeably to 29 Car. II., c. 3 s. 3.

APPLICATION to the Court to enforce an agreement under the following circumstances.

Defendant is lessee of certain houses destroyed by fire; and the plaintiffs became assignees of the reversion and freehold.

After the fire of July last, plaintiffs applied to defendant to say whether or not he intended to *surrender*; and defendant appears to have entered into some *verbal agreement*, the terms of which are disputed by the parties; the plaintiffs contending that it was an *absolute promise*; and defendant insisting that it was *conditional*, viz., if the plaintiffs would give up the last year's rent in arrear. To prove what the real nature of the agreement was, the plaintiffs now proposed to call witnesses, but were prevented by the *Chief Justice*, who said:—

I am restrained by the *statute of frauds* from entertaining the cause upon a *verbal surrender*, although proof of such *surrender* could be made. Here is a case in which, from the agreement not being in writing, the parties differ as to the terms of it; and it was expressly to meet *such* cases that the statute of frauds was formed. I am of opinion that a compliance with the forms of the statute is indispensably necessary, and that a surrender, to be good, must be by deed, *or note in writing by the party* surrendering.

With respect to the *local usage* in case of fire, it gives the tenant a right to surrender; but it cannot exempt him from the necessity of complying with the established forms of law. This usage is nothing more than a tacit proviso, annexed, by the custom of the

1820.

DUGGAN & MAHON v BARTER.

place, to every lease, that if the house be consumed by fire, the tenant shall not be under the obligation of continuing to pay rent, but may give up the ground if he think fit. If he determine to yield up the ground, he must communicate his determination *by writing*, and if he omit doing so within a reasonable time, especially after application to that effect by the landlord, he is to be considered as having waved his election of abandoning, and the landlord will have a right to regard the lease as continuing. I must, th refore, dismiss this application.

ROURKE *against* BAINE, JOHNSTON & Co.

March 1st.

As the supplying merchant is not immediately a party to a suit for wages in the Sessions, he is entitled to be heard against the rights of the servants to follow the fish and oil in his hands, under an execution issued upon a judgment in their favour against their employer. And if he can show any circumstance of fraud, or the suppression of a material fact, with the privity of the servant, that will discharge him from all liability under such judgment.

THE great question raised in this case was, whether a supplying-merchant is conclusively bound by a judgment obtained against a planter, who is a dealer of such merchant, by the servants of the planter.

Per Curiam. The 15th of the King declares "all fish and oil made by the *person who shall hire or employ* the fishermen, subject, in the *first place*, to the payment of wages, &c."

It is important to notice that it is the fish made by the *hirer*, or, in other words, the produce of the *master's fishery*, which is made liable to all the servants in common, without any difference, or preference, in the order of their claims. So long, therefore, as the fish and oil remain in the hands of the *hirer* of the servants, they are liable to all demands for wages; whether such demand be for services actually performed, or for the stipulated wages of a servant who might have been improperly discharged before the period of service expire.

1820.

ROURKE v. BAINE, JOHNSTON & Co.

It is possible that the legislature, by making one man's earnings liable for another's wages, intended to give every servant a direct interest in the industry of his fellow-labourer; and thus to establish the most effectual guard against indolence. In the hands of the hirer, all the fish and oil are liable for all the servants' wages; but in the hands of the supplying merchant, such fish and oil then become liable to other considerations, upon which lawyers have entertained divided opinions, and upon which the *Supreme Court* differs both from the *Court of Sessions* and the *Crown officers at home:* the Court of Sessions holding the proceeds of the voyage liable, into *whose hands soever they might have passed;* and the Crown lawyers limiting that liability to the *actual possession of the hirer or employer.*

The *Court* has expressed its opinion that the practice of *following* has been carried too far in this country *(a)*, much beyond the probable intention of the British Parliament. Composed, as it is, of lawgivers accustomed solely to the language and course of construction adopted by the Courts at Westminster, it is most probable that it had in view the English practice of liens, in giving fishermen a specific right upon the produce of their labour in Newfoundland. By the whole current of decisions and opinions upon the extent of liens in England, it is established as law, that when the thing, or subject-matter, upon which the lien subsisted, passes into the hands of a stranger, or a third party, for a valuable consideration, it is lost.

It is my opinion, therefore, that the *legislature* intended to give a lien upon the fish

(a) In *Dooly* v. *Hackett*, decided 11th December, 1819.

1820.

ROURKE v. BAINE, JOHNSTON & Co.

and oil in the hands of the *hirer only*; but the *custom of the fishery* has extended it beyond such hirer, and created an implied lien in the hands of the *receiver*.

The origin of this custom is to be found in the necessity of the thing; and the interests of the fishery are its best expositor. From the nature of the article of fish, and the method of curing and sending it to market, it is the common practice of this island to take it off the rooms at different times; and a considerable portion of the catch is always removed before the close of the season, and before the time of the wages becoming due. If the servant is to lose his lien by the removal of the fish, he must arrest it upon the rooms; the ruinous consequences of which proceeding require no comment. The necessity of the thing has, therefore, given rise to a *general understanding that the fish may be removed* from the *planter's rooms* to the warehouse of the *regular supplier*, without any detriment to the right of the servants, who are presumed to know, and to be known, to the supplier, as to their number, occupation, and amount of wages, &c.

If there is any fraud, or collusion, or suppression of circumstances, with reference to the supplier, *the lien is lost.* It wants its most essential ingredient,—the *presumed understanding* between the parties, and the *tacit contract* of the supplier to be accountable for the wages of the servants to the amount of the fish and oil he may receive. Subject to such considerations, I conceive the servant has a clear right to follow the fish and oil into the hands of the *supplier*, and that his lien is as strong in the *merchant's warehouse* as on the *planter's room*.

It is necessary in all cases that the demand for wages should be established

1820.

ROURKE v. BAINF, JOHNSTON & Co.

against the actual hirer; and in following up execution, it is possible the planter may have effects sufficient to satisfy the judgment, without recurring to the fish and oil; but the legislature, I think, intended to give the servant not only a summary proceeding, but a summary satisfaction. The supplier has his remedy over against the planter, if he choose to enforce it; and he has, also, the means of indulgence, and of giving time for retrieving a bad year by a better; which, in so precarious a thing as a fishery, and with reference to the many small adventurers now engaged in it, it is of importance to the general interests of the fisheries to preserve.

As the *merchant* or supplier *is not immediately a party to the cause for wages* in the Sessions, *he* has a *right to be heard against the fish and oil being followed in his hands; and if he can show any circumstances that take his case out of the presumptive liability, he is undoubtedly entitled to the benefit of them. The mere judgment against the master will not necessarily bind him*; and any *circumstance* of *fraud*, or *the suppression of a* material fact, with the privity of the servant, *will completely discharge the supplier.*

MARTHA ROWE, administratrix, *against* the Heirs of THOMAS STREET.

March 13*th.*

The whole of the *sea-coast* of this island is dedicated to the *fishery*, by the 10 and 11 *William* III. c. 25; and, therefore, the Governor cannot grant any part thereof.

ACTION to recover possession of a fishing-room at Trinity; and also to recover the sum of £50, being for five years' rent, at £10 per annum, from the year 1813 to 1817.

Per Curiam. This case is very defective of evidence. It is stated that the late *Thos. Street*, deceased, obtained a grant of the fishing-room in question for *James Rowe*,

1820.

ROWE v. The Heirs of T. STREET.

who, in consideration of this service, allowed him to retain the use of the room during his life. All this is very unlikely, insomuch that I should have suspected there were other causes for this arrangement if they had not partly been stated and admitted at the hearing.

It now turns out that *Rowe*, becoming involved with his creditors in England, by way of securing his plantation from being taken in satisfaction of his debts, obtained a grant through the intercession of *Street*. As against the *creditors*, this grant was void, because it has been repeatedly held that the governor cannot grant any part of the island adapted to the fishery. *The whole of the sea-coast is already granted away by the statute of William.* As between the *parties*, however, to the arrangement, I must take as my guide the *intentions* which probably governed them.

It is stated by *Adams, in an affidavit taken de bene esse*, that he received a letter from *Street*, for whom he acted as agent in this island, in the year 1805, in which he acknowledged that he held the plantation in question by permission from *Rowe*, during such time as he thought fit to use it. This is corroborated by the fact that the property has actually since been given up (subject to a subsisting lease) to *Rowe's* representatives. On the one hand, this is considered as a voluntary act, proceeding, *ex mero motu*, of *Street's* widow; while, on the other, it is regarded as an admission of the *right of Rowe's representatives*. With the latter view of the case, under all circumstances, I agree; and, therefore, I hold them entitled to the *surplus rents* received by *Street's* representatives, together with the *reversionary interest* in the lease itself. Beyond this, however,

1820.

ROWE
v.
The Heirs of T. STREET.

I cannot go.—The property was leased to *Macbraire*, and underleased by him, after a length of possession, and with every appearance of right, sufficient to warrant a title in the lessor. If the *Rowes* have fallen asleep over their better claim, it is their fault, and should not prejudice innocent parties.

March 20th.

An order of Court, founded upon the reversal by the King in Council of the decree of the Supreme Court, in the matter of *Crawford & Co's.* insolvency. [Ante. p. 100; and note, that the judgment of the *Chief Justice* was reversed, merely because the proceedings in the *Surrogate Court*, preparatory to the declaration of the insolvency, were irregular in a material point. It by no means follows, therefore, from this refusal, that Mr. *Forbes's* views upon the points brought immediately under his consideration are not correct.]

In the matter of CRAWFORD & Co's. Insolvency.

ON this day, *David Tasker*, for himself and partners, under the firm of *Hunters & Co.*, and *John Boyd*, for himself and partners, under the firm of *Baine, Johnston & Co* appeared in Court, and prayed that the judgment which they, together with *James Stewart*, for himself and partners, under the firm of *Stuarts & Rennie*, suffered to go against them in favour of our Sovereign Lord the King, on the 22d day of December, 1818, for the sum of twelve thousand four hundred and thirty-nine pounds, eleven shillings and threepence sterling, being the amount acknowledged to be held by them of the monies helonging to the late estate of *Crawfords & Co.*, might be set aside and cancelled

It was ordered by the *Court*, that as the whole of the proceedings under the insolvency in this island was annulled and reversed by the decree of his Majesty in Council in appeal from the decision of this Court, wherein *William Bennett* and others, creditors of *John Crawford & Co.*, of Great Britain, were appellants, and the trustees to the insolvent estate of *Crawford & Co.* in this island, were respondents, the judgment against *David Tasker, William Johnston,*

1820.

and *James Stewart*, and their respective partners in trade aforesaid, be cancelled and set aside.

JOHN DELANY *against* NUTTALL, CAWLEY & Co.

June 12*th*.

ACTION to recover the value of the schooner *Maria*, detained from the plaintiff by the defendants.

Per Curiam. It appears by the testimony of all parties, that the schooner *Maria* was built under the direction, and with the personal assistance, of the plaintiff; that the advances necessary for building were supplied by the defendants; that the schooner, when built, was carried to Harbour Grace, and there registered in the name of the defendants; that she was one voyage under direction of the plaintiff, who was master, and made an unsuccessful trip to Labrador; that, in virtue of the certificate of registry, the defendants obtained possession of the *Maria* at her return, and still retain her. It also appears that a custom prevails in this country of advancing supplies to dealers to enable them to build vessels; that the vessels so built are held as securities, to be reassigned upon payment of the supplies; and that a reasonable time is allowed to the debtor to work out the debt and clear the vessel.

Now it appears that, whatever may have been the right of the plaintiff to the vessel as the builder, *de facto*, in the first instance, he had assigned the possession to the defendants, by whom it was registered in their own names; and, I must presume, with the privity and consent of the plaintiff, because

It is usual in this Country for two persons to agree that the one shall build a vessel and the other furnish the capital to enable him to do it; and that the vessel, when built, shall be registered in the name of the party who furnished the materials. In these cases the registered owner holds the vessel *in trust*, first as a security for the payment of the money advanced by him; and afterwards for the benefit of the builder.

1820.

DELANY v. NUTTALL, CAWLEY & Co.

he afterwards navigated her as master under such register. It is probable that they hold the vessel in trust, first, as a security for their own debt, and afterwards for the plaintiff. But this does not clearly appear; and still less can I safely conjecture how long the defendants were bound to allow the plaintiff the use of the vessel to enable him to clear it. I cannot suppose any time, because I have no data to fix it. But I will go into the accounts of the parties, with the view of fixing the balance due from the plaintiff; and if the balance be less than the value of the schooner, the plaintiff will have a right to demand of the defendants the difference, or by paying the money due them, to demand the vessel itself.

Trustees of CULLEN & Co. *against* Trustees of MILLER, FERGUS & Co.

June 19th

The property in an article may be completely transferred to the Vendee, even whilst it remains in the stores of the vendor.

ACTION to recover the value of a certain quantity of salt.

Per Curiam. The sale of salt was complete; and *Miller, Fergus & Co.* had done everything to complete the delivery on their part. The only circumstance which can raise a moment's doubt in the case is, that the salt remained in the *stores of Miller, Fergus &* Co. But it is provided by the agreement that the salt was to remain in their stores, *free of charge*, until convenient for *Cullen & Co.* to receive it. After this the salt is measured out, the quantities determined, *receipts* given for such quantities to the vendors, who charge *Cullen & Co.* with the full amount, and give them up the key of the store in which the salt is deposited. The delivery of the key, I think, was suffi-

1820.

Trustees of CULLEN & Co. v. Trustees of MILLER, FERGUS & Co.

cient to conclude the case if there had been any doubt as to the terms "convenient to receive it." The measuring the quantities, and passing receipts, were, in fact, sufficient to satisfy those words. I, therefore, shall hold that *Cullen & Co.* had not only the property, but the corporal possession of the salt, at the time of their insolvency, and, consequently, that it passes to their trustees. The mere circumstance of the agent of *Miller, Fergus, & Co.* getting the key afterwards, cannot alter the case, unless it could be shown that the salt was re-delivered them, as a guarantee for the balance due on it.

It is not necessary to go into the accounts to determine the fact of the salt being paid for. It was to be paid in account, and an acceptance at 12 months for any balance that might remain. There was a running account between the parties, and the balance was not struck at the time of this transaction; and it was necessary that *Miller, Fergus & Co.* should draw the bill for such balance, as a preliminary step to its acceptance.

July 24th.

Passage-money can only rank as *wages* on an insolvent estate, where it has expressly been agreed that it should be paid as part of the hire of the servant.

IN the matter of *John Cook's* Insolvency, the following question was submitted to the consideration of the *Chief Justice:*—

The trustees to the estate of *John Cooke*, insolvent, wish to be informed, if a bill drawn by *John Cooke* on *Ann Cooke* for £11 16*s.* 0*d.*, part of it for a servant's passage, and part for *John Cooke's* passage, should rank with *servants' wages*; the servant, *William Jago*, being shipped for a sum certain and his passage; to which his Honour gave this answer:—

The Court has never considered *passage-*

1820.

In the matter of JOHN COOK'S Insolvency.

money in the light of *wages*, except, where in fact, it formed a part of the consideration for services, and was expressly agreed to be paid for hire. For example: if A ships B, a servant, and is to give him so much, part to be paid to himself and part to be paid to a third person for his passage, as wages, payment of which wages is usually by bills of exchange; if the bills turn out to be bad, they are considered as a nullity, and the demand subsists in full force, as a demand for wages, entitled to a preference over all others in the settlement of an insolvent estate. Beyond this, I know of no preference for passage-money.

HUNTERS & Co. *against* ARCHIBALD GRAHAM.

October 12*th*.

Supplies issued for the fishery are advanced on the credit of the produce of the voyage; and, therefore, if the proceeds of the voyage, instead of being applied to the payment of those supplies, are diverted to another object, the planter may be sued immediately for the debt.

ACTION to recover £3,000 being for goods sold and delivered as supplies for the fishery.

Defendant appeared in Court, and admitted the amount of goods advanced, but denied that the account was payable until the usual period (31st October.)

In explanation of the large apparent balance of account, defendant stated that he had already shipped a cargo of 1500 qtls. fish for Oporto, and had another in readiness to ship, the proceeds of both of which were intended to be forwarded to plaintiffs' house in Scotland, and applied in payment of their account.

Plaintiffs contend that the supplies were issued in the course of the fishery, payable in fish and oil.

Per Curiam. It appears that the plaintiffs and defendant have had large dealings together for several years past; and that, in

1820.

HUNTERS & Co. v. GRAHAM.

the course of those dealings, fish, oil, and Newfoundland produce, have always been applied in payment for supplies in the usual way of the fishery. In this year, however, the defendant has shipped the usual returns to foreign markets, without the consent, and beyond the control, of the plaintiffs; and the question is, whether, under such circumstances, he can set up the practice of the fishery as to the time of payment, in bar to the present action? I am of opinion he cannot. Wherever goods are delivered, payment becomes due immediately, unless the contrary be expressed, or implied, by the usage of the place or the understanding of the parties. By the usage of the fishery, when supplies are advanced for catching fish, the fish and oil, when caught, are received in payment; they constitute the supplier's security for payment of his debt; and if he finds them travelling out of his hands, he has a right, in most cases, to arrest them, and, in all, to consider the deviation from the established usage as turning the credit into a present debt, and to recover his judgment immediately.

Whoever wishes to avail himself of the usage of the fishery must conform himself to such usage. It appears to me that, in *this case*, supplies for the fishery were issued, payable in fish, at the usual times; and the defendant having disposed of his fish and oil, and put it out of his power to tender them in payment, has become liable to the plaintiffs as for a present debt.

1820.

October 19th.

JENNINGS & LONG *against* HUNT & BEARD.

The judgment of a Court of concurrent jurisdiction is a bar to an action between the same parties upon the same subject-matter, however erroneous such judgment may have been: but where a new action is brought, including *some matter which had been adjudged on the former trial*, and some *which had not*, and the jury assess the damages separately, the Court will give judgment for that part which was not decided in the first action.

SUMMARY proceedings under 49th Geo. III. in *trespass*, for £1155 11*s.* 6*d.* damages done the plaintiffs in their fishery at Labrador. Plea, the general issue; and that the case has been already heard and adjudged between the now parties by the Surrogate Court at Labrador.

There *was a special jury impannelled*, and several witnesses examined, after which, the *Chief Justice* charged the jury to the following effect:—

That the case before the Court comprised mixed issues of law and fact, and mainly depended upon legal points; and, as the case was important, and appealable, it might be necessary to separate the facts, and put them upon the record in a special form, in order that the Superior Court might be enabled to review the whole case with exactness, and apply a suitable judgment in the event of its reversing any opinion which this Court might entertain of the law. That the facts for the consideration of the Jury were, whether the defendants, or their servants, by their orders, did commit the acts of alleged trespass in removing and detaining the plaintiffs' nets? and supposing them to have done so, what damages had the plaintiffs sustained, both in the immediate loss of their nets, and consequent damage in their fishery? What length of time the defendants, or those who held before them, had possession of the rivers in Sandwich Bay, and to what extent such possession had been?—which of the parties had, in fact, the first occupancy of the places in dispute last season? And this might involve a question of what ex-

1820.

JENNINGS & LONG v. HUNT & BEARD.

tent of ground was necessary to the proper customary use of such places for a salmon fishery? Whether the several instruments before the Court were proved as laid in evidence? and to what parts of the case the former judgment applied? The Jury then retired, and returned the following verdict:—"The Jury find the nets in this case were taken up by Mr. *Beard*, and persons under his direction, and not by Mr. *Wakeham*; that Mr. *Beard* had no corporeal possession at Burn's Cove, but that he had a net, with some materials and utensils there, apparently for the purpose of carrying on the salmon fishery, previously to the arrival of the plaintiffs, and that plaintiffs had possession at Cooper's Cove.

"Damages estimated as sustained by plaintiffs, viz.:—

"At Burn's Cove, 14 nets, with cordage, buoys, &c. and 106 salmon	£40 0 0
"Cooper's Cove.—25 nets, with cordage, buoys, &c.	70 0 0
"Loss of salmon voyage, deducting 64 bls.	250 0 0
"Loss of subsequent voyage	100 0 0
	£460 0 0

"The jury find that the defendants, or their predecessors, had possession, and an establishment for a salmon fishery at Eagle and other rivers in Sandwich Bay for forty-eight years; but there is no proof in evidence of the extent of coast used by this establishment, or of any exclusive possession out of the rivers.

"They find the documents produced from the Government-office to be proved. They also find the proceedings before the *Surrogate*, Captain *Robinson*, at Sandwich Bay, to be proved as laid in evidence. They

1820.

JENNINGS & LONG
v.
HUNT & BEARD.

leave all questions of law to the consideration of the Court; and if, &c."

Cur. adv. vult.

October 26th.

ON this day the *Chief Justice* delivered the following judgment:—

The defendants, *Philip Beard & Co.* are engaged in an extensive salmon fishery at Sandwich Bay, on the Labrador, where they have a fixed establishment.

The plaintiffs, *Jennings & Long*, are British subjects, and reside at Halifax, in the province of Nova Scotia, from which place they have, for a few years past, resorted to Sandwich Bay, for the purpose of a salmon fishery likewise. In the pursuit of their common occupation, the parties appear to have been brought into contact upon disputed points of right; the defendants claiming exclusive property in all the rivers in Sandwich Bay, as well as the circumjacent coast, within three miles of the mouths of the rivers; and the plaintiffs contending for the right to place their nets in any vacant spot not actually indispensable to the others' fishery. While the parties were in difference, the Surrogate, Captain *Robinson*, of His Majesty's Ship *Favorite*, arrived at the Labrador, and the defendants, *Beard* & Co., immediately brought their case before him, alleging their rights, and complaining of the trespass which had been committed by *Jennings*. The Surrogate caused the parties to be summoned before him on the 11th of July last, and after a hearing, ordered *Jennings* to make certain reparation to *Beard* & Co., and remove his nets by one o'clock the following day; and, with a view of carrying this sentence into effect, he issued pro-

1820.

JENNINGS & LONG v. HUNT & BEARD.

cess of execution, and directed it to one *Wakeham*. From some unexplained cause, *Wakeham* did not execute the process himself, but the plaintiffs' nets were actually taken up by *Beard*, or his servants, and carried to defendants' settlement on Eagle River. The plaintiffs, feeling themselves aggrieved by the removal of their nets, and the consequent loss of their fishery, came to St. John's, and sought their remedy by the present action. The case has been put to a special jury, under the direction of the Court, and they have returned a verdict for the plaintiffs, assessing the damages at £460, but subject to the opinion of the Court upon the facts which are specially set out in the verdict. The whole case turns upon the defence: it is for the defendants to justify the facts of which the plaintiffs complain, and to show that, by law, they are not liable to the consequences. There are several pleas to the action, but the principal defence is, that the matter at issue has been already heard and adjudged by the Surrogate at Labrador; and, certainly, if it can be made out that the points at issue between the parties have been already determined by a competent jurisdiction, it is not for this Court collaterally to call it in question, however erroneous such determination may be. It is clear law, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is conclusive as evidence between the same parties upon the same matter directly in question in another Court, until such judgment be reversed by a Superior Court. But was there, in fact, a judgment?—was there that conclusion from the law and facts of the case, which is presumed to be formed in the unprejudiced bosom of the judge, and is the essence of a judgment? It is contend-

1820.

JENNINGS & LONG v. HUNT & BEARD.

ed by the plaintiffs, that there was no such judgment; that it appears upon the face of the Surrogate's own proceedings, that he had received the orders of his Commander-in-chief, which he merely obeyed as a subordinate officer, without question as to their legal authority, or exercising any opinion of his own upon the merits of the case. If this be the fact, then there has been no judgment, and the defendants cannot be protected under it.

In looking into the proceedings which took place before the Surrogate at Labrador, it does appear that he had received certain rules and regulations, in the form of a proclamation, expressly applying to the case before him, and that his decision was founded upon those regulations; but then it is offered in explanation of this circumstance, that the Governor's proclamation necessarily formed part of the Surrogate's proceedings, and was, in fact, the *law* upon which he founded his judgment. In support of which position, a bundle of orders and other acts of the local government has been handed into Court, containing a series of regulations and observances for the trade and fisheries of this island, and variously affecting the persons and property of its inhabitants; from which I am to infer that a legislative authority in this government, unknown to the laws of England, but claimed under a prescriptive exercise in Newfoundland, is now, for the first time, sought to be established in this Court. So large, and, indeed, so dangerous, an innovation upon the accustomed principles of adjudication in the Court, ought not to be passed over unobserved. If the proclamation by which the Surrogate is stated to have been governed, be legal, then, indeed, there can be no doubt

1820.

JENNINGS & LONG v. HUNT & BEARD.

that it is as binding on this Court as it was on the Surrogate Court; and that it will be equally binding on the King in Council, should the case go to an appeal. There is no dispensing power in Courts, and that which was the law of the case at Labrador, will be the law in London. I am bound, therefore, to apply to it the same considerations which, I think, would be applied by the Lords of Appeal. It is a determined principle of law, that the King holds a legislative power over conquered or ceded countries, but that no such power is held over countries originally settled by British subjects. This Island and the Labrador were first discovered by the English, and peopled by emigrants from the United Kingdom. But the application of the principle does not rest upon a question of geography, it is expressly declared by the *statute* 49th Geo. III., chap. 27, that the Courts in Newfoundland shall be governed by the laws of England, so far as they may be applicable; and the same course of administering justice, is, by the statute 51 Geo. III., chap. 45, extended to the Labrador. These statutes are affirmative of what was before the common law of all the English colonies; over which it has been solemnly recognized in the celebrated West Indian case of *Campbell* v. *Hall (a)*, that his Majesty holds no legislative authority. The King has, indeed, large prerogatives; but the prerogatives of the Crown are defined by the constitution, and form a part of the law of the land. It will not be contended that there is a prerogative peculiar to Newfoundland; and if there be not, then a proclamation for regulating the trade and fisheries of this island and its de-

(a) Cowp. Rep. 204.

1820.

JENNINGS & LONG v. HUNT & BEARD.

pendencies, must rest upon the same foundation as a proclamation for governing the trade and fisheries of Great Britain. "Proclamations," says *Blackstone (b)*, "are binding upon the subject, where they do not either contradict the old laws, or tend to establish new ones, but only enforce the execution of such laws as are already in being, in such manner as the King shall judge necessary." And I am not conscious of having seen any Act of State, in modern times, which has not been perfectly in unison with this first principle of the constitution. It is a mere sophism to distinguish between regulations and laws. Everything which prohibits that which was not prohibited before, is a law. But to bring this matter at once to the test, let us look at the code of regulations for the fishery and trade on the coast of Labrador. The first article declares "that no inhabitant from Newfoundland, nor any person from any of the colonies, shall, on any pretence whatever, go to the coast of Labrador; and if any such are found there, they shall be corporally punished for the first offence; and the second time, their boats shall be seized for the public use of British ship-fishers upon that coast." A regulation which debars a million of his Majesty's subjects from the exercise of a common right, submits their persons to ignominious punishment, and their property to forfeiture, may well be called a law; and if it be, however penal its provisions, I am bound to enforce them. Now it is well known that the principal fisheries at Labrador are actually carried on by people from this island; and I have purposely put this case, because I wish it to be clearly seen to

(*b*) Vol. 1. p. 270.

1820.

JENNINGS & LONG v. HUNT & BEARD.

what extravagant consequences the principle contended for must lead. The public instrument more immediately connected with the proceedings before the Court is, indeed, of a very different character; and I am aware that it was framed with the benevolent view of quieting the differences which had arisen at Sandwich Bay. But I apprehend that the claims of individuals to the right of fishing in the seas and rivers of that bay could not lawfully be affected by the regulations of the Government. It is said by *Lord Hale* (*c*) "that the right of fishing in the sea, and the arms and creeks thereof, is originally lodged in the crown; but, although the King is the owner, and, as a consequence of his propriety, hath the primary right of fishing in the sea, or creeks, or arms thereof; yet, all the King's subjects have regularly a liberty of fishing in the sea, and the creeks and arms thereof, as a public common of piscary, *and may not, without injury to their right, be restrained of it*, unless in such places, creeks, or navigable rivers, where the King, or some particular subject, hath gained a propriety exclusive of that common liberty, either by the King's charter or grant, or by custom and usage, or prescription." This doctrine is recognized in several adjudged cases; and it was held in *a modern case* (*d*), that where one party claimed a fishery in an arm of the sea, in exclusion of others, it was incumbent on him to prove such exclusive right, as the presumption was in favour of the public. Therefore, whether any exclusive right of fishing could be claimed in the rivers and seas of Sandwich Bay, and, admitting it could, how far the boundaries of such exclu-

(*c*) Hargrave's Tracts, vol. 1, p. 11.
(*d*) 4 Burrowes, 2162.

1820.

JENNINGS & LONG v. HUNT & BEARD.

sive claim might extend, were questions of private right, depending on proofs, upon which the parties interested were clearly entitled to appeal to the law, and take the judgment of a competent Court. The 51st Geo. III., empowers the Surrogate to hear such questions, and directs him to decide according to the laws of England. If such laws are insufficient, I apprehend the proper remedy is an application to Parliament.

Laying every thing out of the view of the Court but the judgment of the Surrogate, and applying it to the case before us, we must recur to the questions, Was there a Court? Did it pronounce a judgment? It is unnecessary to repeat what is so well understood, that if it is possible to come at the substance of the proceedings, this Court is altogether regardless of the form. The proceedings set forth the opening of the Court, the attendance of the parties and their witnesses, the statements of their several cases, and the sentence of the Surrogate. The true issue before him was, I apprehend, whether an exclusive right of fishery in the contested places could be maintained? and it was for the party setting up such right to have proved it.

The Surrogate, however, appears to have considered this point as settled by the proclamation; and he ordered the nets of *Jennings* to be removed, according to the limits therein prescribed.

All that can be said is, that he mistook that for law which was not law, and so far that his judgment was erroneous; but still it is a judgment, in form at least, and cannot be questioned in a collateral way. *Ita lex scripta est.*

I am bound to hold that the judgment at Labrador, so far as relates to the removing

1820.

JENNINGS & LONG v. HUNT & BEARD.

of the nets, and the consequent losses of the plaintiffs in their fishery, is a bar to the present action. In giving this opinion, however, I desire to be understood as not determining any question of right at Sandwich Bay, but merely as considering the judgment of the Surrogate conclusive, so far as it goes, as to the removal of the nets beyond certain limits: the subsequent carrying them to the defendants' own establishment at Eagle River was a distinct transaction. As it is in evidence, that the nets are in the defendants' possession, they should have come prepared to restore them, if required to do so. It is impossible now to send the plaintiffs back to the Labrador; and as the jury have assessed separate damages for the nets, I think I am bound to give judgment for the value.

ERSON & COWAN, appellants,
and
JAMES QUINLAN, respondent.

December 28th.

Fish is not a legal and sufficient tender in payment of a debt contracted for articles furnished for the prosecution of the *seal-fishery*.

THIS was an action to recover the sum of £45, for supplies delivered in the spring of the present year for prosecuting the *seal-fishery*. It appeared at the trial of the cause, in the Surrogate Court at Harbour Grace, that the plaintiffs below had not called upon the defendant for the payment of the supplies issued to him by them, until the beginning of October, and that the defendant then tendered them a quantity of *fish* in satisfaction of the debt. Upon these facts the Surrogate was induced to give judgment in favour of the defendant, as he held that the tender of payment in fish by the defendant was, under all the circumstances of the

1820.

ROGERSON & COWAN v. QUINLAN.

case, legal and sufficient. This judgment was, however, immediately reversed by the *Chief Justice*, who said:—

It does not appear that the supplies issued by *Rogerson & Cowan* were, in the course of the *cod-fishery*, as between merchant and planter, or even that they issued as supplies at all, properly so called. The articles furnished by them to the defendants were for the *seal-fishery*, and not being paid for in *seals* or *oil*, remained as a general debt.

Fish is a legal tender only in virtue of a contract either *expressed* or *implied*; and where there is no express contract, the custom of the fishery is called in to show what was the presumable intention of the parties.

It is usual to issue supplies upon the faith of the voyage; and, in such case, the supplier is bound to receive fish, and the planter is equally bound to deliver fish: neither can refuse to fulfil this part of their implied contract. But the rule, to be good, must be reciprocal; it cannot be binding upon one, and not so on the other. Suppose fish had been in great demand, could *Rogerson & Cowan* have refused bills, and compelled *Quinlan* to give them fish? They could not, for they were not the suppliers of the voyage; and, consequently, as they could not have forced a payment in fish, they are not compellable to receive it in payment.

P. W. Carter, Esq. *against* T. B. Rendell, Esq.

1821.

January 18th.

A Naval Officer in the plantations must be appointed by the Governor, and approved by the Commissioners of the Customs; and must also give security for the faithful performance of the duties of his office. [See *Hogsett* v. *Boyd*, post. But note, this office has since been abolished by act of Parliament.]

THE best account of the circumstances connected with this case, will be derived from the following judgment upon it:—

This action is brought by the plaintiff, styling himself Naval Officer, against the defendant, for intruding upon his office, and appropriating his fees. In *form* it is for a *trespass*; but, *in effect*, it is to try the *title of the office in question*, and the right of receiving the fees.

By the early navigation acts, the Governors of the plantations were charged with the duty of seeing the provisions of those laws properly enforced; and, for that purpose, they were empowered to appoint certain officers under them, who are called Naval Officers. The 12th Charles II., c. 18, sec. 11, enacts, that if any Governor shall suffer a foreign ship to load, or unload, any goods within the precincts of his government, until the certificate (of ownership) shall be produced before him, *or such as shall be by him appointed*, &c. such Governor shall be put out of his government. This power in the Governors is more distinctly recognized by the 15th of Charles II., c. 7, sec. 8, where it is enacted, that no ship coming to any British plantation shall lade, or unlade, any goods, until the master of such ship shall first have made known to the Governor of such plantation, *or such other person or officer as shall be by him thereunto authorized and appointed*, the arrival of the said ship, and have delivered to such Governor, or other person, or officer, a true inventory of her lading, &c. *under the pain of the loss of such ship*, &c.

1821.

CARTER v. RENDELL.

The 7th and 8th of William III., c. 22, sec. 5, recites, that by the last act, the Governors of the plantations were empowered to appoint an officer for the performance of certain things in such act mentioned, which officer was commonly known by the name of the Naval Officer; and requires that every person appointed to such office should, within a certain time, give security to the Commissioners of the Customs for the faithful performance of his duty; and in default thereof, to be disabled from executing the office; and until such security should be given, and the person appointed approved by the Commissioner of the Customs, the Governor should be answerable for the person so by him appointed. The last act to which it may be necessary to refer, is the 10th Geo. III., c, 37, sec. 2, which regulates the fees of the naval officer.

From these acts it appears that the naval officer in the plantations is a person appointed by the Governor and approved by the Commissioners of the Customs, and who has given security for the faithful performance of his office. Any person differently appointed, or who has not been approved, or failed to give the security required by law, is not the "naval officer" contemplated by the statutes, and cannot either perform the duties they enjoin, or claim the fees to which they entitle him.

The plaintiff rests his claim to the office in question upon the strength of his possession, and recognition by successive Governors of the island, within whose appointment the office lies. In general cases this proof would be sufficient; but as the *title* to the office is directly put in issue, and it does appear, by the plaintiff's own showing, that he has, in some instances, been addressed

1821.

CARTER v. RENDELL.

by the Governors as *Deputy* Naval Officer, I think he is called upon to show that he is the officer he styles himself, *pleno jure*, and does not derive his title and possession of office as the *Deputy* of Mr. *Noble*. And, I think, also, that I am entitled to proof, that the security required by law has been given, since the statute absolutely disables any person from executing the office who has failed to give such security; and, being a public statute, the Court is, *ex-officio*, bound to notice it. Now, no appointment of the plaintiff from the Governor of the island has been produced, nor anything from which I can infer an appointment as Naval Officer. An official note from Governor *Holloway* to the plaintiff, addressing him as *Naval Officer*, has been laid in evidence; and I am ready to assent to what has been advanced in argument, that no *precise form of appointment* is necessary; but it is essential that such appointment should appear to be clearly intended by the Governor, and not left to be collected from a loose and accidental mode of expression in official communications. And it is the more essential in this case, because the statute of *Charles II.* prohibits any ship from loading or unloading, until the master shall have reported his ship and cargo to the Governor, or to the officer "by him thereunto authothorized and appointed," under pain of seizure and confiscation.

Every consideration of public expediency requires that an officer upon whose due appointment consequences of so much importance are made to depend, should be lawfully and regularly qualified. I am of opinion, therefore, that the plaintiff has not made out his case, and, consequently, judgment must pass for the defendant.

1821.

In pronouncing this judgment, I must desire, however, to be understood as giving no opinion upon the legality of the *defendant's appointment*.

Trustees of WILLIAM YOUNG *against* ATTWOOD & HAYNES.

February 1st.

A mere voluntary agent (*i. e.* one who does not receive any valuable compensation for his services) is not liable for *non-feazance*, or a *total neglect* to execute the orders of his principal; but for a *mis-feazance*, or *partial and imperfect performance*, he is respousible, whether he is to be paid for his trouble or not. And for a *mal-feazance*, or doing an act which one ought not to do, every man is answerable.

AN action to recover the sum of £270, being the amount of the value of the schooner called the *Enterprize*, which the insolvent, *Young*, had ordered the defendants to insure, in the year 1819, and which they had neglected to do. The vessel went on a sealing voyage the following winter, 1820, *and was lost*.

Per Curiam. I am of opinion that the plaintiffs cannot recover, on *two* grounds:

First,—Because the undertaking of the defendants to have the schooner insured, if actually given by them, was a *voluntary undertaking*; and being such, cannot support an action for non-feazance, or not performing it, unless some step in the course of performance be proved to have been taken; and there is no proof of any step being taken, or any part of the undertaking (if made) being actually performed. [See the reasoning of the judges in the case cited 1st *Marshall's* Insurance, page 207, and *Paley's* Principal and Agent, page 62, and cases there collected.]

Secondly,—Because the undertaking, or contract, to have the schooner insured was not clearly given, but was *contingent*, and made to depend upon the will of *Attwood*, then in London. This I collect from the evidence of *Young* himself, who says, "that he will not undertake to swear positively,

1821.

Trustees of WM. YOUNG v. ATTWOOD & HAYNES.

that *Haynes actually undertook* to have the insurance effected; there were *some doubts.*" And again—"when witness applied to have the schooner insured, *Haynes* said that he had orders from his partner, *Attwood*, not to extend their business, but that he would *send on the order.*" From this evidence I collect, that Mr. *Haynes* expressed his doubts whether his partner, *Attwood*, in London, would agree to advance the premium and effect the insurance, but that he would give it the trial, and send on the order for insurance. And that *Young*, having more faith in *Attwood's* effecting the insurance, from believing it to be too much his interest for him to refuse, reposed in full confidence upon the insurance being effected; but his doing so, and being disappointed, will not, therefore, give him a right of action against *Attwood & Haynes.* A promise may be implied as well as expressed; but it must be *clearly implied*, to support an action for the breach of such promise; and more especially where there is no valuable consideration given.

Judgment for the defendants.

ARTHUR HUNT, appellant,
and
HUNT, STABB, PRESTON & Co. respondents.

February 5th.

An admission of the cause of action by some members of a commercial firm, will not bind the other partners.

PER CURIAM. This is a proceeding, in the nature of an ejectment bill, for the purpose of obtaining the deeds of title, together with the possession, of certain plantations situated in this island. As it is an appealable case, I shall take a view of such of the facts as are not disputed, and are necessary to the judgment I am about to give.

1821.

HUNT
v.
HUNT, STABB, PRESTON & Co.

Two of the defendants, *Henry Hunt* and *John Hatt Noble*, were concerned in trade in London, under the firm of "*Noble & Hunt*;" and they were also engaged, together with *Thomas Stabb* and *John Preston*, in another concern at Newfoundland, under the firm of "*Hunt, Stabb, Preston & Co.*" The two firms had very extensive dealings together, in the course of which the defendants were in the habit of remitting the returns of their fishery to *Noble & Hunt*, and drawing bills on them for the payment of the current demands of their establishment. It is stated that, in the year 1816, the draft of *Hunt, Stabb, Preston & Co.* upon *Noble & Hunt* were greater than they had the means of meeting; and that *Henry Hunt*, the managing partner of *Noble & Hunt*, applied to the complainant to advance monies for the purpose of meeting the drafts of the respondents, and that the complainant did advance about nine thousand pounds; but whether upon the credit of *Noble & Hunt*, or of *Hunt, Stabb, Preston & Co.* is in dispute between the respondents, *Hunt & Preston*; the former stating in their answer, that the money was borrowed of the complainant on a mortgage of the property in Newfoundland; and the latter denying that fact, and affirming it was the balance of an account current solely between the complainant and *Noble & Hunt*; while the complainant appears, from his affidavit, to have considered he had a claim on *both* firms. Be the fact as it may, for the present, the complainant, insisting upon having some security either from *Noble & Hunt*, or from the respondents, deeds of mortgage of the property in question were prepared in London, and executed by three of the respondents, *Hunt, Noble & Stabb*, some time in

1821.

HUNT
v.
HUNT, STABB, PRESTON & Co.

May, 1816, and sent forward to be executed by *Preston*, who was at the time in Newfoundland. It appears by Mr. *Preston's* answer, that the mortgages were handed to him, and that he excused himself, alleging as a reason, his apprehension of endangering the credit of their house by the necessary publicity of recording the deeds, and at the same time professing his desire to see the complainant secured. It further appears, that soon after this refusal, on the part of Mr. *Preston*, to execute the mortgage, he wrote a letter to the complainant, dated 20th June, 1816, in which he acknowledges the receipt of a letter from the complainant, together with the mortgage-deeds, to which he says he has no objection to accede, but for the necessity there was of having them recorded in public Court; and proceeds as follows:—"It has struck me you would have proceeded better by a bill of sale, and a redemption bond; pray turn over this in your mind, and if you think so, Mr. *Hunt* or Mr. *Stabb* may use the enclosed power of attorney; possession may be given, and no enrolment required." The power of attorney enclosed in this letter was from the respondent, *Preston*, to his partners, *Henry Hunt* and *Thomas Stabb*, giving them a joint, or several, authority to sell and dispose as they, or either of them, should think fit, for his (*Preston's*) most benefit and advantage, all his share and interest in the plantation in question. Upon receipt of this power and the letter in which it was enclosed, the deeds in proof before the Court were prepared and executed by the respondents, *Hunt* for himself, and *John Hatt Noble* (under power for such purpose), also, by *Stabb* for himself, and *Hunt* on behalf of *Preston*, by virtue of the above-mentioned power.

1821.

HUNT
v.
HUNT, STABB, PRESTON & Co.

It appears that Mr. *Preston* afterwards went to England, and refused to confirm or acknowledge the act of his attorney; and after ineffectual attempts at an amicable adjustment, the present proceedings were instituted.

At a former hearing, in another stage of this case, I had occasion to observe upon the singularity of its situation: one of the respondents, *Hunt*, had gone the length of confessing the complainant's suit, and confirmed his bill in every important particular; and two others, *Noble & Stabb*, did not seem disposed to dispute it. They have since done that which I consider to amount to a similar confession of the cause of suit; and the remaining respondent, *Preston*, is left to contest it alone, and in the face of the admissions of his partners. A case so situated, is, certainly, very peculiar, and one for which I cannot find any precedent or resemblance. Upon *principle*, I am not aware that it has been held that the admission of the cause of suit by one partner in trade is conclusive against the other partners; but it is to the whole extent of the interests of the party confessing, and is strong proof against the firm, and requires stronger proof to repel the conclusion which must otherwise be drawn from it.

Two objections are raised by the respondent, Mr. *Preston*; one, *to the want of consideration* for the deed, and the other to the *undue manner of its execution*. In support of the first objection, he states in his supplementary answer, which is upon oath, that he believes the debt of £7,280, claimed to be due by the complainant, was contracted with him in a running account, prior to the year 1816, by the firm of *Noble & Hunt*, solely upon their own credit and account.

1821.

HUNT
v.
HUNT, STABB, PRESTON & Co.

This, however, is expressly denied by Mr. *Hunt*, in his answer, which is also upon oath, and is corroborated by *the entries in the books* of the respondents at Torquay, and the depositions of *Glover* and *Pitcairne* as to the circumstances under which the entries were made. Still, however, if this suit were primarily instituted to recover the sum of money which is claimed by the bill, as the consideration for the deeds, I should feel inclined to give the respondents the benefit of a cross-bill, for the purpose of eliciting any circumstances within the private knowledge of the complainant which might show how the debt arose, and from whom it was actually due; and the more so, as the complainant's own affidavit, which is in evidence, under the statute of 5th Geo. II., c. 7, does not expressly state the fact of having advanced the money on the credit of *Hunt, Stabb, Preston & Co.* He says, that from time to time he made large remittances to *Noble & Hunt*, in order to enable them to support the credit of the respondents' house, by paying their bills, and preventing their dishonour; but it does not follow but that he might have made such remittances purely upon the credit of *Noble & Hunt;* and that he did not look to the respondents alone, does appear from what follows, viz.: that he insisted upon having some ample security from *Noble & Hunt*, or from *Hunt, Stabb, Preston & Co.* Without offering any opinion as to the true state of the fact, I think that I could not have refused to leave the case open to a cross-bill had it materially rested upon the question, whether the debt contracted with the complainant was on account of respondents, or on account of *Noble & Hunt?* But that the debt was contracted in some way or other, and is still

1821.

HUNT
v.
HUNT, STABB, PRESTON & Co.

due, is no where denied; nor is there anything which appears upon any part of the proceedings before the Court, from which a doubt can reasonably be raised to the contrary. This debt, although it were admitted to be contracted by *Noble & Hunt*, and supposing such to be the fact, is sufficient to support a guarantee on the part of the respondents. The only question before the Court, then, is, are the deeds in evidence good and valid instruments in law? The respondent, *Preston*, objects to them so far as they profess to be executed in his name; that he did not authorize a *mortgage*, but expressly directed an absolute sale of the property. But let us look at the whole case: A debt was due to the complainant, which three of the respondents agreed to secure by mortgage of their joint property in Newfoundland. The mortgage-deeds are sent on to the remaining party, who objects to executing them merely because it was necessary to record the mortgage; at the same time professing his desire to see the complainant secured, and pointing out a different mode of effecting the same object, viz., by a *bill of sale*, under which possession might be given without enrolment, and a redemption-bond. And in the very letter containing the suggestion, a power of attorney authorizing a sale is contained, and laid at the discretion of the complainant, to be used in the manner pointed out, if he should think it eligible. After this, how is it possible to maintain that he intended an *absolute sale* of the property for money in hand, and not as a *security* for the debt due to the complainant? Why was the power of attorney sent to him, if a sale to a stranger were intended of the very property to which the complainant was looking as a security for his debt? Why was

1821.

HUNT
v.
HUNT, STABB, PRESTON & Co.

he addressed at all? Taking all the circumstances into consideration, before and at the date of the power of attorney, and the letter of advice which accompanied it, I should say that it appears to have been the intention of the respondent to secure the complainant; and that the power which he gave has not been exceeded. I must, therefore, comply with so much of the prayer of the bill as goes to the delivery of the possession of Adam's and Lady's Ships'-rooms, together with the title-deeds; but I must be understood not to pass any opinion upon the debt, whether it is the proper debt of the respondents or of *Noble & Hunt*, for the reasons I have already stated. Should that fact be of importance to either of the parties, it may form the subject of a subsequent inquiry, in which the respondent, *Preston*, will have the benefit of all the evidence he may desire to adduce respecting it.

1821.

June 30th.

HUNTERS & Co. *against* Owners of the Schooner MORNING STAR.

If a fire takes place in a ship from a *notorious defect* in the mode of fitting her up, or from any *other gross and culpable neglect on the part of the owners to adopt the ordinary and necessary means of preventing it*, the exception of "FIRE" in the bill of lading, will not protect them from a liability to answer for the damage occasioned by such fire to goods on board the vessel.

ACTION to recover the amount of damages done to a cargo of flour shipped by plaintiffs on board the *Morning Star*, a vessel belonging to defendants.

The fact of the cargo being shipped and damaged by *fire* is admitted. A bill of lading, with the usual exception against fire, was produced; and it was contended that the fire which injured the cargo was *accidental*, and, therefore, that the defendants were not liable to answer for the consequences of it. This was the principal point in issue.

Per Curiam. "Fire" is excepted out of the risks of carriage, by the terms of the bills of lading, as well as by the provisions of the law. It stands upon mainly the same footing as perils by sea, or other casualties and accidents which are presumed to be out of the power of the master to prevent; but, like other perils, there must be all *due care* taken to prevent fire. If it be caused by *negligence*, which the master might have prevented, or from an original and apparent insufficiency of the thing which was to constrain or prevent it, it is not an *accident*, and lays a fair ground of action against the owners. They impliedly undertake, as carriers, that the vessel shall be staunch and sound, and everything on board essential to the safe carriage of the cargo, properly fitted and secured for the purpose to which it is to be applied. Nothing surely can be more necessary than security against the dangers of fire, particularly when made below, and close to the vessel's bulk-head. Now, applying these preliminary remarks to the

1821.

HUNTERS & Co. *v.* Owners of the MORNING STAR.

case before the *Court*, how does it stand? A vessel freighted with a cargo from Halifax to this port has a chimney in the hold before the bulk-head, which chimney consists of bricks, placed upright, so as to leave only four inches between the fire and the bulk-head, and even this hair-breadth re[illegible]ed less secure by only half-an-inch of [illegible]rtar between the joints of the bricks. It is remarkable, too, that this half inch of mortar was in front of the joints, and, therefore, excludes the presumption that the mortar had been originally there and worked out.

It appears to me to have been so carelessly built, and the insecurity so apparent even to the master himself before the voyage began, that I cannot say it is such a case as is provided against either by the law, the terms of bills of lading, or the justice of the case; and, therefore, I shall give damages to the amount of the injury sustained.

Case from the SURROGATE COURT, and answer of the CHIEF JUSTICE.

July 9th.

THERE have been divers claimants upon the insolvent estate of A, B & Co., receivers of the voyage of C, D & others, for fish-making, room-hire, bait-money, boat-hire, and freight. The trustees of A, B & Co. are desirous of having the opinion of the Court, first, whether such claims can be admitted; and, if they can, in what manner they are to rank, whether as preferable demands, or equally with current supplies?

Under the 49th Geo. III. c. 27, there are only two kinds of claim upon an insolvent estate which are entitled to a preference; viz. *servants' wages*, and *current supplies*: but among current-supplies, *fish-making* and *freight* hold a higher rank than the others.

ANSWER.

There is a rule among the records of the Supreme Court, which appears to have been

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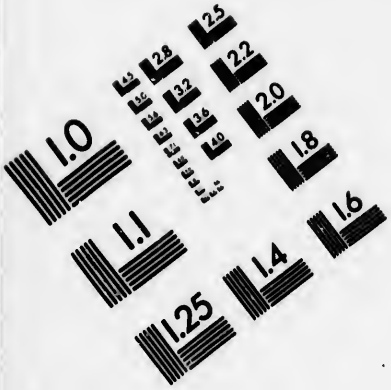

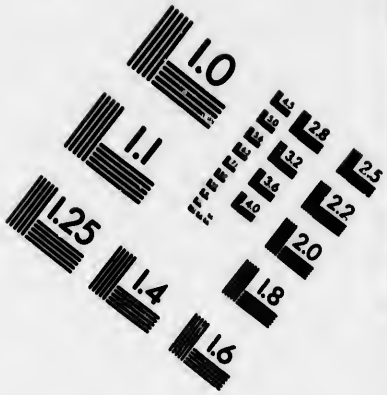

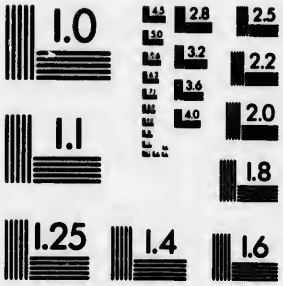

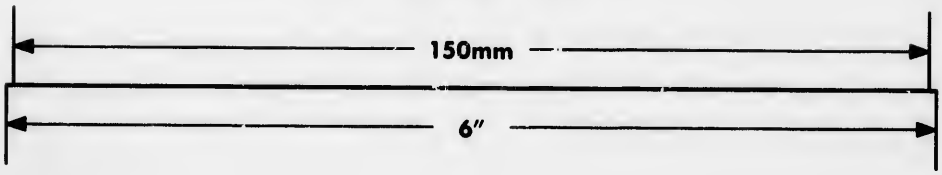

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1821.

Case from the Surrogate Court, & answer of the Chief Justice.

framed by the *Chief Justice*, with the assistance of the Justices of the Court of Sessions, giving preferences of payment to claims of the above description in the order in which they appear to have arisen in the course of the fishing voyage. I never could learn upon what authority this rule was framed; not upon ancient usage, as the recency of the rule itself evidences; and even if it were, such usage appears to have been repealed, as regards insolvent estates, at least, by the 49th of the King, which admits but two preferences of payment; namely, *servants' wages*, which are to be paid in equal proportions, and *current suppliers*, who are to rank equally.

It has always appeared to me that the rule, however well-intended, was not within the power of the Court, which is authorized to establish rules of *practice*, but no rules affecting the *rights of individuals*, which become, in fact, laws, and are exclusively within the province of Parliament.

I hold the law to be this:—A current supplier, by the universal usage of the fishery, is bound to supply every article essential to the conduct and completion of the voyage, if he wishes to entitle himself exclusively to its proceeds; any articles indispensable to the fishery, not furnished by himself, forms current demands upon the voyage equally with his own; and if he receives the fish and oil without providing such articles, he is considered liable to admit them ratably with his own claim. This holds, generally, with regard to all suppliers; but there are two species of supplies which have a preferable claim to every other, namely, *fish-making* and *freight*; and the reason is this: by the common law, every man has a *lien* upon goods in his possession for work and

1821.

Case from the Surrogate Court, & answer of the Chief Justice.

labour performed upon such goods. Thus, the fish-maker for the making, and the carrier for freight, have each their lien; and neither is bound to part with the goods until he is paid to the full amount of his demand. The convenience of the fishery has made this lien ambulatory in most instances, and in general cases it travels with the fish into the hands of the regular receiver of the voyage; beyond these two, I know of no preference among current suppliers, and even these are not properly *preferences*, but specific *liens* upon the fish itself, existing at the time it passed into the hands of the receiver, and received by him under an implied contract to hold it subject to such lien; the trustees, of course, take the fish subject to the same obligations under which the insolvent held it.

In the matter of JOHN M'GRATH's Will.

August 6th.

Accounts of an executor audited by the Court, and the monies in his hands placed in public securities in England, for the benefit of some children to whom it had been bequeathed by the testator.

THIS was an application by one of the executors, *Pendergast*, to the Court, to call upon *Fox*, the other executor, to give into Court a faithful return of the estate of the late *M'Grath*, and also to pay over any balance in his hands, under the direction of the Court, for the purpose of being placed at interest in the public funds, for the advancement of the objects contemplated by the will. The testator left the chief part of his property, amounting to more than £1000, to his executors, in trust for the children of *Fox*; and it was stated that the property was insecurely placed at interest in private hands, and otherwise remaining uncollected and unaccounted for. The accounts of *Fox*, the executor, being now before the Court,

1821.

In the matter of JOHN M'GRATH'S Will.

the items were successively gone into, and the accounts audited and passed.

Per Curiam. As by the testator's will, the interest of what money he had in the hands of Messrs. *Kemps & Co.* and *Mullowney*, was to be applied to the sole maintenance and benefit of *Fox's* children, I suggest, for the consideration of the executors, that the money should be placed in the public funds, and the annual dividends received by *Fox*, and appropriated as directed by the will, till the children should, respectively, become of age, and entitled to a distributive share of the estate.

The suggestion of the Court was adopted by the executors; and it was also agreed that the monies should be invested in the name, and subject to the orders, of the Supreme Court, which, by general order, would direct the annual dividends to be paid over to *James Fox* till further order made.

JOHN F. TRIMINGHAM & Co. *against* JOHNSTON CASKIN.

August 9.

A gunner cannot justify the act of firing upon a vessel by an order from the Governor requiring all vessels, before they proceed to sea, to be provided with passes from the Governor, on pain of being fired at, and compelled to pay for the shot and powder.

ACTION of trespass for firing upon plaintiffs' vessel; compelling her to come to anchor; and obliging the master to pay the sum of six shillings and eightpence for the powder and shot expended in stopping the vessel.

The defendant, who is a soldier in the Royal Artillery, justified under certain orders received from his commanding officer, relating to vessels passing the fort, at the entrance of the harbour; and stated, that the vessel's not answering the description given in the pass (she being therein described as a *Brig*, and not a *Brigantine*) was the

1821.

TRIMINGHAM & Co. v. GASKIN.

reason of his firing at her, and compelling the master to pay for the shot.

Certain written documents, purporting to be orders of the Governor and Commanding Officer of the Forces, were laid before the Court. It was also shown that the vessel called the *St. Vincent* was described in the register as a brig.

Per Curiam. The single fact at issue between the parties is, whether the *St. Vincent* was well described in the *let-pass*, in which she is mentioned as a *Brig* instead of a *Brigantine*. Had the case rested upon this point alone, I should have required the evidence of persons more competent than myself to say whether, according to common acceptation, the word "brig" is sufficiently descriptive of the *St. Vincent*. It appears that, in the certificate of registry, she is described as a "brig;" and in communicating with the collector of the customs, I am informed that it is not an unusual mode of describing vessels of a similar rig. But the plaintiffs have taken a wider ground of action, and contend that the *St. Vincent*, being regularly cleared at the custom-house, and in the act of proceeding to sea, no such instrument as the "*let-pass*," in which she is said to be insufficiently described, was necessary to her protection; and even supposing it were necessary, that it was unlawful to fire at the vessel. The defendant has laid before the Court certain instruments in the form of orders from the Governors of Newfoundland, requiring all vessels, before they proceed from the port of St. John's, to be provided with passes from the Governor, upon pain of being fired at, and compelled to pay for the shot and powder; and these orders are said to be given for the better enforcing of the laws of the revenue,

1821.

TRIMINGHAM & Co. v. GAIXIN.

and in conformity to ancient usage in England. The oldest of these orders appears to have been issued, for the first time, in the year 1776: there has been some relaxation since in favour of *coasting vessels*, but as regards all vessels bound to foreign parts, the order of 1776, and other orders founded upon it, have been regularly enforced; not, however, without the question being sometimes raised as to their legality, as appears by the records of the Supreme Court. In 1815, a vessel called the "*Betsy*," bound from this port to Valencia, was fired at from Fort William, and hit, and in consequence thereof, compelled to return into port and repair. Some of the cargo was injured by the water which penetrated the shot-hole, and an action was commenced against the General commanding the Garrison for the amount of injury, which was estimated at £600; but the vessel and cargo being insured in England, it was thought advisable not to press the case to trial until it should be known whether the parties had not a shorter remedy against the underwriters. The underwriters, it appears, adjusted the damage done to the vessel, but made no allowance for the cargo. No ulterior steps were taken to bring the case to trial, and it consequently abated; but it appears that some application was made to the Lords of the Treasury for an indemnity for the loss sustained, and I was called upon to report upon the case so far as it had gone here. I mention this case to show that the usage of firing upon vessels from this port has been disputed, but more especially to show that the principles which should guide the Court in the decision of the trifling case before it to-day, may become applicable to cases of magnitude hereafter, and, therefore, demand a suitable consideration.

1821.

TRIMINGHAM & Co. v. GASKIN.

After the most serious attention which I have been able to give the subject, my opinion is, that it is not lawful to fire upon a vessel under the circumstances in which the *St. Vincent* was placed in leaving this port. The orders profess to be made for the security of the revenue. It is, I apprehend, open to much doubt, whether the revenue really is protected by them; and, even if it were, it does not appear to be a lawful mode of doing it. The revenue laws are like all other penal statutes; the breach of them is punished by particular forfeitures, and they cannot be extended, by construction, by the Courts that administer them; nor can they be enforced in an unlawful manner. I am not aware of a single plantation-act which authorizes the party infringing it to be fired upon; and I know of no principle in the common law which sanctions such a mode of bringing offenders to justice. Still less should I find any proceeding by which the innocent may be punished for the guilty, and valuable lives and property placed at the discretion of a private soldier, and exposed to the uncertain consequences of a cannon-shot. I believe it is the practice established by ancient usage in certain ports in England, to compel the payment of port-dues by stopping vessels; and I know that in some of the Colonies the same mode has been adopted to enforce certain island duties. But, so far as it has fallen within my knowledge, it has been either sanctioned by particular acts, or immemorial custom, which presumes an act. I know of no general law which would enable me to say that it is legal here; and I feel that I should be taking a very serious responsibility upon myself, if led into speculations upon the expediency of a better mode of enforcing the

1821.

TRIMINGHAM & Co. v. GASKIN.

revenue laws, I were to allow an opinion to pass the Court that might seem to sanction a practice which may be followed by the most fatal consequences.

The order under which this vessel was fired at, appears to me to be founded in a misapprehension of the law. It is, therefore, no defence to the action; for every man, whatever may be his profession, is required to yield his first obedience to the laws of his country. It is not shown that the vessel's being stopped was attended with any inconvenience, and I shall, therefore, limit the judgment of the Court to the money which I conceive to have been improperly levied.

September 6th.

P. W. CARTER, Esq. qui tam, *against* M. UPHAM.

The statute 2, Geo. II., c. 36, does not require the master of a vessel to sign the ship's articles in any *particular place* or *manner*; and therefore a conviction, setting forth that the Magistrates had fined the master for not *subscribing* his name to the ship's articles, is bad on the face of it.

CASE.—The defendant is master of the brig *Commerce*, and was sued in the Supreme Court, on the 23d day of August, for wages due to one of his crew who had been left behind at Quebec in July last. The defence was, that the seaman who sued for his wages had deserted. In reply to which, it was stated that the master had given him money to induce him to go on shore just as the vessel was on the eve of sailing for this island, in order that he might be left behind and forfeit his wages, under pretence of being a deserter. This charge against the defendant was not, however, made out; but, on the contrary, it was proved that the money was advanced by the master, at the desire of the seaman, to buy a few necessaries, and with a strict injunction to be on board on the same evening.

The *Court* gave judgment only for wages

1821.

CARTER v. UPHAM.

earned up to the time of the seaman's going on shore; intimating, at the same time, that his being left behind was an unfortunate circumstance, owing to his own intemperance, but not, in the opinion of the *Court*, amounting to desertion, or a forfeiture of his wages. In the course of the trial, the *ship's articles* were produced by order of the *Court*, and the quantum of wages computed agreeably to the sum therein agreed upon. The articles were in the usual printed form, and the name of the master was inserted in the body of the instrument, in his own handwriting. On the day following the above trial, the defendant was cited before the Court of Sessions, at the information of the Receiver of Greenwich Hospital, for not having signed the articles agreeably to the statute 2 Geo. II., c. 36, and was convicted in the sum of £35, being five pounds for every seaman on board the vessel.

On the 30th of August, it was moved in the Supreme Court to quash the above conviction, upon the affidavit of the defendant, setting forth, *inter alia*, that the information upon which the proceedings were founded, was upon the oath of one of the convicting magistrates; and that the Court of Sessions, as such, was not competent to hear the case, the statute having given the jurisdiction to one or more Justices of the Peace. An office-copy of the conviction was, at the same time, laid before the Supreme Court; by which it appeared that the proceedings were drawn up as having taken place in the Court of Sessions; but this fact being denied, the *Court* granted a writ of *certiorari*, for the purpose of bringing the conviction regularly before it. The certiorari being returnable the 3d of September, on that day

1821.

CARTER v. UPHAM.

the conviction was brought into Court, and was as follows :—

"Be it remembered, that on the twenty-fourth day of August, in the second year of the reign of our sovereign Lord George the Fourth, now King of the United Kingdom of Great Britain and Ireland, at St. John's, in the said Island of Newfoundland, *Peter Weston Carter*, of St. John's, aforesaid, Esq., receiver of Greenwich Hospital dues, for our Sovereign Lord the King, in his proper person, came before us, *John Broom* and *James Blaikie*, Esquires, two of His Majesty's justices assigned to keep the peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said Island committed, and then and there gave us to understand, and be informed, that *Matthew Upham*, master of the brig or vessel called the *Commerce*, of Dartmouth, did proceed on a voyage from Liverpool, England, on or about the twenty-sixth day of February last, bound from thence to parts beyond the seas, having on board the said brig or vessel, *William Ludlow*, *Henry White*, *William Lang*, *William Meader*, *Andrew Lang*, *William Maddison*, and *James Connelly*, as seamen and mariners composing the crew of the said vessel, without first coming to an agreement or contract with such seamen or mariners, in writing, declaring what wages each seaman or mariner was to have, respectively, during the whole voyage, or for so long a time as he or they did ship themselves for, and he and they first signing the same, against the form of the statute in such case made and provided. And upon the aforesaid day, he, the said *Matthew Upham*, appearing, and being present, and being called upon to make his defence against the

1821.

CARTER v. UPHAM.

said charge, and having heard the same, and he being asked by us, the said justices, if he can say anything for himself, why he, the said *Matthew Upham*, should not be convicted of the premises above charged upon him, as aforesaid, pleaded not guilty of the same offence; and being called upon to produce the ship's articles, refused so to do: whereupon evidence being called, *William Ludlow*, mate of the said brig, or vessel, *Commerce*, upon his oath on the Holy Gospel then and there administered, deposed, that the crew of the said vessel at the time of sailing from England, as aforesaid, (exclusive of the said master and his son, a boy,) consisted of him the said *William Ludlow*, *Henry White*, *William Lang*, *William Meader*, *Andrew Lang*, *Wm. Maddison*, and *James Connelly*; and the said *John Broom*, Esq., one of us, the Justices aforesaid, being called upon by the said *Peter Weston Carter* aforesaid, upon his oath upon the Holy Gospel to him then and there administered, deposed and said, that he, on the preceding day (the 23d of August inst.), did see the ship's articles belonging to the said brig *Commerce*, and that the said ship's articles were not at that time signed by the said master, as required by the said statute. Upon which evidence, the said *Matthew Upham* was informed, that if he persisted in refusing to produce the ship's articles, that a fine of five pounds for each of the seven seamen, or mariners, aforesaid, would be levied against him for the use of Greenwich Hospital. Upon this information being given him, he, the said *Matthew Upham*, produced the ship's articles, which were then found to have the said master's name subscribed thereto. The aforesaid *John Broom*, Esq., further, on his oath, as afore-

1821.

CARTER v. UPHAM.

said, deposed, the said *Matthew Upham's* name, now subscribed to the said articles, was not so subscribed on the preceding day when the aforesaid articles were produced in the Supreme Court;—whereupon all and singular the matters, things, and evidence being fully heard and understood by the said *Matthew Upham*, he is asked by us, the said Justices, what he had to say or offer in his defence against the said information and offence, and in answer to the evidence given as above-mentioned, and what he had to say why he should not be convicted of the offence aforesaid; and thereupon the said *Matthew Upham*, by his attorney, *Henry Hawson* (the said *Matthew Upham* being also present and assenting thereto), did acknowledge and confess that the said ship's articles were not, yesterday, when exhibited in the Supreme Court, signed as they now are by the said *Matthew Upham*, but that since that time he had subscribed his name to them: whereupon it manifestly appears to us, the said Justices, that the said *Matthew Upham* is guilty of the premises above laid to his charge. Wherefore we, the said Justices, upon the oath of the credible witnesses so taken, as aforesaid, as well as on a view of the before-mentioned ship's articles so produced to us, as, also, the confession of the said *Matthew Upham*, as aforesaid, do adjudge that the said *Matthew Upham* did proceed in the said brig or vessel *Commerce*, of Dartmouth, on or about the said 26th day of February last, from the port of Liverpool, in England, bound to parts beyond the seas, having on board *William Ludlow*, *Henry White*, *William Lang*, *Wm. Meader*, *Andrew Lang*, *William Maddison*, and *James Connelly*, as the seamen and mariners composing the crew of the said vessel,

1821.

CARTER v. UPHAM.

without first coming to an agreement, or contract, with such seamen or mariners for their wages, in writing, declaring what wages each seaman or mariner was to have, respectively, during the whole voyage, or for so long a time as he or they did ship themselves for, and he and they first signing the same; against the form of the statute in such case made and provided; and, therefore, we, the said Justices, on the said twenty-fourth day of August, at St. John's, aforesaid, in the second year, aforesaid, do convict the said *Matthew Upham* of having proceeded to sea in the said brig, or vessel, *Commerce*, of Dartmouth, on, or about, the twenty-sixth day of February last, from the port of Liverpool, in England, bound to parts beyond the seas, having on board *William Ludlow*, *Henry White*, *William Lang*, *William Meader*, *Andrew Lang*, *Wm. Maddison*, and *James Connelly*, as seamen and mariners composing the crew of the said vessel, without first coming to an agreement, or contract, in writing, with such seamen or mariners for their wages, declaring what wages each seaman or mariner is to have, respectively, during the whole voyage, or for so long a time as he or they shall ship themselves for, and he and they first signing the same; against the form of the statute in that case made and provided; and the said *Matthew Upham* is hereby convicted hereof by us, the said Justices, on the oath of the credible witnesses so taken before us, as aforesaid, as well as on the view of the aforesaid ship's articles so produced to us, as also on the confession of the said *Matthew Upham*, as aforesaid, according to the form of the statute; and we, the said Justices, do adjudge that the said *Matthew Upham*, for his said offence, aforesaid, shall forfeit

1821.

CARTER v. UPHAM.

and pay the sum of five pounds for each and every of them, the said *William Ludlow, Henry White, William Lang, Wm. Meader, Andrew Lang, William Maddison,* and *James Connelly,* to the use of Greenwich Hospital, to be paid to the said *Peter Weston Carter,* Esq. he being duly authorized to receive the same, to be applied according to the form of the statute in that case made and provided."

To this conviction the following objections were made on the part of the defendant :—

First,—That there *was no summons set forth in the record,* and no *information on oath,* which is expressly required by the statute.

Second,—That by the 2d Geo. II., c. 36, there is an express mode of proceeding pointed out, and which must be *strictly pursued ;* and by the statute a warrant is expressly required to be issued.

Third,—That the jurisdiction given, is to one or more Justices of the Peace; and that the *Sessions,* as such, has no jurisdiction.

Fourth,—That it appears by the record that *one of the magistrates* was the principal witness in support of the action; and the *information having been originally* given by such magistrate, under the circumstances of the case he was disqualified for sitting as Judge ; whereas he did sit as Judge, and was one of the *convicting magistrates,* as appears by the record.

Fifth,—That the evidence was insufficient to support the conviction, the magistrate having sworn to the *whole point of law at issue.*

Sixth,—That the record does not set out the *execution,* which was issued in the name of the *Court of Sessions.*

Seventh,—That there is no place laid in

1821.

CARTER. v. UPHAM.

the conviction to *show the justices had jurisdiction* over the offence.

The *Court* directed that the case should stand over till the next day, and then gave the following judgment:—

There is one objection to the conviction, which appears upon the face of it, and which is fatal; but, before I notice it, I feel myself called upon, from the peculiarity of the situation in which I am placed, to offer some preliminary remarks on the nature of the case before the Court. Could I feel myself authorized to refuse the interposition of the Supreme Court in the manner now sought, it would only be changing the face of the proceeding, which would, in all probability, take the form of an action for damages, and be attended with much more expense and trouble. In England, it is usual, before an action is commenced against magistrates, to bring their proceedings under the review of the Superior Court, for the purpose of quashing them if they are illegal; because a subsisting conviction, good upon the face of it, however unlawful in fact, cannot be impeached in a collateral way.

The statute 43d George III., cap. 141, was made for the purpose of protecting magistrates after their proceedings might be set aside, and is a very beneficial statute to the magistrates. Supposing the Court should refuse to inquire directly into the lawfulness of a conviction, upon what principle of justice could it refuse inquiry in a collateral action? Surely, not upon the rule of English law, which is founded in systematic justice, and disallows the proceeding of inferior Courts to be questioned incidentally, only because it has provided a direct mode of inquiring into their legality. But if the Court should first refuse to entertain any

1821.

CARTER v. UPHAM.

proceeding which might be directed immediately against a subsisting conviction, and afterwards turn round the party upon the rule of English law, who should attempt to question it in a collateral way, it would be tantamount to closing the doors against justice altogether; for how is a party, aggrieved by an unlawful conviction, to obtain redress?

If I do not open inquiry *directly*, into the lawfulness of the proceedings of magistrates, I cannot refuse it *indirectly*; and it does appear to me, after some experience in this island, that the magistrates would gain nothing by exchanging the present summary form of redress for a personal action against themselves.

The case before the Court is this: the defendant was convicted by two of His Majesty's Justices of Peace, and fined the sum of thirty-five pounds, for not complying with the requisites of the statute 2d Geo. II., c. 36, sec. 1, which enacts, that in case any master of any vessel shall carry any seamen upon any voyage, without first entering into a written agreement, declaring the nature of the contract between the parties, and he and they signing the same, such master shall forfeit the sum of £5 for every such seaman. The complaint was, that the defendant, who is master of the brig *Commerce*, had not *signed* the articles; and the point for the Justice's determination was, whether he had, or had not signed them, before the voyage began. The witness who was called to support the information, deposed, that he had seen the articles the day before, and that they were not, at that time, signed by the master, as *required by the statute*. It is objected that the witness went beyond the fact, and took upon him to swear to the law. It is true that evidence as to law can-

1821.

CARTER v. UPHAM.

not properly be received; and that a conviction founded on such evidence alone, must fail; but if a witness swears to facts sufficient to warrant a conviction, I do not think his giving his opinion upon the law, would invalidate the other parts of his testimony. If the case had rested here, I should not have thought the objection material; but the words used by the witness are important, and relate to a circumstance under which the conviction was really founded.—By not signing "as required by the statute," the witness intended that the articles were not *subscribed*; for when the articles themselves were afterwards produced before the Justices, the conviction goes on to state, that they were then found to have the master's name "subscribed thereto;" and the witness being called again, desposed, that the defendant's name, "now subscribed to the said articles, was not so subscribed the preceding day, when the aforesaid articles were produced in the Supreme Court;" and, thereupon, the defendant was convicted. The master, in his affidavit in support of the present motion, swears that he filled up the agreement, and that his name, which is inserted in the body of it, was signed by himself, and is in his own hand-writing. It is not denied, or rather it is admitted, and is within the knowledge of the Court, that this was the fact, and that the defendant's name was written at the beginning of the articles in the way which is usual, before they were produced in the Supreme Court, and as I am bound to presume, for there is nothing charged to the contrary, before the vessel proceeded on her voyage. It appears, then, that the Justices did not confine themselves to the question, whether the master had signed the articles or not, but they convicted

1821.

CARTER v. UPHAM.

him for not signing them in a particular place; this was going a step beyond the statute, and making that an offence which is not an offence against the law. The statute only requires that the agreement shall be signed by the master before he proceeds to sea. The statute of frauds in the same manner requires, that certain agreements should be in writing, and signed by the parties to be charged therewith. The place of signature, under this statute, which regulates all the great contracts in the kingdom, has never been considered essential to the validity of any instrument required to be signed; on the contrary, if a party's name be inserted in the body of the writing, with a view of giving it authenticity, it has been expressly held by the Courts to be a sufficient signing within the statute; and it has been so held even in cases where a blank has been purposely left at the bottom of the instrument for signature, and the party has omitted to fill it up. [See the cases collected in *Roberts*, on *frauds*, 122.]

The same doctrine had before been recognized in respect to the signature of wills, and is, I believe, a rule of the civil law. The analogies of law bear me out in holding, that if the master of a vessel sign the agreement with his men, before he proceeds on the voyage, the place of signature is not material. The printed form has no blank for the master's subscription; the place and time of entry, rate of wages, &c., are only applicable to the seamen. The master's contract is with the owners, personally, not on the credit of the ship, and is never set out in the ship's articles. There is nothing in the nature of the thing which makes the place of the master's signature material; if he signs, that is sufficient to bind him to the

1821.

CARTER v. UPHAM.

agreement, and to satisfy the statute. I am of opinion that there was no *corpus delicti* in this case, upon which the Justices could found any conviction: by their own showing, they have fined the defendant for that which is not an offence against the law. Their proceedings are, therefore, a nullity, and must be set aside.

There have been many other objections raised against the conviction, but it is unnecessary to go into them. Before I close the observations of the Court, however, there is one which it may be essential to add, and which I desire may be clearly understood. It is this: that whenever a conviction has been *substantially right*, this Court will not disturb it upon the ground of mere irregularity of form. In England it is observable, that the strictness with which convictions by magistrates were formerly regarded, has been a good deal relaxed in latter years; and the statutes passed for protecting magistrates in the execution of their office, are framed in the same spirit of liberality. I do not think I shall go beyond that sound discretion which is reposed in the Court, under the act which directs it to apply the laws of England, so far as they may be applicable, to this island, in holding that the same degree of technical strictness which is observed at Westminster in examining the formal parts of a conviction, is not applicable to Newfoundland; and that every conviction in which justice has been, in fact, done, ought to be supported by the Court,

1821.

October 29th.

The custom found by the Special Jury in the case of *Meehan* v. *Brine*, [ante p. 6] must be taken subordinate to the statute of limitations: and a non-claim for six years is, consequently, a good plea in case of an action upon a bill of exchange.

HAYES *against* JOHN NEAVE and WILLIAM NEAVE.

ACTION to recover the sum of £61 5*s.* 10*d.* for principal and other charges upon a protested bill of exchange.

In November, 1806, a bill of exchange was drawn by the defendants in favour of *Edmond Walsh*, for £53 15*s.* on Dartmouth, which bill, however, was never sent forward, or put into circulation, but retained by *Walsh* until last year, when he endorsed it to plaintiff for a full consideration. The bill having been transmitted last fall to Dartmouth, was returned under protest, and this action was brought to recover the amount, under the alleged special custom of this island, that time does not run against a bill of exchange. The defendant relied upon the statute of limitations, and complained of the hardship of being called upon to pay a bill which had been drawn more than fourteen years ago, and was fraudulently endorsed to the plaintiff last year, when *Walsh*, the payee, had become indebted to the defendants, upon subsequent dealings, in a much larger amount than the bill now sued for.

Per Curiam. Without going into the private circumstances of the case, which may press with greater or less hardship on one side or the other, it appears to me that the action is barred by the statute of limitations, which has always been acted upon in this Court. I am aware that the special custom found by the Jury in the case *Meehan* v. *Brine*, taken in all the latitude to which the language of the verdict may be strained, is capable of being opposed to the statute; but when a conflict of this kind takes place,

1821.

HAYES v. J. & W. NEAVE.

the special custom must give place to the statute, upon the first principle of colonial laws, which cannot be repugnant to the positive laws of England. I am not reconciled to the decision which passed the Court soon after my sitting here, and which recognized the custom contended for: two special juries had found opposite verdicts; one that the custom prevailed immemorially in this island, by which bills of exchange on England might be locked up for an indefinite time without imputation of *laches*; and the other, that bills of exchange here were discharged by the neglect of the holder in the same way as in England. It was fairly open to the Court to set off the two verdicts against each other, and consider them as conclusive against a custom which wanted that invariable and universal understanding which is the essence of usage, and indispensable to give it the sanction of law. But it did appear that a very general practice prevailed of holding bills in this island upon the faith of the continued liability of the drawers, and that an abrupt decision would produce a great deal of hardship; so stands the case at present;—though I cannot but see that the custom contended for is a very bad one, and in the end must be very injurious to the interests of persons residing in this island; it has the effect of ultimately throwing the loss upon every bad bill upon them. It would be idle to follow the drawer or prior endorser to England, and sue there upon an over-held bill.

The Courts in England would laugh at our custom. How can there, in fact, be a local custom upon a foreign bill of exchange, an instrument in its very nature transitory, and forming a contract which is to be executed out of the country where the custom

1821.

HAYES v. J. & W. NEAVE.

prevails? Upon every view of the case, in principle as well as expediency, I feel it my duty not to allow a bad custom to pass beyond the boundaries of law; and I, therefore, hold, that the special custom found by the jury in *Meehan* v. *Brine*, must be taken subordinate to the statute of limitations, and that six years of non-claim are a complete bar to an action upon a bill of exchange in this island.

LUKE DOYLE's Servants *against* the Receivers of the Voyage.

November 14*th*.

The provisions of the 49th Geo. III., cap. 27, in favour of servants, are *cumulative;* and do not, consequently, take away, or abridge, their right to follow the fish and oil, under the 15th Geo. III. cap. 31.

CASE.—*Doyle* was a planter, and took supplies from divers merchants, to whom he put off his fish in unequal proportions. At the close of the fishery, the servants went into the Sessions Court, and recovered judgments for wages against *Doyle*; but before execution, process was taken in the Supreme Court, at the suit of the creditors of *Doyle*, and he was declared insolvent, and his effects vested in the hands of trustees. The property of *Doyle* being insufficient to pay the servants, they resorted to their remedy, under the 15th Geo. III. (following the fish and oil), and demanded their wages from the receivers of the voyage. On this day, the trustees and receivers were severally summoned before the Court, and the whole case taken up, when the *Court* made the following decree:—

In the case of *Benning & Hollohan's* insolvency, the same question was raised, whether, in case of the insolvency of the actual hirer of the servants, the proceeds of the insolvent's effects should not be first applied in payment of servants' wages, un-

1821.

DOYLE'S Servants v. The Receivers of the Voyage.

der 49th *Geo. III.* before the servants could resort to the receivers of the voyage?

But the *Court* held that such statute gave a *cumulative* remedy to the servants, and did not take away the right which they had before of looking to the immediate productions of their labour, the fish and oil, for the payment of their wages. While the affairs of an insolvent are winding up, the servants will starve. If they could follow the fish and oil when the planter who shipped them was *solvent*, *a fortiori*, they can do so when he becomes incapable of paying them. The servants are entitled, if they think fit, to follow the fish and oil, under the 15th Geo. III.; and as they have done so in this case, the receivers must account with them, which must be done in the following manner:—

First.—Let balances be struck between *Doyle and his servants*, upon accounts *between them*, and such balances carried into one aggregate account of sums due servants, (omitting any payments voluntarily made by receivers, who will have a right to set off the same against refunding.)

Second.—Let the fish and oil received by all the suppliers be computed, and an aggregate account of such fish and oil set out.

Third.—As the whole voyage is to the deficiency, so will each receiver's proportion be to the amount he must refund, (giving him credit for any wages actually paid as receiver.)

In respect to the insolvent estate, it is certainly first liable to servants' wages; and I am aware that in relieving it from this first demand, some difference is necessarily made in the respective interests of parties claiming upon such estate. It seems but just, therefore, that the parties refunding should be

1821.

allowed to claim the amounts respectively refunded *as wages*, before any claim for current supplies.

November 10th.

L. Doyle's Servants.

The *Chief Justice* refuses to alter the order made by him, relative to the claims of these servants, on the 14th of the present month.

ON this day, application was made to alter the mode of paying servants' wages, as ordered on the 14th November last; when the *Chief Justice* said:—

I do not, upon reflection, think that I can alter the rule laid down in this case. It is easy to frame cases of hardship on one side and the other; but I must be governed by legal principles; and I do not conceive I have any right to interfere in rights accruing before insolvency between different current suppliers, who have received unequal proportions of the voyage. There is no reason why one supplier, who is active, may not take care to pay himself, and cover any probable claim for servants' wages by an over-receipt of fish and oil; and if he takes the precaution to do this, which it is perfectly lawful for him to do, why should the Court frustrate his vigilance by appropriating his over-receipt of fish and oil, first, to the payment of wages, and then call upon him to refund in proportion to the fish received? A case of great injustice may be supposed by so doing; for example, A supplies to the amount of £200, and receives £300 in fish and oil; B supplies £50, and receives exactly that amount in fish and oil, —wages amounting to £200; A's surplus is first appropriated to pay this, which brings the deficiency to £100, of which sum A, who endeavoured to secure himself by precaution, is called upon to contribute 6-7ths; and B,

who neglected to secure himself against wages, is only called upon for 1-7th, being their relative proportions of fish received.

The Court rule appears the best.

1821.

The CHURCH-WARDENS *against* JOHN RENDELL.

November 19th.

The church-wardens may recover from the owners of pews a fair proportion of the expense incurred in the necessary and indispensable repairs of the church.

ACTION to recover one pound, as an assessment *for pew rent* for the last year.

DEFENCE. That the pew was not taken by *defendant individually*, but jointly with *Warren* and *Boden*, and that each party paid *one-third*; and that the church-wardens have neglected to repair the glass in the window opening from the pew occupied jointly with defendant, although they have been called on and required to do so.

The proceedings of the vestry were laid in *evidence*, from which it appeared that certain expenses were incurred in the repairs of the church; that there was a meeting of the pew-holders convened at the vestry, where the necessary repairs were submitted, and estimates produced, and approved by the meeting *then present*; and that it is to cover such expenses that the assessments are demanded.

The Court considered that the contributions to the church were *conventional*; they could not be demanded as rates, properly so speaking, but as the proportions of a general expense incurred for the purposes of the institution, for which every holder of a pew, or interest, in the church, had impliedly made himself liable. When the church was built, it was, of course, intended by those who built and held an interest in it, that it should be attended, and kept in necessary

1821.

The CHURCH-WARDENS v. RENDELL.

repair; and they *impliedly* bound themselves to bear the expenses of such repairs and attendance Every person who has purchased, or otherwise become possessed of, a pew, knows, or ought to know, the obligation he has entered into; and when the repairs have been agreed upon at a general meeting, and the expenses incurred by the church-wardens, they have a clear right to reimbursement, and to recover from each pew-holder his proportion of such expense, as for money *laid out and expended*; but the expenses must be absolutely *necessary* and *indispensable*, or they cannot be recovered.

SAMUEL CODNER *against* BAINE, JOHNSTON & Co.

December 11th.

Bait-money is subject, first, to the payment of wages, and afterwards to supplies.

ACTION to recover the amount of certain money due for bait, under the following circumstances:—

CASE. Plaintiff supplied one *Chafe*, of Petty Harbour, and lately had judgment against him for the amount, and took out execution, but the effects not being sufficient to satisfy judgment, execution was served upon defendants, who hold, as is alleged, certain sums due by their dealers, and retained by them on settlement of account with such dealers, for bait supplied by *Chafe*.

It was admitted by defendants, that they had received the bait-money set forth, and contended they retained such money to satisfy a debt due by *Chafe* to them for *current supplies*.

In support of which an account was stated between defendants and *Chafe*, by which it appeared that they had furnished *Chafe* with

1821.

CODNER v. BAINE, JOHNSTON & Co.

articles during the winter, but in the beginning of the fishing-season they had discontinued their supplies, and, by way of securing the debt then due, took an assignment of his boat, which they afterwards let to him again *on hire* for the ensuing season.

It was further stated by the defendants, that they had supplied *Chafe* with the understanding, that the bait-money due by their dealers was to be retained by them in satisfaction of their debt, and without such understanding they would not have advanced supplies, or let their boat on hire.

The *Court* determined, that the articles furnished by defendants before the fishing season commenced, could not be considered as supplies for the fishery. Where winter supplies were issued, and continued during the fishing season, the Court would not separate the account, but consider all as supplies; but *aliter* where the supplies were discontinued before the fishery began. In regard to the claim for boat-hire, it was, certainly, to be regarded as a supply in itself, but it was of a *peculiar character*, and would not *otherwise* take the case out of the general principle so often laid down. The defendants were, certainly, entitled to *retain* what proceeds of the fishing voyage might come into their hands, to the amount of the *hire of the boat*. It was objected, that the defendants had not notified plaintiff of their claim upon the boat, agreeably to the rule laid down in *Baine, Johnston & Co.* v. *Alsop*, 14th November, 1821; but this case differs from that, inasmuch as there, the party sought to *recover* boat-hire from the receiver of the voyage; here, the party only sought to *retain* to the amount of the boat-hire, and his right to do so fell within the principle frequently laid down by the Court, that it

1821.

CODNER
v.
BAINE, JOHNSTON & CO.

will not disturb different current suppliers who might have received different proportions of the voyage; it would only call upon them to contribute to the payment of wages, in proportion to the value they might have received. All fish and oil were made, in the first place, liable for wages; and where they could not be followed in *specie*, they must be traced through their representative. Bait-money was of this description; it was subject first to wages, and next to current supplies; and as the plaintiff in this action had paid all the wages, he was entitled to call upon the defendants, to contribute a ratable proportion of the bait-money he had received, towards the payment of wages earned in the bait-boats.

December 15*th.*

Assignees of STABB, PRESTON & PROWSE *against* Trustees of STABB, PRESTON, PROWSE & Co.

Although a commission of bankruptcy in England, will not necessarily supersede a declaration of insolvency in this country, yet, if under the particular circumstances of a case, it shall appear that the claims of the creditors, generally, may be most satisfactorily arranged and adjusted in England, the Supreme Court will consider *that* a good ground for superseding the insolvency.

THIS was an application to the Court to supersede the insolvency which had been declared in this case, and to cause the proceeds of the insolvent estate to be handed over by the trustees under the Newfoundland insolvency, to the assignees under the English comission.

Per Curiam. This case is peculiarly circumstanced, and, in some respects, has imparted its character to the proceedings of the Court. It may be necessary, therefore, to explain the reasons which have guided the Court in the course it has adopted.

On the 28th of June, process of attachment was awarded against the effects of *Stabb, Preston, Prowse & Co.*, an extensive trading firm in the island, with the view, as

1821.

Assignees of STABB, PRESTON, and PROWSE v. Trustees of STABB, PRESTON, PROWSE & Co.

it would seem, of leading to a declaration of their insolvency, and preventing an undue preference amongst the creditors. At the return of the writ, the agent who had been left in the management of *Stabb, Preston, Prowse & Co's.* concerns, attended Court, and admitted, that the available property of the house was not sufficient to satisfy the demands against it; and prayed, that as none of the partners were in Newfoundland when the attachment was sued out, farther time might be allowed them to appear. The principal creditors, who were also in attendance, pressed an immediate declaration of insolvency. The Court granted three months further time, and enlarged the writ of attachment, intimating that it would authorize such persons as might be nominated at a meeting of creditors, and approved by the Court, to carry the attachment into effect, in such manner as might appear most conducive to the interests of all parties concerned.—The writ of attachment is a peculiar process unknown to the common law; it is like the proceeding *in rem* of the civil law; and places the goods attached, in the custody, and under the control, of the Court. It is usually executed by the Sheriff; but as it was pretty evident from the beginning that the case would terminate in insolvency, it was deemed more expedient to conform the proceedings of the Court, in the first instance, to the course which it was probable they would ultimately take; and there was the less difficulty in adopting this course, as the Judge is expressly enabled by the statute, to perform every ministerial act of the Court by the hands of such persons as he may deem proper to appoint. Trustees were accordingly appointed, to attach and hold

1821.

Assignees of STABB, PRESTON, and PROWSE
v.
Trustees of STABB, PRESTON, PROWSE, & Co.

the effects of *Stabb, Preston, Prowse & Co.* subject to the direction of the Court.

At the expiration of the time which had been granted, the matter was again moved in Court, and it being made to appear that all the partners had been duly apprized of the process against them, the *Court* conceived that everything had been done which could reasonably be expected to be done to satisfy the intention of the statute, and declared *Stabb, Preston, Prowse & Co.* insolvent. I do not scruple to say that the *Court* had anxiously looked for the appearance of the assignees under the English commission, in order that any question of a conflicting nature might be raised before the case had gone the length of an actual declaration of insolvency; but in that expectation it was disappointed, although the bankruptcy had taken place in England more than two months before. Not feeling satisfied that the Court could suspend its proceedings any longer, it became necessary either to give the particular creditor the benefit of his judgment, or to declare the defendants insolvent; accordingly, all parties were publicly notified to attend Court on the 8th of October, and the agent for the defendants being examined, and stating, as before, that the effects of his principals were insufficient to pay their debts, the *Court* proceeded, formally, to declare them insolvent.

A question has been raised, which may properly be referred to this stage of the case, whether the defendants could legally be declared insolvent in this island, none of them being present, or personally within the jurisdiction of the Court at the time? and it has been compared to an act of bankruptcy which, being penal in its consequences, cannot be committed by inference, or follow

1821.

Assignees of STABB, PRESTON, and PROWSE v. Trustees of STABB, PRESTON, PROWSE & Co.

upon the act of an agent; but the cases are not parallel. In England, the acts of bankruptcy are certain definite acts, the doing of which is necessary to bring a party within the operation of the statutes. In Newfoundland, the mere inability to pay twenty shillings in the pound, makes the party insolvent; the fact of insolvency is the act of bankruptcy. The law has appointed the Courts to inquire into this fact, and, if found, to declare it. The process of attachment is the means through which the fact is to be ascertained by the Courts. The examination of the party and his creditors are auxiliary steps in the course of inquiry; but the awarding of attachment is the first judicial step to which all the subsequent proceedings are referred. Now, the writ may go against the goods of an absentee; indeed, it seems intended to apply to cases where the party cannot be personally served with process. If the goods attached are insufficient to pay all the debts, the party becomes insolvent. Suppose he cannot be found to undergo examination, is the Court to stand still, and see the estate wasted, however satisfied it may be of his insolvency? If he attends and denies his insolvency, it cannot prevail against the fact: shall his absconding suspend the law? The first object of every system of insolvent law is to provide for the interests of creditors. It is the express object of our law, which declares the prosperity of the trade and fisheries of Newfoundland to depend, in a great measure, upon the equal distribution of insolvents' estates. A very large proportion of the business of this country is conducted by agents, whose principals are absent; and to maintain, as a general proposition, that persons engaged in trade in this

1821.

Assignees of STABB, PRESTON and PROWSE v. Trustees of STABB, PRESTON, PROWSE & Co.

island, and becoming insolvent, cannot be declared so merely because their bodies may not be within the corporal touch of the Court, would be to place one-half of the property in this island out of the laws of the island. It appears to me, that wherever the goods are within the jurisdiction of the Court, they are liable to be attached; and, wherever the goods so attached, are found to be insufficient to pay the demands of the creditors, it is competent to the Court, upon being satisfied of the party's insolvency, to declare the fact, and take order for distributing the insolvent's effects according to law. Entertaining this view of the law, I am of opinion, that the declaration of insolvency in this case was lawful.

But it is contended that the bankruptcy of *Stabb, Preston & Prowse*, in England, vested all their estate and effects in this island, in the assignees under the English commission, and virtually superseded any proceedings under the insolvency in this island. This is a very large question, but it is not a new one in this Court. I have already had occasion to express it as my opinion, that where a person engaged in the trade of Newfoundland, becomes bankrupt in England, the creditors, in respect of Newfoundland transactions, might come into this Court, and cause such person to be declared insolvent, with the view of having such of his effects as might be situated in this island, distributed according to the law of the island (*a*). I do not presume to question the decisions which have been made at Westminster, (*b*) although I humbly conceive that

(*a*) *Crawfords & Co's.* insolvency, 31st January, 1818.
(*b*) *Solomons* v. *Ross*, 26th January, 1764. Chan. *Jollet* v. *Reitveldt*, and *Depanthieu* v. *Bevian*, 23d Nov. 1769. Chan. *Hunter* v. *Potts*, 4 T. R. 182. *Still* v. *Worswick*, 1 H. Bl. 665.

1821.

Assignees of STABB, PRESTON, and PROWSE v. Trustees of STABB, PRESTON, PROWSE & Co.

some of the arguments of the judges in the cases alluded to, have gone too far—much further than can be supported upon sound universal principle, and, indeed, than the cases themselves will support (*c*). When it is held that a British subject, living within the jurisdiction of British laws, shall not be allowed to do any act which may tend to defeat these laws, I can fully understand and follow the doctrine; but where it is said that he cannot do so, because the personal property of the bankrupt is everywhere subject to the law which governs his person, I must confess that my industry has hitherto been as unsuccessful in endeavouring to find such a principle of universal law, as my understanding has been to be convinced by the arguments upon which it rests; the proviso with which it is qualified, viz., that it is operative only so far as it may not militate against the particular laws of the country in which the property may be placed (*d*), appears to me to destroy the only value it can have as a principle of universal law; to have effect, it should overreach every municipal regulation which might interfere with the rules of equal justice sought to be established by it. The bankrupt laws of England are sufficiently operative in themselves, to prevent an English creditor from evading the spirit of the law by resorting to foreign tribunals; neither can I feel the force of the distinction between personal and real property, as the ground-work of a general principle of insolvent law. In most countries where a system of bankrupt law is admitted, the bankrupt's lands as well as his goods are liable to the payment of his debts. Why should

(c) See the argument of Lord *Loughborough* in *Stall v. Worswick*, 1 H. Bl. 665.

(d) *Phillips* v. *Hunter*, 2 H. B. 402.

1821

Assignees of STABB, PRESTON, and PROWSE v. Trustees of STABB, PRESTON, PROWSE & Co,

not land follow the law which governs the person of the debtor, and pass under assignment of his estate? Trade, with its varied sources of credit, and extended ramifications of contract and liability, is as fixed and immovable as legal estate; it is alike the subject of real provision, and governed by laws and usages which virtually enter into all its engagements, and form an implied and essential part of all its obligations. The creditor who contracts upon the faith of such laws, has not only a right to the benefit of them in the interpretation of his contract, but, I think, to have them administered at the *locus in quo*—the place where the contract was entered into, and where the law which governs it prevails. Abstract rules of justice should be framed with reference to the rights of parties: where the disposition of property depends upon the mere volition of the owner, such as the disposal of an estate by will, the personal domicile of the owner may afford a fair rule as to the distribution of his estate; but where the rights of other parties, as creditors, are concerned, the interests of such parties should be first consulted. This resolves the question before the Court into what it really is—a question of mere expediency, as to the best mode of distributing an insolvent's estate, with reference to the rights of those who are entitled to it. It is not, as in the cases cited, a dispute between creditors, *inter se*, upon conflicting claims; but a question between the creditors of an insolvent estate, as to the best mode of effecting a common object, whether the interests of the body of creditors will be best served by proceeding under insolvency in Newfoundland, or by referring all parties to England. I am not aware of any law to prevent this Court from labouring

1821.

Assignees of STABB, PRESTON, and PROWSE v. Trustees of STABB, PRESTON, PROWSE & Co.

to the same end as the High Court of Chancery; indeed, it was formerly the practice of that Court to support two commissions against the same person, at the same time; the principle of mere convenience upon which that practice has been changed, may require a simultaneous proceeding to be continued here; it is merely a question of convenience, with reference to the rights of creditors. In the case of *Crawfords & Co's.* insolvency, the effects had been partly distributed, and divers acts had been done by the trustees which appeared to me to require the Newfoundland commissions to be continued. In this case, nothing has been done but collecting the estate; and as the insolvents are all in England, and their concerns interwoven with a great number of collateral partnerships, all of which centre in England, it does appear to me that justice will be most effectually done by directing the proceeds which have been realized in Newfoundland, to be transferred to the assignees under the English commission, upon security given to the Court to pay, in the first place, all preferable claims for servants' wages and current supplies, and referring all other creditors to England.

The APPRAISERS under the 1st Geo. IV., c. 51, *against* PATRICK MORRIS.

March 6th, 1822.

Every description of interest in lands and houses in St. John's, seems liable to assessment under the 1st Geo. IV., c. 51.

THIS was a summary application to the *Court* to compel defendant to pay the amount of assessment for indemnifying parties under act 1st Geo. IV., cap. 51. The sum assessed was £24 6*s.* 0*d.*, being one-and-a-half per cent. on £1,620.

The defence was, first, that plaintiffs had

1822.

The APPRAISERS v. MORRIS.

not shown how, or upon what grounds, they called upon defendant to pay the above sum; and it was required that plaintiffs should produce their books, showing the rates upon which the assessment was founded. The books were ordered to be produced. Plaintiffs stated, that entering upon the grounds occupied by defendant, they placed it at a supposed value, with reference to the general value of houses and other property situated in St. John's, of which they assessed each person holding any property, whether leasehold or residuary, according to the supposed value of such property or interest. The defendant contended, secondly, that tenants holding under leases, since the fire of 1817, &c. are not liable; that the act must be held to have been operative at the time that the first measures were adopted, although it had not really passed;—at any rate, that as it has a *retrospective* operation, the Appraisers should have looked at the property as it actually stood immediately after the fires of 1817, the streets being then widened, and the additional value derived therefrom actually paid for by the tenant, in the increased rent:—argues, upon general principles, that as the remuneration was for those who should sustain loss of ground, so the proprietors whose ground and houses were rendered more secure and valuable, should pay in proportion to the additional value conferred; but that such value alone generally derived to the proprietors of the ground:—contends that the landlord alone ought to pay; and, in support of his position, puts the case of vacant ground at the present day assessed as vacant ground, so that if a tenant who had lain by were to build to-morrow, he would not pay anything for the house so built; why, then,

1822.

The APPRAISERS v. MORRIS.

should those tenants pay a contribution who may have happened to build before the appraisement?—that the landlord alone has property in the ground, and houses built on it; it is generally set at rack rent:—why should a tenant who pays the full yearly value of the ground, and has, consequently, no assessable interest, pay anything towards assessment?

Upon the whole, Mr. *Morris's* view of the question seems to be, that when the town was destroyed, and measures were rendered necessary to secure it against a future calamity of the same kind, that certain ground, then all being vacant, was required to be taken for the security of ground in general; it was like a waste, and all was to begin *de novo*; as the ground became permanently more valuable for the security afforded it, so the ground should be assessed to pay for such security; building then, or thereafter, were accidental circumstances, which should not be taken into account. A tenant might have built before the assessment, or the day after it was made, and, in either case, he ought to stand upon the same footing; but not for the first to pay, perhaps, on a house assessed at £2000, and the other nothing; especially that the measure of widening and leaving breaks being adopted before leases of 1818, &c. the ground derived additional value, which it ought to pay for.

Appraisers contend that they could not enter into such distinctions. The security afforded was like an insurance; wherever a man had an insurable interest he must have paid to have such interest insured. The value of the property had been graduated with reference to the interests of parties, gathering such interests from proofs of title and tenure.

1822.

The APPRAISERS v. MORRIS.

SUMMARY OF JUDGMENT.—Act enacts that the value of the ground taken for widening the streets shall be appraised by certain persons, as therein appointed, and the value so appraised shall be paid by all the proprietors of houses, tenements, lots and parcels of ground, lying within the limits of St. John's, in such proportions, with reference to the value of their several interests therein, as the said appraisers shall appoint.

The only questions the *Court* can entertain are, who are the proprietors? Have they the interest assumed by the appraisers in making their assessment? If they have any interest capable of being appraised and assessed, the *quantum* affixed by the appraisers is not examinable in this or any Court; it is final and compulsory upon the parties. Defendant contends that the only proprietors contemplated by the Act are landlords; that the Act must be presumed to have reference to rights existing at the time at which it begins to operate, viz., from the first laying out of the streets in June, 1818; but the Act specifically makes houses and tenements liable; and although the words "with reference to the value of the several interests of proprietors" apply to such interests, according to the *extent and situation of the ground*, yet they also apply to the respective interests of *landlords* and *tenants*; in this sense the appraisers have taken it, and the *Court* inclines to follow them. I must lay out of the case all considerations derived from the additional rents charged by landlords, upon the strength of anticipated regulations in rebuilding the town—the diminution of the value of property in St. John's since the decline of the trade—the delay in the passing and transmitting of the Act of Parliament to this island. The Act was framed upon broad,

1822.

The APPRAISERS v. MORRIS.

general principles, with reference to the whole society. The fires of 1817 and the following years, had destroyed, not the ground, but the buildings, and a large proportion of the merchandise, in St. John's: it was to guard against similar destruction that the law was passed. Every man who had property to lose by a fire, was deemed interested in preserving it from fire; and as the means of preservation, certain spaces of ground were left to be paid for by all who had some interest in the town, some houses to be guarded from fire, or some ground to be rendered less valuable by its devastations.

It might be argued that ground could not be burnt, and, therefore, should not be assessed; but as the interests of the community, generally, must suffer by a general calamity, although some particular species of property might not be affected immediately, so all property whatever, permanently held, was deemed to fall within the danger of loss, and the necessity and benefit of security.

The question which first suggests itself, is—has a man any interest in a house that may be burnt? will he suffer by a fire? If he will, the questions as naturally follow, to what extent will he suffer? what is the value of his interest? and to what amount should he pay for security? If the landlord, in the contemplation of the act, and the additional security derived to future buildings on his ground, exacted a higher rent, he is, or ought to be, assessed in proportion to such rent; and, therefore, his assessment must tend to lighten the assessment on the tenant. I cannot suppose that the value of the ground and house together, may only be worth the ground rent; it may be so, and, I dare say, is, in many cases. But I cannot relieve parties from the consequences of im-

1822.

The APPRAISERS v. MORRIS.

provident bargains, or any unexpected decrease in the value of houses and stores in St. John's, arising from the revolutions of trade and decline of fisheries. All I can do is to apply a construction to the Act, such as the legislature must be presumed to have intended. To me, it appears in the light of a general and permanent assurance against fire. Has a man any property at stake? has he a house or store to insure against fire? then he has derived some benefit from the security afforded, and should pay in proportion to his interest in the general benefit.

R. YONGE *against* JAMES BLAIKIE, Esq.

March 18th.

Those statutes which require a license from a *magistrate* for the retail of liquors, have for their object the preservation of the health and morals of the people, and are, therefore, applicable to the condition of this country. But those statutes which require a license from the *commissioners of excise*, have a fiscal object, and cannot be enforced here.

THIS case had been ordered to lie over, to enable the Court to look into the law; and on this day, the *Chief Justice* delivered the following judgment upon it :—

This action is brought for the purpose of obtaining the opinion of the Supreme Court, how far a license from the Sessions is necessary to authorize the retailing of spirituous liquors; and to what penalties persons who may retail distilled spirits without such license are liable.

The conviction is made in virtue of the 35th Geo. III., cap. 113, and is drawn in the summary form therein pointed out. Several objections have been taken to the conviction. It is contended that the statute upon which it is founded, has been repealed by the 48th George III., cap. 143; and that supposing the Court should not be of this opinion, yet the statute is a law of excise and revenue, and as such, cannot be enforced in Newfoundland. I entertained some doubt whether the 48th Geo. III. had not repealed

1822.

YONGE v. BLAIKIE.

the 35th Geo. III., by implication, as it appeared, on a first view, to introduce more extensive provisions upon the same matter (*a*); and this doubt was strengthened by finding that it had been raised in a book of some merit upon the duties of a justice of peace (*b*). But upon more attentive examination of the several laws relating to licensing the retail of liquors, it will be found, that they are divided into two distinct classes, with two distinct objects, viz., the justice's license, and the excise license—the one relating to the police, and the other to the revenue. By tracing the laws themselves from their source, the distinction will become more evident. I shall endeavour to do so, premising, that I have no index or means of referring to the statutes, except the abridged and very imperfect tables prefixed to each volume.

OF THE JUSTICE'S LICENSE.—So early as the reign of Edward VI., statute 5th and 6th, c. 25, it was enacted that none, except such as were allowed by two justices, should keep a common ale-house, or tippling-house, or use commonly the selling of ale, or beer, under the penalty of twenty shillings. The next statute was the 3d Charles I., cap. 3, which extended the like prohibition to the retailing of cider or perry without license, and was followed by the 12th and 13th William III., cap. 15, which further extended the prohibition to the retailing of brandy and other distilled liquors without a license, in the same manner as was required to sell ale or beer, and under similar penalties. This statute was subsequently repealed, but the provision requiring a justice-license to retail spirituous liquors,

(*a*) 9 East Rep. 44.
(*b*) Dickinson's J. P. Art. Ale-house, note h.

1822.

YONGE v. BLAIKIE.

was revived by the 2d Geo. II., c. 28, s. 10, which enacts, that no persons shall sell "brandy or other distilled liquors by retail, to be drank in their houses," but such as shall be thereunto licensed, in the same manner as the ale-house keepers.

The next statute which it may be necessary to notice, is the 26th Geo. II., c. 28, which requires the magistrates, upon granting a license to any person to keep an ale-house, to take recognizance for the maintenance of good order therein. This statute also contains other provisions, as to the time and manner of granting licenses.

In consequence of the confusion introduced by different laws and different punishments, in relation to the licensing of ale-houses by the justices, it was found necessary to pass the 5th Geo. III., c. 46, which enacted, that in lieu of the penalties inflicted by former Acts of Parliament on retailers of ale, beer, and other exciseable articles, without license, the offender should forfeit forty shillings. This penalty is increased by the 35th Geo. III. to twenty pounds, and a discretion is placed in the power of the convicting magistrate to reduce the fine to any sum not less than ten pounds. All these Acts of Parliament relate solely to the justice's license, or as it is called in the statute under which the conviction is made, a license to retail ale, beer, and other excisable liquors. The word "excisable" is used merely as a term of description; it was so used, for the first time, I believe, in the statute 9th Anne, cap. 23, which required the justice's license to be made upon a stamp. It should be observed that the justice's license was, at that time, the only license required for selling ale, beer, and other liquors, subject to an excise duty. The term

1822.

YONGE v. BLAIKIE.

"other excisable liquors" was merely intended to designate the kind of instrument which required a stamp; it was afterwards copied into other statutes, and has grown into a distinguishing term between licenses granted by justices, and licenses granted by the excise (*c*). I now proceed to the

EXCISE LICENSE.—The first Act of Parliament which required a license from the Commissioners of the Excise, was the 12th Geo. I., cap. 12, which applied to ale and beer only, and was afterwards repealed; and it was not until the 48th Geo. III., the Act under consideration, that ale, beer, and other undistilled liquors, required an excise license in addition to the justice's license. Pursuing the statutes, according to their dates, the next was the 9th Geo. II., cap. 6, which enacts, that no person shall sell brandy, rum, or other distilled spirituous liquors, in any less quantity than two gallons, without an excise license, under the penalty of one hundred pounds; and farther provides that no licenses shall be granted to any person to sell such liquors, except to those who may be first duly licensed by the justices.

This Act was altered by the 16th Geo. II., cap. 8, which reduced the penalty to ten pounds, and renewed the clause of the former act, prohibiting excise licenses to be granted to any but ale-house keepers.

The latter provision was still defective, and to remedy it, the 29th Geo. II., cap. 12, sec. 22, enacts, "that the commissioners of the excise shall not grant any license to any person to retail spirituous liquors who shall not first produce a license from the justices to sell ale, beer, or other excisable liquors."

(c) See the case *Rex* v. *Downs*, 3 T. R. 569.

1822.

YONGE v. BLAIKIE.

It is material to notice the words of this section, as they are copied *verbatim* into the 48th Geo. III., the Act which is relied upon in argument as repealing the Act under which the conviction is founded. I pass over the 9th Geo. III., cap. 6., which is merely a Parliamentary exposition of the law upon certain doubts as to existing penalties. The last Act which I have been able to trace upon this branch of the subject, is the 13th Geo. III., cap. 56, which, instead of all former penalties, imposes a fine of fifty pounds upon such persons as retail distilled spirits without a license from the commissioners of the excise. Thus far the statutes requiring an excise license to retail, only applied to distilled spirituous liquors; ale, beer, and other undistilled liquors, might be retailed under the justice's license alone, which, as we have seen before, was liable to a stamp duty *(d)*. Now the 48th Geo. III., the Act in question, in lieu of the stamp duty, subjects the retailers of ale, beer, cider, and perry, to the necessity of a license from the commissioners of excise, upon payment of a certain annual duty, under the penalty of fifty pounds, with the usual proviso, that no such license shall be granted to any person who shall not first produce an allowance from the justices to keep an ale-house. All the last-mentioned statutes relate to the excise, and impose certain duties upon granting excise licenses, which go into the aggregate fund, and form part of the revenues of the state.

From this view of the Acts of Parliament, it will be seen that the *Justice's License* and the *Excise License* are different instruments, regulated by different laws, and founded on

(*d*) See 6th Geo. I., c. 21, s. 66, and 44th Geo. III.

1822.

YONGE v. BLAIKIE.

distinct principles; the justice's license having for its object the health and good order of the community; and the excise license to provide a public revenue,—the one a very necessary measure in a distant settlement, such as Newfoundland, to which the other is altogether inapplicable.

From every information which I have been able to collect, the Justices in this island have always exercised a control over ale-houses, and other places where spirits are commonly retailed; the laws authorising them to exert such authority not only may be applied, but in fact have been applied ever since magistrates were appointed in the island; and it appears to me very proper they should continue to be enforced (*e*). I am aware that it is said in *Blackstone's Commentaries*, vol. 1, p. 108, and other works upon the constitution of the colonies, that the English laws of police, as well as of revenue, are not applicable to the condition of a colony; but this must be taken with some limitation.

A police of some sort is necessary to the well-being of every community in the earliest stages of its existence: the appointment of a Justice of the Peace, and of a constable, is in pursuance of the laws of police, as much as the power of suppressing disorderly houses; and a power of this sort may be as essentially connected with the interest of a

(*e*) Justices were first appointed in Newfoundland about the year 1728, and, as it would appear, assumed an early jurisdiction over public houses; for in a memorial addressed by them to Governor *Osborn*, they complain of the Fishing-admirals interfering with this branch of their authority.—[*Reeves*, 106.]—The first public order of Governor *Rodney*, preserved among the records, is dated 1749, and alludes to former orders against the sale of strong liquors by *unlicensed people*.

1822.

YONGE v. BLAIKIE.

rising society, as the power of suppressing a riot, or of apprehending a felon.

This review of the statutes clears the case of another objection, viz., that if the laws relating to licenses are held to be operative in this country, they must equally apply to the merchant who imports foreign liquors and sells a small quantity at a time, and to the publican who allows them to be drank in his house. The mere difference of persons would certainly make no difference in the application of the law; but the law itself only applies to public houses: all the statutes relating to justices' licenses, the 5th and 6th Edw. VI., cap 25, sec. 4; 2d Geo. II., cap. 28, sec. 10; 26th Geo. II., cap. 28—the statutes under which the recognizance for the good conduct of the parties is taken at the present day—refer to common ale or tippling houses; it is the place where the liquor is drunk, and not the liquor itself, which is laid under the superintendency of the police. The words of the law, as well as the reason on which it is founded, only apply to houses were ale and distilled spirits are sold by retail, and consumed at the time.

It is contended that the act upon which the conviction rests, is a local act, expressly limited in its operation to England, and, therefore, cannot be extended by construction to Newfoundland. But it is evident that this limitation in the act was intended merely to prevent its being applied to Scotland, where the retailing of liquors was subject to different regulations.

The laws of England, as such, are the laws of Newfoundland, so far at least as they can be applied to it.

An opinion of Mr. *Fane*, the law-adviser to the Board of Trade, is cited in *Reeves's* History, page 111, wherein it is said that

1822.

YONGE v. BLAIKIE.

the laws of the parent country cease to apply to the new country when it becomes a settlement; and if so, adds Mr. *Reeves*, it may be important to ascertain from what time Newfoundland may be considered as a settlement.

But, with every respect for the opinions of such very eminent men, it has fallen within my experience to learn, that the Colonial Courts date the discontinuance of English statute laws, not from the time of the colony being settled, but from the institution of a local legislature in the colony; and the reason of the rule is, I think, with the interpretation given it by the colonial lawyers. I am of opinion that the statute 35th Geo. III. is in force in Newfoundland, notwithstanding the words of the Act, which limit its operation to England:—it is in force as the *law of England*.

It remains to notice the last objection, which is, that the Justices of the Sessions have heretofore demanded a discretionary sum of money for licenses, as a condition upon which only they would grant them. I shall cite the acts of Parliament upon this branch of the subject, and observe, by the way, that neither the duties of the excise, nor upon stamps, are in force in Newfoundland; and I know of no other manner in which money can lawfully be demanded for licenses. The 9th Geo. II., cap. 23, enforced by 24th Geo. II., cap. 40, s. 24, enacts, that for every license granted by Justices of the Peace, the sum of two shillings and sixpence, and no more, shall be paid to the clerk of such justices, on pain of forfeiting £5. And the 48th George II., cap. 143, s. 10, declares, that it shall be lawful to take such and the like fees, and no other or different fees for licenses to keep a common ale-house, as

1822.

have heretofore been taken by justices' clerks. With these remarks, *I give judgment for the defendants.*

MEMORANDA.

On the 30th of September, 1822, Francis Forbes, *Esq., of Lincoln's Inn, Barrister at Law, resigned the office of Chief Justice of the Supreme Court of Judicature in Newfoundland, to which he had been appointed by commission, bearing date the 4th August, 1816, and the duties of which he had discharged from the 15th of July, 1817, to the 6th May, 1822; during the whole of which period he was resident in this island. He was succeeded, on the 1st October, 1822, by* Richard Alexander Tucker, *Esq., A. M., of the Inner Temple, Barrister at Law, who took his seat in the Supreme Court, on the 5th May, 1823, and continued to preside there, as the sole Judge thereof, until the 2d January, 1826, when the Royal Charter, granted by His Majesty to the Supreme Court of Newfoundland, under the provisions of the 5th Geo. IV., cap. 67, s. 17., was promulgated, and the Bench was then filled by the undermentioned persons:—*

The Hon. Richard Alexander Tucker, *Chief Judge.*

The Hon. John William Molloy, *and* *The Hon.* Augustus Wallet Des Barres. } *Assistant Judges.*

And, at the same time, James Simms, *Esq. was sworn into office as His Majesty's Attorney General. In September, 1826, the Hon.* Edward Brabazon Brenton *was appointed*

an Assistant Judge of the Supreme Court (in the room of Mr. MOLLOY, *who had been removed from his office), and officiated in that character until the 12th October, 1827, when, in consequence of Sir* THOMAS COCHRANE'S *return to England, the temporary administration of the government devolved on Mr.* TUCKER, *as President of the Council, who appointed Mr.* BRENTON *to act as the Chief Judge, and* JAMES COCHRANE, *Esq. as Assistant Judge, of the Supreme Court. The return of His Excellency the Governor to St. John's, on the 12th August, 1828, put an end to this arrangement; and Mr.* TUCKER *and Mr.* BRENTON *immediately reverted to their respective offices of Chief Judge and Assistant Judge.*

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT,

SAINT JOHN'S, NEWFOUNDLAND,

From the Year 1823, *to the Year* 1828.

HUNTERS & Co., appellants,
and
HERNAMAN & HOWARD, respondents.

May 12*th*, 1823.

The Supreme Court has no power to entertain appeals from judgments in the Surrogate Courts for sums not exceeding forty pounds. But the Supreme Court has authority to issue the writ of *habeas corpus*, and all other prerogative writs.

THIS case came on upon appeal from the Surrogate Court at St. John's; and *Simms*, for the appellants, stated, that *Hunters & Co.* had been the suppliers to one *M'Pherson*, a planter, and had supplied him in *October*, 1820, with articles to a large amount, on account of the *fishery for* 1821. That *Hunters & Co.* had received from *M'Pherson* a small quantity of oil on account of these supplies, which had been sold for £26 7*s.* 5*d.*, and that the respondents, who had furnished *M'Pherson* with the rest of his supplies for the year 1821, had brought an action against *Hunters & Co.* in the Surrogate Court, and obtained a judgment

1823.

HUNTERS & Co
v.
HERNAMAN & HOWARD.

against them for the proceeds of the said oil. The question, therefore, for the Court to decide was, simply, whether *Hunters & Co.* were not, in point of fact, the suppliers of *M'Pherson* for the year 1821, and, as such, entitled to retain the sum in dispute in part-payment of *M'Pherson's* debt to them?

On the part of the respondents, *Hayward* objected, in the first place, to *the jurisdiction of the Court*, which, as he contended, could not receive an appeal from the Surrogate Court unless the amount of the judgment appealed from *exceeded* forty pounds: and in support of this objection, he referred to the 5th section of the 49th Geo. III. c. 27, and to an opinion of the law-officers of the Crown, upon the extent of the jurisdiction of this Court, which had been entered, by the direction of the late *Chief Justice*, in the records of the Supreme Court. But even if the Court possessed jurisdiction in this case, he further insisted that it was bound to affirm the judgment of the Court below, upon the *real merits* of the case; for that *Hunters & Co.* were so far from considering themselves as the suppliers of *M'Pherson* for the year 1821, that they had actually defended themselves from an action brought against them in that character, by pleading that they had ceased to be the suppliers of *M'Pherson* since 1820. They were, therefore, now estopped by such plea from contradicting that fact.

In reply to the objection to the jurisdiction of the Court, *Simms* observed, that Mr. *Forbes* had always considered the provisions of the 49th Geo. III., c. 27, with regard to appeals, as merely *cumulative;* and had uniformly held that this Court possessed, *at common law*, appellate jurisdiction in all civil actions whatever, decided

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

in the Surrogate Courts; and with reference to the estoppel, it was urged by *Simms* that the plea alluded to by Mr. *Hayward* was filed in an action between different parties, and could not, therefore, have any operation, or force, in the determination of the present suit.

The *Chief Justice* said, that as the plea to the jurisdiction involved a point of great difficulty, as well as interest, he should take some time to consider it; and on the 29th of the same month, His Honour delivered the following judgment:—

If this appeal were to be decided upon the *real merits* of the case which has given rise to it, the attention of the *Court* would be confined to a single point, viz., whether that priority of payment, and that lien upon the produce of the fisheries, which the 49th of the late King, and the usage of this colony, have secured to the "current supplier," can be claimed by a merchant who had furnished a "planter," about the close of one season, with a number of supplies intended for the use of the following one; and the long train of able and elaborate decisions which have been delivered by the late *Chief Justice* upon every branch of the subject connected with this question, would most probably have enabled me to settle it by the application to it of those principles which have been uniformly recognized and acted upon by him. But, upon the part of the respondents, an objection has been taken, *in limine*, to the jurisdiction of this Court; the judgment appealed from not exceeding £40, and the power of the Supreme Court to receive appeals from the Surrogate Courts being, as they contend, confined, by the 49th Geo. III. c. 27, s. 5, to judgments which exceed that amount. In order, therefore, to exhibit the grounds upon which this

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

objection rests, and to explain the circumstances under which I am called upon to determine the validity of it, I shall first detail the words of the section above alluded to, and then advert to the conflicting constructions which have been put upon those words by Chief Justice *Forbes*, and the law officers of the Crown.

Now, by the 49th of the late King it is enacted, "That upon any decree or judgment given in a Surrogate Court for any sum exceeding £40, it shall be lawful for the party against whom such decree or judgment shall be given, to appeal therefrom to the Supreme Court, having first given notice of such intention, and having entered into a security to the Surrogate in double the sum for which such judgment or decree was given or made, within two days after making or giving such judgment or decree, for duly prosecuting such appeal; and upon any decree or judgment given in the Supreme Court for any sum exceeding £100, it shall be lawful for the party against whom such decree or judgment shall be given or made, to appeal therefrom to his Majesty in Council, having first given notice of such intention, and having entered into security, to be approved by the *Chief Justice*, in double the sum for which such judgment or decree was given or made, within two days after the giving or making of such judgment or decree, for duly prosecuting such appeal; and in all cases of appeal, as soon as notice shall be given and security entered into as aforesaid, execution shall be stayed, but not otherwise." These are the very words of the 5th section of that Act, and there is not another syllable in the whole chapter which has any relation whatever to appeals. But it was the opinion of Mr. *Forbes* (whose

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

reasons for that opinion will, by and by, be reviewed by me with that respect which is due to his splendid talents,) that, independently of any statutable enactment, the Supreme Court did, and, from its nature and constitution, of necessity must, possess an appellate jurisdiction from all the inferior tribunals of justice in this island; and that the 5th section of the 49th Geo. III. was merely intended to prescribe the mode in which that jurisdiction should be exercised in one case; and, consequently, that it was not restrictive of the common law powers of the Court over other cases. Acting upon this principle, he permitted appeals to be brought before him from judgments in the Surrogate Courts of any amount; but the propriety of this practice having been questioned, and doubts having also arisen as to the right assumed by the *Chief Justice* of removing the proceedings of other Courts into the Supreme Court by writ of *certiorari*, an opinion was obtained (by the Governor, I believe,) from the law officers of the Crown, who certainly differed from Mr. *Forbes* on both points. This difference did not, however, destroy the *Chief Justice's* confidence in the reasons which had governed his conduct; and in a paper in which those reasons are explained at great length, and with remarkable ability, he accordingly requested that the subject might again be brought under the consideration of the King's law officers, accompanied by those explanations from him which would put them fully in possession of the views he entertained respecting it; and in the meantime he continued, as I am informed, to act as he had previously done. To this exposition of his motives no answer appears to have yet been given by the law officers of the Crown; and

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

we cannot, consequently, ascertain what impression it may have made upon them. The question seems therefore to be still *sub judice;* and instead of being bound by either of these discrepant opinions, I am now required to declare which of them I will follow; for until this question shall have been finally determined by competent authority, I shall feel myself as much at liberty to pursue that course which appears to me to be the proper one, as if the point had never been raised upon any former occasion.

Having thus explained the circumstances under which this case is brought before me, I shall now give a short statement of the arguments which have been urged by Mr. *Forbes* in support of the appellate jurisdiction of this Court; and afterwards endeavour to show why I entertain *some doubts* upon one of his positions, and *altogether dissent* from the other.

Mr. *Forbes* contends, then, "*totis viribus suis,*"—first, that if the 49th of the late King had been wholly silent upon the subject of appeals, the Supreme Court of Newfoundland would have possessed an appellate jurisdiction exactly similar to that which is exercised by the Court of King's Bench: and, secondly, that this power, which it derives from the common law, is only modified, and not abolished, by the statute. In support of the former position, he remarks, that the right of appeal is one of the privileges which the subject enjoys by the common law; and in confirmation of this doctrine, I would here observe that, after a very careful research, I can only find, among the almost infinite variety of Courts which exist in England, a single one of a civil jurisdiction(*a*)

(*a*) The County Court for Middlesex, erected by 23d Geo. II., c. 33.

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

from the decision of which a Writ of Error, or something in the nature of an appeal, does not lie to some superior tribunal; and in the instance to which I allude, the judgments of the Court are declared, in the Act by which it is erected, to be final, in the most forcible and express terms. Still, however, it is impossible, upon looking at the summary proceedings of the Courts in this island, not to perceive that the principle "INTEREST REIPUBLICÆ UT SIT FINIS LITIUM" is deeply interwoven in the constitution of them all; and on this account I am hardly disposed to carry the analogy, in this particular instance, between the Supreme Court and the Court of King's Bench, *quite so far* as the late *Chief Justice:* at the same time I confess I should be afraid to deviate from his steps, if my opinion upon the other point advanced by him was in unison with his; but as I cannot, after the most attentive examination of his arguments, bring myself to agree with him on that point, I shall freely state the grounds upon which I am induced to think, that, whatever appellate jurisdiction this Court might have been entitled to at common law, in the absence of any legislative enactments in regard to it, *the 49th of Geo. III. has strictly limited and restrained it to judgments for sums exceeding* £40. Now it has been asserted by Mr *Forbes*, that the *sole object* of the 5th section of the abovementioned statute was to enable the *Surrogate*, or *Chief Justice, to stay execution upon judgments* in certain cases therein described, and that appeals may be brought in all other cases *without a stay of execution.* In his opinion, therefore, the provisions of that section were absolutely *cumulative;* and, of consequence, added to, instead of abridged, the appellate jurisdiction of the Supreme

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

Court. But at common law a writ of error operates as an *immediate supersedeas* (*b*); and the Courts before which those writs have been brought, have on some occasions declared (*c*) respondents to be in contempt who have ventured to sue out execution after notice of an appeal. A *stay of execution* is, indeed, a *necessary and inseparable incident to an appeal at common law*; and, accordingly, we find that the legislature has been obliged to pass several Acts (*d*) to enable respondents, in the particular cases therein specified, to take out execution upon judgments recovered by them in inferior Courts, unless the appellants should enter into proper security to prosecute their appeal, and also to satisfy and pay, if the judgment should be affirmed, the damages and costs thereby adjudged, together with all costs and damages to be awarded for the delaying of execution. It seems, then, to be "*luce clarior*" that if this Court has a right at common law to receive appeals upon judgments not exceeding £40, it must also possess at common law a power to suspend the execution of such judgment during the pendency of the appeal; but the section already quoted from the act of the 49th Geo. III. declares that in *all* cases of appeal, as soon as notice shall be given and security entered into as aforesaid, execution shall be stayed, but *not otherwise*; and, consequently this section has, by necessary implication, taken away any appellate jurisdiction which this Court might, if there had been no such section, have claimed under the common law; for this section only requires security to be given where the judg-

(*b*) 1 Vent. 331. 1 Salk. 321. 2 Str. 867.

(*c*) 1 P. Wms. 685.

(*d*) See 3d Jas. I., c. 8. 3d Car. I., c. 4. 19th Geo. II., c. 70; and 51st Geo. III. c. 124.

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

ment is of a certain amount, and only permits a stay of execution where security has been given; and thus it has effectually destroyed that property which essentially belongs to an appeal at common law. In a few instances the British Parliament has, as we have seen, abridged the quality which, by the common law, a writ of error possesses, of working a *supersedeas* of the judgment appealed from, by compelling the appellant to put in bail in error to entitle himself to a stay of execution; but in those cases to which this enactment does not apply, the common law rule still prevails; and I think I may affirm that an appeal which will not entitle an appellant to a stay of execution, *either conditionally by the statute law*, or *unconditionally by the common law*, is *wholly unknown to the law of England*. Upon these grounds, therefore, I feel myself bound to declare, that I have no authority to entertain this appeal. And here my observations on this case would naturally have terminated, if, having had occasion in the course of them to advert to the power of this Court to issue writs of *certiorari* as "*vexata quæstio*," I did not consider it necessary to avail myself of this opportunity to make known my sentiments and intentions upon a subject of great importance, and which has somewhat agitated the public mind. I shall, therefore, now proceed to vindicate the claims of the Supreme Court to such a power, by showing—

1st. That in the discussions of this question, we are warranted in drawing a parallel between the Supreme Court and the Court of King's Bench.

2dly. That the jurisdiction of the Supreme Court would be altogether imperfect and

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

unsatisfactory unless it possesses the power for which it contends.

3dly. That there is not a word in the Statute by which this Court was erected, either directly, or by inference, prohibitory of its exercising such a power; whilst, on the other hand, its right to do so is clearly deducible from some of *the express provisions of the Act*, as well as from *the spirit which runs through them all*.

And under each of these heads I shall adduce such arguments as must, I conceive, prove convincing to every reasonable mind.

In the first place, then, I shall, for the purpose of repelling any charge of inconsistency which may be brought against me for reasoning, in this instance, upon a supposed resemblance between the functions of the Supreme Court and those of the Court of King's Bench, after having expressed my doubts whether an analogy obtained between them upon another point, content myself with observing, that the appellate jurisdiction of the Court of King's Bench is founded on a different principle from the privilege it enjoys of issuing writs of *certiorari*. As the highest Court of common law in the kingdom, it is, except in a single case (*a*) standing upon a particular reason, a Court of appeal from all other Courts whose proceedings are governed by the rules of the common law; and this jurisdiction is obviously founded upon that natural principle which connects an inferior with a superior, and renders the acts of the former liable to the revision and control of the latter. Between these Courts and it, there is a sort of natural and necessary connection; but its relation to Courts whose proceedings vary from the ordinary course of the common law, is very

(*a*) The Court of Exchequer.

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

different; for with them it has no other concern than to prevent them from passing those limits which the common law has assigned them; and to enable it to do this, it is expressly armed with the writs of *certiorari* and prohibition. Accordingly it was held by Lord *Holt* (*b*), "that wherever a new ju-" risdiction is erected by act of Parliament, " and the Court or Judge that exercises this " jurisdiction acts as a Court or Judge of " record, according to the *course of the com-* " *mon law*, a *writ of error* lies on their judg-" ments; but where they act in a *summary* " *method*, or in a new course, different from " the common law, there a writ of error lies " not, but a *certiorari*." It is manifest, therefore, that the *writ of error* is not *co-extensive* with the *certiorari*; and, consequently, those restraints which the 49th of Geo. III. seems to me to have imposed upon appeals, do not necessarily extend to writs of *certiorari*. Having shown, then, upon what grounds, and for what purposes, the Court of King's Bench is clothed with its high and transcendent powers, I must next show that upon similar grounds, and for similar purposes, the Supreme Court ought to possess similar powers; and this I shall endeavour to do, by showing in what points a comparison will hold between them. Now, as the Court of King's Bench is the highest common law Court in England, so also it must be admitted that the Supreme Court is the highest Court in Newfoundland; for, without urging other arguments in support of this proposition, it is evident, from the use of the word 'Supreme,' which is a term of relative signification, that this Court must be above all others in this Island. But, in order to preserve an uniformity of rule and practice

(*b*) Salk. 263.

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

among the various Courts in England, the highest Court there is invested with power, as *Bracton* (c) expresses it, "*omnium aliarum corrigere injurias et errores*;" and I think, it must be conceded to me, that a comparison between the circumstances under which the two Courts are called upon to exercise their respective functions, will prove that it is even *more necessary* that a power to correct the injuries and mistakes of inferior jurisdictions should reside in the Supreme Court than in the Court of King's Bench, since the inferior Courts of this country must, from their constitution, be more liable to commit errors than the corresponding Courts in England. And this leads me to my second position—that the jurisdiction of the Supreme Court must be altogether imperfect and unsatisfactory if it does not possess the power to which it lays claim. Now, there is not in the act to which this Court owes its existence, any direct and express authority given to it to issue any one of the prerogative writs of certiorari, prohibition, mandamus, and habeas corpus; and, consequently, its right to issue any *one* of them must rest on precisely the same footing as its claim to issue any *other* of them. If, therefore, it can issue *one* of them, it certainly can issue *all* of them. But I apprehend that the most violent oppugners of the power of this Court to issue a writ of *certiorari*, are hardly prepared to say that the numerous inhabitants of this colony are totally deprived of that protection to personal liberty which the common law, enforced and improved by a number of statutes, has secured to British subjects by the writ of HABEAS CORPUS; and yet they must go this length if they deny the power of the Supreme Court to issue it;

(c) Lib. 3, cap. 7, Fo. 108, a.

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

for unless such a power resides in this Court, it unquestionably does not exist in this Island. Lame, imperfect, and most unsatisfactory, therefore, must the jurisdiction of the Supreme Court be, if it cannot issue the writ of *certiorari*; since the same argument which takes from it the power to do so, must, "if trusted home," likewise strip it of every claim to issue the writ of habeas corpus; AND THUS PLACE MORE THAN SIXTY THOUSAND BRITISH SUBJECTS BEYOND THE PALE OF THAT BARRIER WHICH OUR FOREFATHERS HAVE ERECTED AS THE BEST OUT-WORK AND SUREST DEFENCE OF PERSONAL LIBERTY (*d*). Without meaning, then, to push the "*argumentum ab inconvenienti*" anything like so far as my Lord *Coke*, who asserts that (*e*) NIHIL QUOD EST INCONVENIENS, EST LICITUM; and, *e converso*, that whatever is convenient is also lawful, I think I may fairly assume that nothing less than

(*d*) In speaking of the writ of *Habeas Corpus*, Mr. *Selden* describes it as "Libertatis personalis omnimodæ vindex "legitimus *ferè solus*." [Vindic. Mar. claus. edit. A. D. 1653.]—And with reference to the word "*ferè*," I would observe that it appears to me to have been here employed by Mr. *Selden* in the same sense in which it is used by *Horace*, in the line "Quèis paria esse ferè placuit peccata, laborant." (Sat. iii. Lib. 1.)—Upon which M. *Dacier* remarks, "Le mot "*ferè*" n'est pas pour *affoiblir*, ou *diminuer*, cette proposition universelle. Car il est vrai que les Stoiciens soutenoient, que toutes les fautes estoient egales sans aucune exception. Les Latins se servoient de "ferè" & de "propé," pour affirmer les choses plus modestement. C'est pourquoi Valla ecrit, que "feré utor hâc veste," signifie, je me sers *toujours* de cet habit, je n'en porte jamais d'autre." In rendering it, therefore, into English, we may, in the passage quoted from Mr. *Selden*, as well as in the line from *Horace*, express its meaning and force by the words *altogether*, or *entirely*.

(*e*) See a sensible note upon the force of *arguments from inconvenience*, by the late Mr. *Hargrave*, in his edition of Co. Litt. p. 66. a.

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

the positive language of a statute could divest the inhabitants of this colony of a claim to participate in one of the first blessings which the common law of England has conferred on those who enjoy the inestimable privilege of living under its benign and salutary influence. But so far is the 49th of the late King from containing any words derogating from the power of this Court to issue prerogative writs, that I am now prepared to show that its right to do so might, even in the absence of all other arguments in support of it, *be inferred and deduced from the provisions of that Act.* If we look, then, to the 11th and 12th sections of it, we shall find that a *strictly limited jurisdiction* is thereby given to certain Courts therein mentioned; but how, I would ask, are those Courts to be confined within the boundaries there assigned to them, if there is no power in the Supreme Court to check and control them whenever they evince a disposition to pass those limits? And how can this Court exercise the power which seems thus to devolve on it, if it cannot remove their proceedings by writ of *certiorari*, for the purpose of inspecting them, upon a sufficient suggestion that they are wandering from the path of duty prescribed to them? But the inference to be drawn from the 13th section is *still more forcible and conclusive*; for that section gives the *Chief Justice* authority to settle the forms of process in every Court in the Island, with the solitary exception of the Vice Admiralty Court; and, surely, this must imply a power on his part to enforce the observance of those forms, since it would be the extreme of folly and absurdity to impose upon him the task of settling them, if, when settled, they were not strictly binding and obligatory upon the Courts for

1823.

HUNTERS & Co. v. HERNAMAN & HOWARD.

whose use they were contrived: and yet it is apparent that they never can be thus binding and obligatory upon them, if their proceedings are not subject to the inspection and control of the *Chief Justice*. Most fully convinced, therefore, that the power to issue prerogative writs is vested in this Court, I shall exercise this power, without hesitation, whenever a sufficient cause is shown to me for my doing so, until I shall be positively enjoined, by a competent authority, to desist from doing it: and I shall adhere to this determination with invincible resolution and constancy, because the decision I have formed upon the other point of jurisdiction, in opposition to the practice, and to the powerful reasoning in support of that practice, of my predecessor in office, has satisfied myself, as I trust it also must every impartial person, that in the investigation of this question, my mind has been wholly free from any wish, or desire, to stretch the jurisdiction of this Court the smallest point beyond its due and legal limits.

HUNTERS & Co., appellants,
and
Trustees of JOHN LANGDON, respondents.

May 12th.

The Surrogate Court decided, that the law of *current-supply* does not extend to a *general trader*; and that the 49th Geo. III., c. 27, is not applicable to the *seal-fishery*.

THE appellants had furnished *John Langdon* with supplies for the fisheries, to the amount of £27 15*s.* 0*d.*, which *Langdon* had made over to the owner of a schooner fitted out by him for the *seal-fishery*; and the appellants had brought their action in the Court below against the trustees of *Langdon* for this sum, upon the ground that they were entitled, in the settlement of *Langdon's* estate, to a preference as current suppliers.

1823.

HUNTERS & Co. & Trustees of JOHN LANGDON.

Judgment had, however, been given against them, and reasons are assigned by the Surrogate in support of his decision: First, that *Langdon* was a general trader, and that credit had been given to him by *Hunters & Co.* as a *general merchant.* Secondly, that the 49th Geo. III., c. 27, is not applicable to the *seal-fishery*, but is entirely confined to the *cod-fishery.* In appealing, therefore, against this judgment, *Simms*, on behalf of the appellants, contended, that both the grounds upon which it was founded were bad in law, and referred to *Le Messurier's*, *Kelly's*, *Graham's*, and *Dolly's* cases, in support of his objection. On the other side, *Hayward* insisted that the judgment below was right in whatever light it may be viewed; and contended, as in the former case, that the Supreme Court had not power to review it.

The Court deferred judgment to a future day; and afterwards dismissed the appeal, on the grounds stated in the judgment on the foregoing case.

JOHN HANY *against* GEORGE & WILLIAM GADEN.

May 29th.

Spanish Dollars, at 5 shillings each, are not a legal tender in satisfaction of a demand for freight which, by the Bill of Lading, the Owner of the Goods had promised to pay in *British Sterling.*

THIS was an action, originally brought in the *Surrogate Court*, to recover the small sum of £2 2*s.* 6*d.*, the amount of freight of certain goods per the brig *Thomas*, of which the plaintiff is master; but referred to the *Supreme Court* for decision, by consent of parties. As the question was of great importance to the trade at large, namely, whether *Spanish Dollars*, at five shillings each, were a *legal tender* in payment of freight, the *Court* took time to consider it, and to search the records for some *precedent* to guide its judgment.

1823.

June 30th.

HANY
v.
G. & W. GADEN

THE following judgment was this day delivered by the *Chief Justice* in the foregoing case :—

This action, though extremely trifling in its amount, is yet, from the question which it involves, one of the most interesting suits to the members of this community at large, that will probably ever come before me; for upon the determination of it will, in some measure, depend the mode in which cash-payments are to be made, upon all contracts entered into by and with the inhabitants of this island. The facts of the case are shortly these: The plaintiff is the master of a ship in which certain articles belonging to the defendants were brought from England; and the bill of lading, signed by the plaintiff, expresses that freight was to be paid for them at St. John's, in *British Sterling*. Upon the delivery of the goods, the defendants tendered payment of the freight in *Spanish dollars, at 5s. each;* but the plaintiff declined receiving them at that rate, contending that he was entitled to demand payment in *coin of the realm;* and upon the defendants' refusal to comply with this demand, he immediately commenced an action against them. The question, therefore, that I am now called upon to decide, simply is, whether the value of a dollar in Newfoundland is 5*s. Sterling*, or not; and in order to explain the principle on which I have founded my opinion, upon a subject of so much interest and difficulty, I shall detail, at some length, the early circumstances which led to that attempt to alter the value of the dollar in this colony, which has given rise to the present controversy.

From that excessive emission of bank-notes which took place under the Bank Restriction Act, it is certain that the circu-

1823.

HANY
v.
G. & W. GADEN.

lating medium of England became very much depreciated (*a*); and that the value of bullion, as measured by this depreciated medium, experienced a corresponding increase. Indeed, the rise in the price of the *precious metals* was even in a *higher* proportion than that of other commodities, owing to the immense exportations of gold and silver which were annually made to the Continent for the support of our large armies on the peninsula of Spain; and thus a difference of from 25 to 30 per cent. for some time prevailed between the *mint-price* and the *market-price* of bullion. In this state of things it is obvious to observe, that the exchange upon England could not be prevented from falling considerably below par, since remittances might be made in cash, and a profit of nearly 20 per cent. secured thereon, after deducting all the expenses of its transit. From a laudable desire, however, on the part of the officers of government, connected with the department of finance, to check this discount upon their bills as far as they possibly could, and at the same time, from their not attending with sufficient judgment

(*a*) Many persons find a difficulty in understanding how a paper-medium can be depreciated, through any other cause than a *doubt of the solvency of the Government, or Company*, by which it was issued; but it is, nevertheless, perfectly true, that it may be depreciated by *excess* in the issue of it, where the most *unbounded confidence exists in the solvency of the body* by which it was circulated. Thus it may be stated as a proposition, so plain and incontrovertible that it may be considered almost an axiom, that the value of the circulating medium will always vary *directly* as the quantity of commodities to be bartered for it, and *inversely* as the quantity of such circulating medium. If, therefore, the latter *increase*, whilst the former remains *constant*; or if the latter increase in a *higher ratio* than the former, the value of the circulating medium must necessarily *decrease*. And such was, in reality, the case during the operation of the Bank Restriction Act.

1823.

HANY v. G. & W. GADEN.

to the *causes* which regulate their value, they frequently declined to negotiate them, except upon such terms as rendered it more advantageous to the party applying for them to make a remittance in *specie*; and this having been accordingly done in many instances, the want of a sufficient circulating medium soon became sensibly felt in most of the colonies. To remedy this inconvenience, different expedients were resorted to by them. In some, recourse was had to a paper medium, under the authority of an Act of the Colonial Legislature: but, as no such measure could be adopted here, it was deemed advisable, in the year 1811, to raise the value of the dollar (the only coin in circulation) to nearly the same standard to which silver had *then* attained in England. For this purpose an agreement was entered into by the great majority of the principal merchants, pledging themselves to receive and pay the Spanish dollar at 5*s*. A notice was contemporaneously issued by the officer commanding the troops, apprizing the public that dollars would be received at the army pay-office for 5*s*. each, in payment of bills of exchange, and issued to the troops at that rate: and, to give a farther sanction to this proceeding, a proclamation was issued by his Excellency the Governor, recommending the adoption of it by the inhabitants in general. That the intention of all these parties was, that the dollar should then be considered worth 5*s*. sterling (by which term "sterling" I here mean to apply to it the *English standard*, in contradistinction to those various *currencies* which obtain in the several colonies) there cannot be the slightest doubt; and it is equally certain, that this intention was carried into the most complete practical execution for a consider-

1823.

HANY
v.
G. & W. GADEN.

able period; during which no one ever hesitated in taking the dollar for 5*s.* in payment of contracts entered into at home, as well as in satisfaction of debts incurred in this country. But when, upon the arrival of peace, the demand for bullion to pay our soldiers abroad had ceased, the directors of the bank of England immediately began to restrain the issue of their paper, in the anticipation of a return to cash-payments; and the value of bullion having been thus reduced *below the mint price*, a complete change was wrought in those circumstances which had occasioned the *nominal* increase to the value of the dollar in this country. Anxious, therefore, to ascertain how far the effect may have survived, in this island, the cause which produced it, I have examined a great number of the leading merchants, in the hope of finding that some uniform practice had generally been pursued by them, either to allow, or reject, payment in dollars at 5*s.* each, where the transaction from which the debt accrued was of such a nature as to require that it should be liquidated in *sterling* money. And though a mere usage of such recent origin could certainly not obtain the force of a law in any other country than this, I should, notwithstanding, have supported it, from a consideration of the peculiar condition of this colony, if satisfactory proof of its existence had been furnished me. In short, I should have deemed it one of the strongest of those cases of which it is said, "COMMUNIS ERROR FACIT JUS." But so far from having adopted one uniform rule upon this point, the merchants appear to entertain the most opposite and contradictory opinions in regard to it. One stoutly maintains that he has an undoubted right to tender the dollar at 5*s.* in payment of a debt

1823.

HANY
v.
G. W. GADEN.

of *any* description; and tells us that it has been his invariable practice to do so. Another insists upon the same right and the same practice; but admits that the masters of ships from England have sometimes *reluctantly* consented to accept of payment in dollars at that rate, after some altercation upon the subject. A third considers the question open to great doubt; and has, therefore, in his dealings always endeavoured to prevent litigation, by inserting in his contracts a special stipulation relative to the value of the dollar. And a fourth contends, that there is no ground whatever for believing that a debt contracted in British sterling can be discharged by dollars at 5*s.* each. There is, in fact, almost "SUUS CUIQUE MOS." If, indeed, a question of this sort could be settled by a *majority*, there would, I apprehend, be a considerable one in favour of the doctrine of the *first* class; but it is a sound maxim, that "MULTITUDO ERRANTIUM NON PARIT ERRORI PATROCINIUM;" and it is also a settled rule of law, that *inconsistent* customs mutually destroy each other (*b*). I am, therefore, quite satisfied that there is no existing usage in regard to the subject-matter of this action, which ought to influence my judgment in the determination of it. Nor can the slightest use be made of the Governor's proclamation in the settlement of this question. As "*Arbiter of Commerce*," the King may, by his proclamation, legitimate foreign coin, and make it current in any part of his dominions; declaring at what value it shall be taken in payments. But Sir *William Blackstone* conceives (*c*) (and I think most justly) that this ought to be done *by comparison with the*

(*b*) Black. Com. Vol. 1. p. 78.
(*c*) 1st Com. p. 278.

1823.

HANY
v.
G. & W. GADEN.

standard of our own coin; and that otherwise the consent of Parliament would be necessary. Sir *Matthew Hale*, however, is of opinion (*d*) that the King may, by virtue of his prerogative, debase or enhance the value of the coin below or above its sterling value; and refers to a case wherein it was determined, upon great consideration, that a tender in base money, which Queen Elizabeth, by her proclamation, had ordered to pass current in Ireland, was legal. It seems, therefore, not to be clearly settled what are the precise limits of the royal prerogative upon this point; and, consequently, if the King's representative in this island had taken upon himself to *order*, by proclamation, that the dollar should be circulated for 5*s.* sterling, it would, perhaps, have become a nice question for me to decide upon the validity of it; since such eminent characters as Sir *Matthew Hale* and Sir *William Blackstone* have advanced opposite opinions upon it. But, fortunately, that question cannot be raised in this case; for the Governor's proclamation respecting the value of the dollar is purely *recommendatory*, and does not in any shape assume to prescribe a positive rule in regard to it. The greatest force that could attach to this proclamation, would be to sanction, by the concurrence of the Crown, an alteration in the value of the dollar, if the inhabitants would consent to make such an alteration; and we are thus brought back to the question, how far such an alteration has been made? And this cannot, as I have already shown, be determined by any usage, or custom, uniformly adopted, and uninterruptedly acted upon, by all the members of the community.—I must also here take occasion to remark, that I cannot

(*d*) 1 Hal. P. C. 194.

1823.

HANY
v.
G. & W. GADEN.

discover, by the records of this Court, that there has ever been a direct adjudication upon this point by the late *Chief Justice;* though I believe it was incidentally raised in several of the cases (*e*) which were decided by him; and from what I can collect from those cases, I have reason to think that his view of this subject very much corresponds with my own. I confess, then, I do not see by what right, "or colour like to right," the defendants in this action can insist upon the plaintiff's accepting of dollars at 5s. each, in payment of a demand upon them for freight which they have covenanted to pay in British sterling. They may tell him, it is true, that the people of Newfoundland have agreed to circulate the dollar at that rate; but to this it might possibly be a sufficient answer for the plaintiff, that he was not a party to such an agreement—"NON HÆC IN FÆDERA VENI."—But, admitting that the people of this country could, by general consent, and with the approbation of the Governor, have raised the value of the dollar to 5s. in such a manner as to make it current at that rate in *all transactions whatever*, still the defendants could not derive any benefit even from this admission, because there is not, as I have before demonstrated, any existing usage, or custom, founded upon such agreement, which can be applied to the determination of this question. The tender of payment which was made by the defendants being therefore not a legal one, it follows that judgment must be entered for the plaintiff. Lest, however, it should be erroneously supposed, that the *principle* upon which I have decided this action will be extended by me to con-

(*e*) I allude to *Stewart* v. *Hutchings*—*Cookesley* v. *Mitchell*—and *Hart & Robinson* v. *A. H. Carter.*

1823.

HANY
v.
G. & W. GADEN.

tracts entered into between parties who all reside in this Island, it will be proper that I should give some explanation of my opinion and intentions upon this point. Now it is conceded, on all sides, that for several years past the dollar has obtained a *currency* (*f*) in this place for 5s.; and that such is always understood to be its value in all the ordinary transactions of life.—When the butcher tells me that beef is a shilling a pound, his meaning always is, that I may have five pounds for a dollar; and when the merchant sells me a cask of wine for £50, he has not the most distant idea that he is asking more than two hundred dollars for it. Nay, further, many salaries which were formerly paid in *sterling* money, are now paid in what I must call the *currency of Newfoundland*. In a word, there is not a contract entered into *here*, in which there is not an implied understanding between the parties to it that any debt arising out of it may be discharged by a payment in dollars at 5*s*. each. The practice, itself, I have already traced to its original source; and shown that its existence is derived from that want of a circulating medium which has at one time or other induced most of the colonies to attempt to prevent the exportation of their coin, by either reducing the weight, or enhancing the

(*f*) When the several colonial legislatures first altered the value of their coins, they undoubtedly thought that the alterations prescribed by them would be real, and not nominal, ones. They soon found, however, that their power extended no further than to make those coins pass *current* at a higher nominal value in the particular countries which were subject to their laws; and that in all transactions between them and the parent kingdom, no change whatever took place in the value of the coin. Every coin had, therefore, two values, a *sterling* and a *current* one; and I think that the same effect has been produced in Newfoundland, with respect to the dollar at least, by the inhabitants consenting to circulate it for 5s.

1823.

HANY v. G. & W. GADEN.

nominal value, of it. The folly and injustice of such a proceeding are now pretty generally felt and acknowledged: but when measures of that sort have been once adopted, and acted upon for any length of period, it becomes very difficult for a community to get back to the path from whence they have strayed. Besides, the evil attending their deviation from it, soon brings about its own cure; for though most legislatures have been weak enough to suppose, that the value of money depends upon *them*, and that they may alter it as they please, yet their endeavours to do so have always proved abortive. The universal rule is, that the value of coins, as of all things else, must ever depend upon the abundance of, and the demand for, them. In spite, therefore, of any arbitrary decree to raise the *nominal* value of money, its true and intrinsic value, as measured by this universal rule, will always remain the same; for prices will quickly adapt themselves to the new standard; and the only change which will be produced by it will thus, after a short period, become merely a change of words and sounds —"*Vox, et præterea nihil.*" At first these changes of currency necessarily work some injustice, by compelling a creditor to take less money in satisfaction of his debt than he is fairly entitled to; but upon contracts subsequently entered into, they have no real operation whatever. It is manifest, however, that if we were *suddenly* to abandon the now prevailing currency, all those persons who have contracted debts under it would suffer very serious injury; and unless some Parliamentary enactment, or some decision by His Majesty in Council, shall take place upon this subject, I shall always hold, that all contracts entered into in this

1823.

HANY
v.
G. & W. GADEN.

country, whilst the dollar passed for 6*s.* may be discharged by a payment in dollars at that rate. That dollars are the only coin which can circulate here, whilst no distinction is made between them and crown-pieces, which contain more silver by a ninth part than the dollar does, every man of understanding must immediately perceive; and it seems, therefore, to be exceedingly desirable that some mode should be adopted of transposing the currency of Newfoundland into British sterling; as is the practice in other colonies which have established a currency different from that of the Parent State. From the want of some such measure, it is, I observe, usual for the merchants here to consider *bills of exchange* as synonimous to *English sterling*; and to take the difference between the value of the dollar, under different circumstances of the exchange, as the common measure of Newfoundland currency and British sterling. But this is, certainly, a fallacious and improper standard of comparison; for the exchange, i. e. the *computed* exchange, depends upon *two* circumstances, viz., 1st, the quantity of bills in the market, and the demand for them; which is termed by an ingenious writer (*g*) the *real* exchange; and 2dly, the relation which exists between the currency of the country in which the bill is negotiated, and of that in which it is payable; and this is denominated by him the *nominal* exchange. So far, therefore, as the computed exchange is influenced by the nominal exchange, it is a correct measure of the difference between the currencies of any two countries; but as the com-

(*g*) Mr. Blake, who has explained the principles which govern the exchange in an able and most luminous treatise upon that subject.—See also an excellent pamphlet by Mr. *Huskisson*, entitled "The Question," which contains much useful and highly instructive information relative to currencies.

1823.

HANY
v.
G. & W. GADEN.

puted exchange is also affected by the real exchange, which is liable to continual fluctuation, the computed exchange ought never to be taken as the measure of that difference, without previously ascertaining what the state of the real exchange actually is. But it is not for me to suggest a remedy for the many inconveniences which grow out of the crude and anomalous condition of our currency (*h*). My province, I am sensible, is "JUS DICERE, ET NON JUS DARE:" and I trust I am one of the last men upon earth to usurp an office that does not properly belong to me. Conceiving, however, that it may be useful that my sentiments upon this important subject should be generally known, and perfectly understood, I have investigated it with the closest attention; and in the hope of preventing litigation, by an early publication of the rules by which I shall henceforth be guided in the determination of all questions which may arise out of it, I shall now arrange those questions under four general heads, or divisions; and concisely state the rule which appears to be applicable to each of them.

1st. Where contracts are formed, or a debt in any way accrues, in *Great Britain*, the presumption seems to be, that the parties

(*h*) Among the evils attending the present state of our currency, I cannot forbear to notice the want, which must necessarily be felt, of a *genuine* silver coin below the value of a dollar. That five shillings of the new English coinage should be given in exchange for a dollar, which does not contain *nine-tenths* of the silver that they do, no one, I think, can suppose: and it is even less probable that five quarters of a dollar (which contain rather more silver than five good shillings) should be given in exchange for one dollar. The necessary consequence, therefore, of not raising the value of the *fractional parts* of the dollar in the *same proportion with the dollar*, was to drive those fractional parts out of the country; and unless their place had been supplied by some spurious remnants of the old coinage, it would have been very difficult, and almost next to impossible, to procure change for a dollar.

1823.

HANY
v.
G. & W. GADEN.

must have understood that payment was to be made in *British sterling*. I shall, therefore, by a *general intendment of law*, consider this as forming an essential part of all such contracts; and shall, consequently, hold, that they cannot be discharged by payments in dollars at 5*s*. a-piece. And, *a multò fortiori*, that a payment of that description cannot be a legal satisfaction of a contract in which, *ex abundanti cautelâ*, the parties have inserted an express stipulation for payment in *British sterling*.

2dly. By an agreement—*express* on the part of those persons who signed it, and *implied* on the part of the other members of the community, by their acquiescence in it for nearly twelve years past—the dollar has obtained a general currency in this island for 5*s*. In all transactions and dealings, therefore, which are wholly confined to Newfoundland, I shall enforce this general agreement as strictly as if the parties had, in each particular case, covenanted to accept of payment in dollars at that rate.

3dly. All debts which may be contracted between the inhabitants of this island, and of those countries (for example, Canada and Nova Scotia) where the dollar also passes for 5*s*., may be satisfied by payments in dollars at that rate; unless there be any circumstance attending the transaction out of which the debt arose, from which it may be fairly inferred, that the parties intended that payment should be made in British sterling.

4thly. In our intercourse with those countries which have a currency of their own, different from British sterling, and also different from the Newfoundland currency (*i*),

(*i*) By an act of the New Brunswick legislature the nominal value of the dollar *has lately been raised to 5s. 4d. in that province!!!*

1823.

HARY v. G. & W. GADEN.

we must adopt the principle, "*quam legem exteri nobis posuere, eandem illis ponemus;*" and admit evidence of what their practice is respecting the payment of debts growing out of contracts which have their inception here, and their completion in any of those countries. Thus, if freight, for instance, from Newfoundland, is paid by them in their currency, freight from thence to Newfoundland will also be paid by us in our currency; but if it has, by the course of trade, been generally settled in British sterling, the same custom will also be observed by us.

In framing these rules for my future guidance, I have been obliged, in the absence of any municipal law to regulate our currency, and of any judicial precedent to determine how far custom has supplied the place of such a law, to resort to principles of *natural equity;* and I cannot close my observations upon this most interesting subject, without expressing my unfeigned diffidence in the powers of my mind to grapple with a question of such vast magnitude, and accompanied with circumstances of such singular difficulty. Under the strong impression of this feeling, I shall, therefore, earnestly recommend any person who may be dissatisfied with the principle upon which I profess to decide it, to avail himself of the first opportunity of bringing the point, by an appeal from my judgment, under the consideration of his Majesty in Council.

1823.

June 9th.

WILLIAM NEWMAN *against* The CHURCH-WARDENS.

An election of *Church-wardens*, according to the prevailing practice in this country, is good: and church-wardens so elected, have a right to remove from the church any articles they may deem injurious to its appearance, or offensive to the members of the congregations.

THE several points which arose in this case are stated, and the law applicable to them explained, by the *Chief Justice*, in the following judgment:—

Per Curiam. The only question for the *Court* to decide in this case is, whether the defendants were authorized, *as Church-wardens*, to remove from the plaintiff's pew certain curtains and other fixtures which they seem to have considered injurious to the general appearance of the church, and offensive to some of the members of the congregation? In the course of the trial an attempt was, indeed, made to show that the defendants had not been elected Church-wardens *according to all the forms and solemnities required by law*; but I then expressed a strong opinion that it was quite sufficient, in an action of *this* nature, for the defendants to prove that they had *acted as Church-wardens*, and been acknowledged as such by the community at large. Upon this point, the case of *Berryman* v. *Wise*, 4 T.R. 366, is quite conclusive; for there Mr. Justice *Buller* is reported to have said, that "in the case of all peace-officers, justices of "the peace, constables, &c. it was sufficient "to prove that they acted in those charac-"ters, without producing their appointments "(and that even in the case of *murder*); and "that in actions for tithes it is not necessary "for the incumbent to prove presentation, "institution, and induction; proof that he "received the tithes, and acted as the in-"cumbent, being sufficient." There can be no doubt, therefore, but that proof of the defendants having acted as Church-wardens

1823.

NEWMAN v. The CHURCH-WARDENS.

is all that can be required in this action. I do not, however, by any means, regret having allowed an investigation into the nature of the defendants' appointments; because that investigation has enabled me to deliver an opinion upon it which will probably prevent the question from being brought before me again in another shape. I have no hesitation, then, in declaring that, upon an attentive consideration of all the evidence which was adduced under this head, I am fully satisfied that the defendants were *duly elected Church-wardens*. It is true their election was not conducted precisely in the same manner that it would have been in England; but neither was it *possible* that it should be so; for (to pass by other trifling deviations from *mere form*) the oath which is taken in England by Church-wardens, and upon the neglect to administer which in this country so much stress has been laid by the plaintiff, ought to be taken by the Church-wardens in the *Archdeacon's* Court; and, consequently, could not be administered in this country, where there is no such Court (*a*), in the *same way* in which it is done in England. But if we look to the disputes which long prevailed between the temporal and spiritual Courts with respect to the right of the latter to administer oaths to Church-wardens (*b*); and, at the same time, consider that the tendency of the oath (*c*) which, by the permission of the temporal Courts, is now administered to Church-wardens, is merely to place them under a more solemn obligation to discharge faithfully their duty towards the

(*a*) Since this judgment was delivered, an Archdeacon has been appointed to Newfoundland.
(*b*) Gibson's Code, 960.
(*c*) See it at length in Gibs. 216.

1823.

NEWMAN v. The CHURCH-WARDENS.

church, we must perceive that the oath being intended for the benefit of the church, and the right to administer it being conceded to it as an indulgence, the church is at liberty to wave this privilege, upon the principle "QUIS-QUIS POTEST RENUNCIARE JURI PRO SE INTRODUCTO; and that, consequently, an oath of that nature cannot be deemed essentially necessary to the validity of the appointment of a Church-warden in this country. The effect of the plaintiff's argument throughout, is to prove too much: for he contends for a conformity, "*in omnibus*," between the usages of England and of this country; forgetting that if the church here were really clothed with the same character, and invested with the same rights, which it enjoys in England, he would be liable to the payment of tithes, Easter-offerings, and other ecclesiastical dues which are, unquestionably, of far greater value to the church than her privilege of compelling Church-wardens to take an oath for the faithful execution of their office. But we are taught by reason and good sense, as well as by act of Parliament (*d*), that the law of England is the law of Newfoundland, so far, only, as it can be applied to the situation and circumstances of this colony; and the slightest attention to its present situation and circumstances, must convince us that a very small portion indeed of those parts of the *canon* law, which, by long custom, have been incorporated into the laws of England, are capable of being carried into operation here. The utmost, therefore, that can be insisted on by the most rigid stickler for form, is, that our usages should conform to those of the mother-country as *closely as circumstances will permit:* and trying the practice which has prevailed here, in regard to

(*d*) 49th Geo. III., c. 27, s. 1.

1823.

NEWMAN v. The CHURCH-WARDENS.

the appointment of Church-wardens, by this standard I can find no fault at all with it. On the contrary, I have observed with much satisfaction that the practice here seems to follow, as closely as possible, the rule prescribed by the 89th canon(*e*); and knowing as I do, that the most important deviations (*f*) from that canon will not impugn the validity of the election of Church-wardens in England, provided there be a *custom* to warrant such departure from it, I have no scruple in pronouncing the defendants, who were chosen according to the custom which has uniformly prevailed in this island, to have been *duly elected*.

Assuming, then, that the defendants were Church-wardens, properly chosen and appointed, it remains to be determined whether, as such, they had authority and power to remove the curtains and other articles from the plaintiff's pew in the manner they did. And I conceive that they clearly did possess such authority and power. That the owners of pews have not an absolute, but only a qualified, right to them; and that they cannot, consequently, make any alteration in them which has the remotest tendency to injure the appearance of the church, or to annoy any member of the congregation, is a position too plain to admit of an argument: but from this proposition it follows, as a corollary, that a power must be lodged somewhere to determine what alterations are injurious to the appearance of the church; and by the law of England (*g*) such a power is placed in the hands of the Church-

(*e*) See *Catten* v. *Barwick*, 1 Str. 145.

(*f*) By *custom*, Church-wardens may be chosen by a select vestry, by the old Church-wardens, or by the Lord of the Manor.

(*g*) Burns's Eccles. Law, vol. 1, p. 336.

1823.

NEWMAN v. The CHURCH-WARDENS.

wardens, who may, with the consent of the parson, pull down anything which has been erected in the church by an individual without due license. I apprehend, therefore, that the proceeding complained of hardly needed the sanction of a vestry resolution, though that certainly gives additional force to it. And, with respect to the objection which has been urged against the notice by which the meeting of the vestry was called, I shall only remark, that as the use of a notice is to apprize interested parties of the subjects which will be brought under the consideration of the vestry, in order that they may appear to defend their rights, a defect in the form of the notice must necessarily be aided by the appearance of the party; and, consequently, that *as the plaintiff was actually present at the meeting in question*, he cannot have sustained any prejudice from a defect in the form of the notice by which it was convened.

A power to remove any fixtures placed in the church by an individual, being thus, as I conceive, vested in the Church-wardens—at any rate, in the Church-wardens and vestry—it is not for this Court to say whether or not they have exercised this power with discretion; because I have no *legal* rule by which to measure their conduct; and, in the absence of such a rule, I am aware that my opinion upon it is not entitled to any particular regard. In justice to the defendants, however, I must add, that they do not appear to me to have been influenced by those hostile and vindictive feelings towards the plaintiff which he is disposed to ascribe their conduct to: and I am persuaded they will readily restore the curtains and other articles (*h*) to him, upon an undertaking on

(*h*) Quære, if the plaintiff's property in them be extinguished or not.—See Burns's Eccles. Law, vol. 1, p. 337.

his part to desist from any farther attempt to fix them in the church. 1823.

JOHN L.L. CHANCEY *against* T. H. BROOKING, administrator to the estate of JOHN MURPHY.

June 16th.

A Judge is bound to follow the decisions of his predecessors in office.

THIS was an action to recover £27 14*s.* for the occupation of certain premises belonging to the plaintiff. The nature of the suit is sufficiently explained in *the following judgment.*

Per Curiam.—It is admitted that the premises, for the use and occupation of which this action has been brought, are what is termed in this country a "*fishing-room*;" and the question for the decision of the *Court*, therefore, is, whether the owner of *such* premises is clothed with the rights of a *landlord in England*, or is only entitled to those privileges, with respect to priority of payment, which are conferred upon the "*current supplier*" by the 49th of the late King; for I assume that the same rules which are prescribed by that act for the distribution of the estates of persons *declared* insolvent, have, by the uniform usage of this country, been applied to the distribution of the effects of persons who have *died* insolvent; and that this custom has been sanctioned, in several instances, by judicial recognition. Now, if the point which is thus brought under the consideration of the *Court* had been a *new* one, it would, certainly, have deserved and received a great deal of attention from me; but it has been so fully investigated, and so ably settled, by the late *Chief Justice*, in the case of *Hunt, Stabb, Preston & Co.* v. *the Trustees of the estate of*

1823.

CHANCEY, v. BROOKING.

Lemessurier (a), that nothing remains for me but to follow, *implicitly*, the rule so clearly laid down by him. In his judgment upon that case, Mr. *Forbes* draws a distinction (in my opinion a very sensible one) between buildings erected for *dwelling-houses*, without any immediate reference to the fisheries, and those *temporary structures* which have been erected for the sole and express purpose of carrying on the fisheries; and he conceives that the proprietors of the former possess the same rights of distress as the English landlord; whilst the owner of the latter can be considered in no other light than as a supplier to the fisheries; to which those sheds or cabins are merely an *accessary*, governed by the same laws which prevail with respect to other branches of supply. Concurring, therefore, as I do, with Mr. *Forbes*, in his view of this subject, I shall, of course, decide in conformity to it, that the plaintiff in this suit, is only entitled to share in the distribution of the effects of the intestate as a *current supplier;* and I shall, also, take this opportunity of declaring that my decision would have been the *same*, if my own opinion upon the question had even been at variance with that of my predecessor in office. Of all the evils which can afflict a country, *uncertainty with regard to those rules which regulate our lives and properties* is, undoubtedly, one of the greatest; for the slighest reflection will convince us that the condition of society must ever be extremely miserable, "UBI LEX EST VAGA AUT INCOGNITA." From the peculiar constitution of this colony, that evil has existed here in a degree unknown to the other parts of his Majesty's dominions; and to that cause we may, in a great measure,

(a) P. 222.

1823.

CHANCEY v. BROOKING.

ascribe that spirit of litigation which has been so remarkably prevalent among the members of this community. It is obviously, therefore, of greater importance to the peace and happiness of any country that its laws should be *clearly defined*, than that they should possess *superior excellence*; since men may enjoy tranquillity and security under a code of laws by no means perfect; whereas they never can be quiet and secure where the laws are obscure and liable to arbitrary changes. In other words, it is of much less consequence *what* the rule is upon any given subject, than that there should be *some fixed and settled rule* in regard to it. But it is evident that this certainty, so desirable and so necessary, can never be attained if judges allow themselves to think that they are not strictly bound by the solemn determinations of those judges who have preceded them; for if the decisions of a judge may be over-ruled and overturned by his successor, a new rule may be introduced by every new judge; and thus *variety* would usurp the place of *certainty* in our system of jurisprudence. By authorizing the *Chief Justice* of Newfoundland to decide how far the laws of England can be applied to that anomalous state of things which exists in this island, the Imperial Parliament has invested him with a larger share of power than is, perhaps, delegated to the Chief Magistrate of any other British colony; and, happily for the interests of this country, that power was lately committed to a man whose incorruptible integrity, firm independence, indefatigable industry, acute genius, and sound learning, eminently qualified him for the discharge of the arduous and important duties of his situation. By him most of the questions depending upon *local usage* have

1823.

CHANCEY
v.
BROOKING.

been already determined; and wherever I find that a point has been *expressly* decided by him, I shall feel myself imperatively bound by his decision upon it. Nor do I apprehend that his reasoning can often fail to convince me of the propriety of his opinions; but should this ever happen in any case, I shall still conform my judgment to his decision; taking care, at the same time, to state freely the grounds upon which I venture to differ from him; in order that the party against whom I shall consider myself obliged to give judgment, may, if he thinks fit to act upon my view of his case, appeal to His Majesty in Council; by whom alone, as I conceive, such decision, if erroneous, can be reversed. And until it shall have been so reversed, it will be regarded by me as a rule from which, though I may disapprove of it, I shall not consider myself by any means at liberty to depart,—"LAPIS MALE POSITUS NON EST REMOVENDUS." By adhering rigidly to this line of conduct, I trust I shall accelerate the arrival of the period when the laws of Newfoundland will be as clearly ascertained, as well understood, and as satisfactorily administered, as those of the other parts of the empire; and that I shall have the gratification to see the spirit of litigation decline, as persons daily become better acquainted with the nature and extent of their respective legal liabilities and rights.

1823.

June 19th.

THE liability of Government property in this town to assessment, under the 1st Geo. IV., c. 51, is the question submitted to the consideration of the *Chief Justice* by the following memorial:—

To the Hon. RICHARD A. TUCKER, *Chief Justice of the Island of Newfoundland, &c. &c. &c.*

The Memorial of the Appraisers under the Act of the 1st Geo. IV., c. 51, for the rebuilding the town of St. John's, and for indemnifying persons giving up ground for that purpose,

HUMBLY SHOWETH:—

That your memorialists were duly appointed Appraisers under the said Act; that in conformity with such appointment they proceeded to value all the property within the limits of the said town; in the doing of which, your memorialists had some doubts what were the limits of the said town of St. John's; and, also, whether Fort William, Fort Townshend, and other buildings belonging to Government, came within the meaning of the said Act; and in order to remove such doubts, they made application to Mr. *Forbes*, the late Chief Justice, for his opinion and interpretation of the said Act, who gave them his opinion: That the town of St. John's was defined and laid down in a plan to be found at Government-house, and designated "A Plan of the Town of Saint John's" by the Act of 51st Geo. III., cap. 45; and that as the Act was framed for the express purpose of arresting the progress of fire in future, that the Government buildings were equally protected with other

Government property in St. John's —*ex.gr.*, a *barrack* —is not liable to assessment under the 1st Geo. IV., cap. 51.

The general rule that the King is not bound by Acts of Parliament, unless he be particularly named therein, is open to some exceptions; for if the Act be professedly made *for the remedy of some great public evil, the advancement of religion, the encouragement of learning*, or *the support of the poor*; it will bind the King, though he be not named in it, if it does *not trench upon any of his established prerogatives*, or *directly tend in its operation to expose him to any pecuniary charge.*

1823.

Case submitted by the APPRAISERS under 4th Geo. III., c. 51.

property by the widening the streets; and that as individuals were compelled to pay for the ground so taken away by an assessment on their property, Government could not shrink from a tax that was laid on the subject, particularly as they partook of the protection afforded by the Act.—Your memorialists delivered an account of the assessment on all the Government property to his Excellency the Governor, and demanded payment of him. His Excellency paid your memorialists the assessment (amounting to £229 18*s.* 4*d.*) on the Government-house, Navy-yard at the South-side, the Ships'-room, and all the public property that he considered immediately under his direction, but desired your memorialists to call on the officers of the several departments for the assessment of the property under their charge, which they have refused to pay. Your memorialists beg leave to state, that the garrisons were not valued as fortifications, but only in their value as houses, tenements, &c. Your memorialists exhibited their book of assessment to the Governor, when finished, who approved of the same. That they afterwards laid it before a public meeting of the said town called for that purpose, where it was also approved of. That it was also laid a considerable time for inspection at the house of Mr. *Thomas*, one of the appraisers, while the public were invited by advertisement to examine it for the purpose of ascertaining if their respective properties were correctly recorded in it; many of the proprietors availed themselves of this opportunity; others did not, where but two material objections are made, which were decided on, and overruled by Mr. *Forbes*.

Your memorialists, therefore, pray the

1823.

Case submitted by the APPRAISERS under the 1st Geo. IV., c. 51.

advice of your honour in the premises; whether the public buildings in question, so assessed by your memorialists for the protection the Government buildings derive from the widening of the streets (the streets having been widened in front of the ordnance-yard, and other public buildings), are subject and liable to such assessment? or whether your memorialists must retrace their steps, and assess the whole town anew, to make up the deficiency occasioned by the non-payment of the sums in question?

WM. THOMAS,
ALEX. HAIRE,
HENRY SHEA,
GEO. LILLY.

St. John's, 19th June, 1823.

Upon the foregoing memorial, the following Order was immediately made :—

Let such notice of the application which has been made to the *Court*, by the foregoing memorial, be given to those officers of Government who have refused to pay the several sums of money assessed upon the public buildings respectively committed to their charge, as will enable them to justify (if they shall think proper to do so) their refusal to pay the same, either by a *written statement* of the grounds upon which they conceive the property of the Crown to be exempt from the operation of the Act of the 1st Geo. IV., c. 51, or by *personal appearance* in this Court, on Monday the 23d instant, at 11 o'clock in the forenoon.

R. A. TUCKER.

Supreme Court, 19th June, 1823.

And on this day (the 23d instant) the *Chief Justice* delivered his opinion upon the question in these terms :—

1823.

Case submitted by the APPRAISERS under the 1st Geo. IV., c. 51

In considering the question which has been proposed to me by the appraisers, appointed under the Act of the 1st Geo. IV., c. 51, for "the rebuilding of the town of St. John's, in Newfoundland, and for indemnifying persons giving up ground for that purpose," respecting the liability of *Government* property to an assessment under the provisions of that Act, I have found it difficult to repress a wish that I might feel myself authorized to pronounce that the appraisers were warranted, by a fair construction of the Act, in including property of that description in their rates; for, in the first place, the events to which that Act owes its origin were so afflicting and calamitous to the inhabitants of this town, that it is impossible not to desire to extend its operation *in their favour* as far as possible; and, independently of the warp which may thus naturally be produced upon my feelings, I am always anxious to concur in opinion with Mr. *Forbes*, who, I am told, was quite satisfied that Government property was subject to this assessment (*i*). But whatever sympathy I may indulge for the misfortunes of this community, and whatever deference I may entertain for the judgment of the late *Chief Justice*, I am, at the same time, deeply impressed with a sense of that duty which attaches to the situation I fill; and I have, accordingly, endeavoured to dismiss from my mind every circumstance which might tend to create an influence adverse to the faithful discharge of that duty. When *legal* points are submitted to me, I shall always form my decision upon them by the strictest and most inflexible regard to what I conceive to be the rules of law applicable to them. It is, then, I must

(*i*) This was, however, it is to be observed, only an *extra-judicial* opinion.

1823.

Case submitted by the APPRAISERS under the 1st Geo IV., c. 51.

observe, a settled rule of law, that the King is not bound by Acts of Parliament, unless he be particularly named therein (Black. Com. vol. 1. p. 185.) To this rule, however, there are, I am aware, some exceptions; and, perhaps, the rule itself ought always to be laid down with this qualification —that where the King is not particularly mentioned in a statute, he will not be bound thereby, unless the statute be professedly made for the *remedy of some great public evil*, the *advancement of religion*, the *encouragement of learning*, or the *support of the poor;* in either of which cases he will be bound by it, whether named therein or not, provided *it does not trench upon any of his established prerogatives*, or *directly tend in its operation to expose him to any charge*. Thus, it has been decided, that the 5th and 6th Edward VI., c. 16, which was made for the prevention of corruption in the buying and selling of public offices, is so far binding upon the King, that he cannot dispense with the liability which the Act imposes upon persons convicted of an offence against the provisions of it (Co. Litt. 234, a.; 3 Inst. 154.) So, also, it was solemnly adjudged in the Magdalen College case, that the 13th Elizabeth, c. 10, which was intended to promote the interests of religion, by restraining the alienation of the property of the church, does extend to the King (11 Rep. 66.) And the same rule was recognized in the case of the *King* v. *the Bishop of Norwich, and Others*, which depended upon the construction of the 31st Elizabeth, c. 6, for the prevention of simoniacal presentations to benefices (Cro. Jac. 385.) But in these, as well as in many other cases which might be cited to the same purpose, the statutes under which they arose did not infringe any

1823.

Case submitted by the APPRAISERS under the 1st Geo. IV. c. 51.

branch of the Royal prerogative, nor subject the Crown to any direct imposition or burden. It was only incidentally and collaterally that the King could be affected by them; and yet their several objects might have been completely evaded and defeated, if they had been altogether inoperative upon him. It was, therefore, most properly determined, that he was bound by, although not particularly named in, them. I cannot, however, find a sentence in any book of law which has fallen under my observation, that will warrant me in carrying the exceptions to the principle that the King is not bound by Acts of Parliament, unless particularly named therein, a single point beyond what has been done in the cases just mentioned; but, on the contrary, I perceive, that wherever a case does not fall within any of those exceptions, the general rule is most strictly observed and maintained. For example, it is admitted that the King is exempt from the payment of rates under the 43d Eliz. c. 2 (Nolan's Poor Laws, vol. 1, p. 65); and the reason of this exemption seems clearly to be, because he is not named in the Act (Nolan, p. 122). But the 43d of Eliz. is, as is well known, the foundation and corner-stone of our whole system of poor laws; and has accordingly received the most liberal construction for the advancement of the interest of the poor, which the judges could possibly give to it. If, therefore, they could, in *any* case, have been induced to depart from the general rule, we are authorized to believe that *this was precisely the case in which they would have done it.* Let us see, then, since the 43d of Eliz. and the 1st Geo. IV. are, from the objects for which they provide, *equally entitled to a liberal interpretation*, whether there is any

1823.

Case submitted by the APPRAISERS under the 1st Geo. IV., c. 51.

expression, or word, in the *latter*, which will enable us to push its operation beyond the limits which have been assigned by Courts of Law to the *former*. Now, the 1st Geo. IV. directs, that the assessment to be made in pursuance thereof, "shall be paid by all and "every the proprietors of houses, tenements, "lots, and parcels of ground, lying and "being within the limits of the said town of "St. John's;" and the 43d of Eliz. enjoins the overseers "to raise weekly, or other-"wise, by taxation of every inhabitant, "parson, vicar, and other, and of every oc-"cupier of lands, houses, tithes impropriate, "propriations of tithes, coal mines, or sale-"able underwoods, in the parish," such sums of money as may be necessary to accomplish the object of the Act. If, therefore, the King is not included under the designation of an "*inhabitant*," or the "*occupier of lands and houses*," I cannot discover any reason for including him under the description of the "*proprietor of houses, tenements, lots, and parcels of ground.*" Indeed, the two statutes appear to me, with reference both to their subject-matter and their phraseology, to run "*quatuor pedibus*" with each other; and I am, consequently, most decidedly of opinion, that the same construction which has for more than two centuries been given to the one, must also prevail in regard to the other. But it may, perhaps, be urged, that the King's exemption from the poor rates in England is a *personal* privilege, and that arguments drawn from it ought not to be applied to a question relating to Government property not in the *personal* possession of his Majesty. To this I answer, that it was always holden, *procul dubio*, that property occupied *solely for the public use*, is not subject to assessment under the 43d of Eliza-

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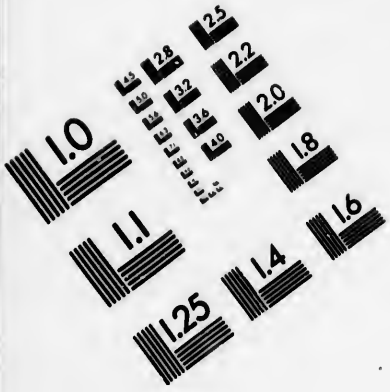

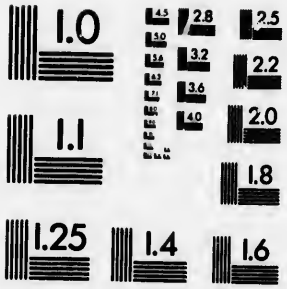

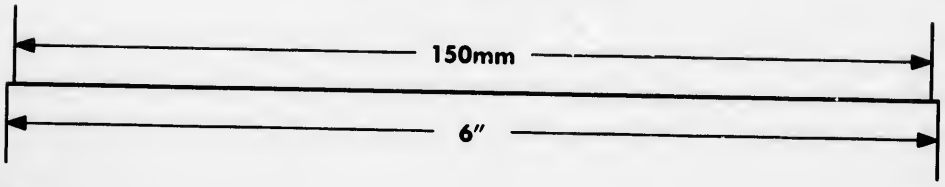

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1823.

Case submitted by the APPRAISERS under the 1st Geo. IV., c. 51.

beth; and the question which arose upon that Act was, whether the King was not liable to the assessment on account of his *beneficial occupation* of the premises? (*k*) The argument against the assessment of public property, is, therefore, *stronger* when it is not in the personal occupation of His Majesty than when it is; and I confess that the doctrine, that public property shall be taxed for the promotion of any public object whatever, is wholly new to me, and seems to involve an absurdity like that of taking from the right hand in order to pay the left. In fact, the appraisers were so far aware of this, that they have not rated the Court-house and other public buildings, which they consider as belonging to the *town*; but the distinction which they thus endeavour to draw between the *British public* and the *public of Newfoundland*, is not, I conceive, warranted either by the language, the intention, or the spirit of the Act under which they derive their authority; and it would, I apprehend, require a perfectly clear and explicit enactment to subject a barrack, erected for the protection of the town against enemies, to a contribution to any expense which may be incurred for the sake of preserving it from the destructive effects of fire. In the absence, therefore, of any such enactment, I have no hesitation in declaring that this Court has not the power to coerce the payment of the assessment which has been made upon any part of the property belonging to the Government. If such payment has been *voluntarily* made in one in-

(*k*) Upon this principle I should have held, that the occupiers of Government houses, as the Assistant Commissary General, the Ordnance Storekeeper, and others under similar circumstances, were liable to the assessment, if the rate had been an *annual* one, or one of that nature which could be fairly borne by *tenants*,

stance, it must be considered and accepted by the inhabitants entirely as a *boon*; and it cannot, consequently, be converted into a precedent upon which a claim may be founded to compel the payment in other cases.

1823.

In the matter of THOMAS THISTLE's Estate. Memorial and Order thereon.

June 24th.

To the Hon. RICHARD A. TUCKER, *Chief Justice of the Island of Newfoundland, &c. &c. &c.*

The Memorial of JOHN HILLYARD, of St. John's,

HUMBLY SHOWETH:—

That since the decease of your memorialist's mother, who died about fourteen years ago, and who was entitled to some property in Harbour Grace, under the intestate estate of her father, Mr. *Thomas Thistle*, your memorialist has principally supported himself by his own exertions, and his sister has resided with Mr. *M'Kie*, her uncle: that the property of the late Mr. *Thistle* has been divided among his children; and that part which would have been your memorialist's mother's, if living, has been under the care and management of Mr. *M'Kie*,—your memorialist's father being now, and for a number of years past, in a state of insanity: that your memorialist having passed his minority, and conceiving that no person has a greater interest in the property, which must come into his hands and that of his sister's, whose prospects in life he is desirous of promoting, prays that, as his father is in a state of insanity, and not likely to re-

1823.

In the matter of THOMAS THISTLE'S Estate.

cover his reason, memorialist may be permitted to take upon himself the management of the above-mentioned estate, for the purpose therein mentioned; and will ever pray.

JOHN HILLYARD, Jun.

St. John's, 16th June, 1823.

Upon the above memorial, the *Chief Justice* made the following order:—

Upon considering the prayer of this memorial, together with a number of facts set forth in a letter addressed to the *Chief Justice* by *Mr. M'Kie*, bearing date the 16th instant,

It is ordered, 1st. That the fact of Mr. *John Hillyard*, sen., having left this country without obtaining any possession of his wife's property, be proved by two or more credible witnesses, by affidavit.

2dly. That such documents be laid before this Court as will establish the fact, that *John Hillyard*, jun. has arrived at the age of twenty-one years.

3dly. That Mr. *Kie* be directed to render an account, upon oath, of all his receipts of rent, &c. on account of the property belonging to *John* and *Jane Hillyard*, with a statement of his disbursements on their account, distinguishing the sums paid to, or expended on account of, each particular child.

4thly. That this memorial, and the order thereon, be recorded.

June 30th.

Order of Court, appointing Guardians of the person and estate of an infant.

In the matter of JANE HILLYARD, an infant.

IT was ordered that *Newman Wright Hoyles*, and *James Cross*, Esqs. be empowered by an authority under the Seal of the

Court, to take charge of the property belonging to *Jane Hillyard*, during her minority, and to receive the rents, &c. issuing from the same, subject to the direction of the Court with respect to their appropriation. It was further ordered, by consent of the parties, that the accounts between *Peter M'Kie*, Esq. and *John Hillyard*, should be submitted to the arbitration of Messrs. *Hoyles* and *Cross*; and that, in the mean time, Messrs. *Hoyles* and *Cross* should lease the property at present vacant.

1823.

In the matter of THOMAS THISTLE'S Estate.

The Owners of the Brig LADY HAMILTON, appellants, and WILLIAM STAFFORD POPE, respondent.

July 3d.

PER CURIAM. Before this case was argued upon the appeal, I was strongly disposed to think, from an attentive examination of the transcript of the proceedings of the Court below, that the judgment there given must be *reversed*. I was, however, happy to listen to every argument which could be adduced in support of it; and I have since given to those arguments all the consideration which they appear to me to deserve. I am, therefore, now prepared to deliver my opinion upon the question, with a full knowledge of all the circumstances connected with it.

By the law of England, there can be no lien on a ship in the port to which she belongs. And the legal, i. e. the *registered* owner of a ship is not liable to pay for repairs made, or stores furnished, under the authority, and for the benefit, of another person.

On behalf of the appellants, it has been very justly argued by Mr. *Simms*, that the plaintiff below ought only to have succeeded in his action upon one of the following grounds :—

1st. As having a *special-lien* upon the brig.

2dly. On account of the *defendant's liability as part-owner*.

1823.

Owners of the brig LADY HAMILTON & W. S. POPE.

3dly. Because the defendant below, though merely an *agent*, had, by his course of dealing, rendered himself liable as a *principal*.

And the proper mode of trying this case will, therefore, be to inquire how far, under the circumstances of it, the plaintiff below can sustain himself upon *any* of these grounds.

Upon the *first* point I shall shortly remark, that it seems to be clearly settled that, by the law of *England*, (*a*) there cannot be a lien upon the ship in the *port to which she belongs*. Thus Lord *Mansfield*, who is reported to have said, (*b*) "that a person who "supplies a ship with necessaries, has not "only the *personal* security of the master "and owners, but also the security of the spe-"cific ship," afterwards admitted (*c*) "that "work done for a ship in *England* is sup-"posed to be on the *personal* credit of the "employer. In *foreign* parts the master "may hypothecate the ship." This principle has, indeed, been recognized in several other cases; and I have, consequently, no difficulty in pronouncing that the plaintiff below had *no lien* upon the vessel, for the supplies furnished to her by him.

With respect to the *second* point, it was most satisfactorily proved, by the evidence given at the trial of the cause, that Mr. *Bennett*, who is the real appellant in this suit, had agreed to pay a certain sum for half of the brig, then on the stocks, *after she should be completed and fitted out by Mr. Douglas*. This was, therefore, most decidedly not an *absolute* agreement to purchase a part of the vessel as she *then* was; but

(*a*) By the *Civil* Law it is otherwise.
(*b*) In the case of *Rick* v. *Coe*, Cowp. 636.
(*c*) In *Wilkins* v. *Carmichael*, 3 Doug. 101.

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merely an agreement to become the future purchaser of half of her, at a stated sum, upon the *contingency* of her being completed and fitted out by Mr. *Douglas*. Independently, then, of the provisions of the Registry Act, Mr. *Bennett's* interest in the vessel could not take place until *after* the happening of that contingency upon which it entirely depended; and as *all* (*d*) of the articles for which this action was brought, were required to put the vessel in that condition in which Mr. *Bennett* had agreed to become the purchaser of a proportion of her, his interest in the vessel, if it had depended *solely* upon that agreement, must necessarily have commenced *subsequently* to the delivery of those articles; and he could not, consequently, upon any pretence whatever, have been held liable for the payment of them. But the respondent contends, that a few of these articles were delivered *after* Mr. *Bennett* had actually become the *registered part-owner* of the brig; and he conceives that for these, at least, Mr. *Bennett* must, at all events, be responsible. According to this doctrine, then, the *registered* owner of a vessel is bound to pay for everything which is furnished to her, without any regard to the circumstances under which the articles may have been supplied, and cannot even repudiate a contract entered into in relation to her by a stranger without his authority or consent. But this doctrine is certainly not *law*. The title to a ship, says Lord Chief Justice *Abbott* (*e*), may furnish *evidence* that repairs are made, or stores furnished, under the authority, and for the benefit, of the legal owner, as, in fact, they generally are:

1823.

Owners of the brig LADY HAMILTON & W. S. POPE.

(*d*) This was distinctly admitted by *Lilly*, in arguing the case.

(*e*) In his work on Shipping, p. 21.

1823.

Owners of the brig LADY HAMILTON & W. S. POPE.

but it does no more; and, therefore, if it appear that they were made, or furnished, under the authority, and for the benefit, of *another*, the legal owner will not be answerable. Thus, where a ship was sold, and registered in the name of the purchaser, in the interval between an order for stores, given by the seller, and the delivery of them on board, the purchaser of the ship was held (*f*) not to be responsible for them, although he was the legal owner of the vessel when the stores were delivered on board of her. To that part, therefore, of the respondent's demand which is founded upon the delivery of some of the articles *after* the vessel had been registered in the names of Messrs. *Douglas & Bennett*, this case affords a *complete answer*; since it was clearly proved, that the articles had been ordered some time previously by Mr. *Douglas*, and were intended to put the vessel in that state of equipment which formed the consideration for the price which Mr. *Bennett* had agreed to pay for the half of her. I do not, in fact, see how it is possible to distinguish this case from that of *Trewhella* v. *Rowe*: and under the authority of the judgment which was given upon it, I feel myself fully justified in holding, that Mr. *Bennett* was not liable to this action as *part-owner of the brig*.

It remains, then, to be considered, whether he was liable upon the ground of his having conducted himself as *agent* in such a manner as to incur the liability of a *principal*, and the answer to this must, undoubtedly, be drawn from the *evidence*, which, as I understand it, negatives such a responsibility in every part of it. Without travelling through the whole, I will confine myself to a small portion of it, which I conceive is de-

(*f*) See *Trewhella* v. *Rowe*, 11 East.

1823.

Owners of the brig LADY HAMILTON & W. S. POPE.

cisive upon this point. Now, Mr. *Douglas* informs us, that *he* agreed with the plaintiff for the work, telling him that he had sold half the vessel to Mr. *Bennett*. That he, Mr. *Douglas*, was to fit her out, and that *when fitted out*, Mr. *Bennett* was to pay a certain sum for the one-half share of the vessel. This, then, was the representation, upon the faith of which the respondent agreed to furnish the articles which Mr. *Douglas* was in want of; and every one must see that there is nothing in this representation from which the respondent had a right to infer that Mr. *Bennett* would be liable for the payment of the articles which Mr. *Douglas* was contracting with him for. If, therefore, the respondent did, unfortunately for himself, entertain such an opinion, he, undoubtedly, acted under a great mistake, and every one must feel sorry for him. But there is no ground whatever, either of law or equity, for transferring the consequences of this mistake to Mr. *Bennett*, who was, to all intents and purposes, a perfect stranger to this contract at the period of its *inception*; and although, during the preparation of the articles, he had some communications with the respondent about them, yet he never said or did anything which went beyond the line of his duty as an agent, in which character he had, on other occasions, acted for Mr. *Douglas*. The respondent seems, then, through ignorance of the law, and from a very negligent omission to acquaint Mr. *Bennett* that it was his intention to look to him for payment of the articles, to have brought himself into the condition in which he now stands, without the slightest fault on the part of Mr. *Bennett*; and, consequently, if a loss must fall upon one of these parties, it ought, upon every principle of justice, to

be borne by him, and not by Mr. *Bennett*. Under every view, therefore, both legal and equitable, of the merits of this case, I am of opinion that the judgment of the *Court* below must be *reversed*.

July 14*th*.

THOMAS SKINNER v. PATRICK TARRAHAN.

ACTION on the case for a nuisance. *Row* stated the plaintiff's case to the jury, and called several witnesses, who were sworn and examined.

Lilly afterwards addressed the jury for the defendant; and, also, called a great number of witnesses.

After the examination of the defendant's witnesses, *Row* was heard in reply to the defence; and the *Chief Justice* then charged the jury to the following effect:—

This action turns upon *matters of fact*; which particularly belong to the jury. The general and universal rule of law is, that we must so use our own, as not to injure our neighbour,—"SIC UTERE TUO UT ALIENUM NON LŒDAS." The jury must, therefore, apply the *facts* of the case to this *principle*, and determine whether the defendant has been guilty of a violation of it. The case of *Mitchell* v. *Cotter* turned upon the fact of the necessary having been built *before* the well was dug; and it was there properly decided, that the plaintiff could not sustain his action. All the evidence respecting the annoyance to which some witnesses were exposed by nuisances from the *plaintiff's premises*, is irrelative to this action, except in mitigation of damages. The jury ought, however, to take the situation of all the parties into their consideration; for, undoubtedly,

In his charge to the Jury, in an action upon the case for a nuisance, the *Chief Justice* told them that the question, whether a certain thing amounted to a nuisance or not, ought always to be considered *with reference to the general state of circumstances in the place where the grievance complained of arose*; for that an act might undoubtedly become a nuisance in one condition of society, which would not be so in another.

1823.

SKINNER v. TARRAHAN.

the same inconvenience which would amount to a nuisance where there was more room and space, ought not to be considered in that light, where the parties are *bundled* and *huddled* together in such a way that it is scarcely possible they can avoid causing some annoyance to each other.

The jury retired, and soon returned a verdict—damages ten shillings, with costs to be paid by defendant.

ROBERT EVANS, appellant,
and
THOMAS BULLEY, assignee of the Estate of THOMAS CONGDON, respondent.

July 18th.

PER CURIAM. Two exceptions have been taken to the judgment in this case by the plaintiff, in error. The 1st, That *the judgment is grounded upon a particular statute not applicable to the circumstances of the case:* and the second, that *the judgment is contrary to law, inasmuch as it was given against the appellant, in violation of the lien which, as factor of the bankrupt, he had upon the goods which formed the subject-matter of the action.* To the former of these objections, it will be a complete answer, that it does not in the least signify upon *what grounds* the judgment was *professedly given*, provided the *facts stated on the record be sufficient to warrant* it; and I shall, therefore, confine my observations to the *second* point, which involves the question, whether the appellant was the *factor*, or merely the *confidential clerk*, of the bankrupt; for if he were the former, there is not a shadow of doubt but that the judgment below is erro-

The great distinction between a FACTOR and a CONFIDENTIAL CLERK, or other agent, is, that the *factor* has certain duties imposed on him, and is subject to certain legal liabilities resulting from those duties, which the *confidential clerk* is altogether exempt from. And the *lien* which the law gives to the factor upon the goods of his principal in his possession, is founded entirely upon the consideration of the duties and liabilities to which he is thus exposed.

1823.

EVANS & BULLEY.

neous (*a*); and, on the other hand, it is equally certain, that the claim to a lien is entirely without foundation, if he were not that description of agent who is termed a *factor*. Let us see, then, what a *factor is*, and examine how far he *resembles*, and in what respects he *differs from*, a *confidential servant*, entrusted with the management of his master's affairs. Now, every servant is an agent; but every agent is not a servant. They differ as the *particular* from the *general*; and, therefore, though a servant and a factor are both agents, it is obvious that a very important distinction may exist between them. One of those distinctions is sometimes said to be, that the factor is paid by a *commission*, and the servant by a *salary*, or *wages*; but this distinction does not hold in many cases; for a servant may have the same rate of commission as a factor, without being clothed with the character of a factor (*b*); and the latter may, unquestionably, accept of a fixed salary in lieu of the usual commission, and still continue, to all intents and purposes, a factor.

We must, therefore, look for some other criterion to distinguish them by; and I think we shall not search long before we are convinced that the *material and essential difference* between these characters consists in the *factor's being subject to many legal liabilities, from which the confidential clerk is wholly exempt*. Thus, if a factor should neglect to effect an insurance where he ought to do so (*c*), or should sell goods to a person in bad credit at the time of sale (*d*); in these,

(*a*) 3 Bos. and Pull. 408.
(*b*) *M'Donald* v. *Buchan*, 5 Dow's Rep. 127, cited in Paley's Principal & Agent, p. 10.
(*c*) Paley's Principal and Agent, p. 19.
(*d*) Ibid. 26.

1823.

EVANS & BULLEY.

and in many other cases of a similar kind, he would be obliged to make good any loss which his principal might sustain through his default; and he is often compelled to advance large sums of his own for the protection of the property of his principal, in order to discharge himself from the responsibility he would incur by his omission to perform certain acts in regard to it. In consideration, therefore, of the onus, and legal liability, so cast upon him, the law, which is always just, has furnished him with a lien upon the goods of his principal in his possession, as the best security it could afford him for the repayment of the money it compels him to advance on account of his principal. In a word, his lien is derived from his liability, and is exactly co-extensive with it (*g*). But a confidential clerk, entrusted with the management of his employer's affairs, can never be under a legal liability to advance any money of his own for the benefit of his employer. This, then, is, as I conceive, the "*crucial instance*" (*h*) by which we may distinguish the factor from the confidential clerk, viz., that the former has certain duties imposed upon him, and is subject to certain liabilities resulting from those duties, which the other is altogether exempt from. Having thus endeavoured to show what the true difference is between these two classes, I shall next proceed to inquire to which of them the appellant belongs. And in order to determine this point, recourse must be had to the *evidence* given at the trial. From it we learn, that the bankrupt, about the time of his depart-

(*g*) That is, liability and lien may be taken to be convertible terms, though the lien, indeed, extends further than the *actual charge*.

(*h*) Lord Bacon's "NOVUM ORGANUM," pp. 55—56.

1823.

EVANS & BULLEY.

ure from the country, agreed with the appellant that he should act as *clerk* and *bookkeeper* for the ensuing year, at £36 per annum; and that the bankrupt, finding afterwards that he could not return to Newfoundland as soon as he originally expected to do, wrote to the appellant to apprize him of his detention in England, and at the same time promised him an increase of salary commensurate to the additional trouble which would devolve on him in consequence of the protracted absence of the bankrupt. The quantum of this increase seems never to have been settled by the parties; but it is proved that the plaintiff in error expected to have his salary raised to £100 a-year, and that, under this expectation, he continued to keep the books of the bankrupt, to manage his affairs, and to transact all manner of business for him as his *representative*, or *confidential agent*. Is it possible, then, I would ask, for any one to call a person so situated a *factor*, in the sense in which that term ought *legally* to be understood? If the appellant had conducted himself carelessly or imprudently in his office, could the bankrupt have obtained a compensation in damages for any injury occasioned by such neglect or folly? *Above all*, could the appellant have been liable, under any circumstances growing out of his employment, to *advance his own money for the security and preservation of the bankrupt's property?* It is, I think, most certain that he could not; and I am, therefore, of opinion, that his claim to a *lien*, as a *factor*, is utterly without foundation; and I must, consequently, affirm the judgment of the Court below.

1823.

Bladeston & Wife *against* W. & H. Thomas.

August 4th.

A tender of payment in Spanish dollars, at 5*s.* each, is not sufficient where the party has covenanted for payment in *lawful money of Great Britain*. [See *Hany* v. *Gaden*, ante p. 336.]

THIS was an action to recover £100 of rent for the farm called the "Grove." The lessees had covenanted to pay rent in *lawful money of Great Britain*, and had tendered payment for the last year in dollars at 5*s.* which were refused by the agent of the lessors. The *Court* held that payment in dollars at that rate was not a satisfaction of the lessees' covenant; and that, therefore, as the tender was not a legal one, judgment must be entered for the plaintiffs.

Trustees of Langley *against* Trustees of Darrell & Campbell.

August 4th.

Where a contract has been entered into for the transfer of property in a vessel, which is void from a non-compliance with the provisions of the registry acts, the Supreme Court cannot, under its powers as a Court of *equity*, enforce a compliance with the terms of such contract, or afford any relief to the parties concerned in it.

THIS case gave rise to a question upon the construction of the Register Act; and the *Chief Justice*, in consequence, deferred judgment to another day.

And on this morning, the 11th inst., His Honour delivered the following decree:—

Upon the hearing of this case, I was strongly impressed with the idea, that the 34*th George III.*, *c.* 68. opposed an insuperable bar to the plaintiffs' claim; but, as the transaction upon which it is founded did not appear to have been entered into with any *fraudulent intention* to contravene the objects of that Act, I was unwilling to give judgment against them until I had ascertained, by a careful examination of the Act, and of the various cases which have grown out of it, that it was impossible for me to pursue any other course without a violent departure from those principles by

1823.

Trustees of LANGLEY v. Trustees of DARRELL & CAMPBELL.

which Courts of *equity*, as well as Courts of *law*, have been guided in their construction of that important statute.

The question I am now called upon to decide, arose out of the following facts: In the early part of 1822, *Beenlen & Langley* sold a small vessel to *Darrell & Campbell* for £150, payable in fish in the autumn of that year; and under this sale, or agreement to sell, *Darrell & Campbell* received possession of the vessel, though there was neither a bill of sale, nor an indorsement of transfer on the register, as required by the provisions of the Act to which I have already referred. At a subsequent period they paid a proportion of the purchase-money; and having, afterwards, sent the vessel to sea, she was, unfortunately, lost before the remainder of the purchase-money had been paid, and, also, before they had acquired a legal title of ownership in her by a compliance with the forms prescribed by the Registry Acts. Under this state of the transaction the insolvency of both parties took place; and the trustees of the vendors now demand from the trustees of the vendees a dividend upon the balance of the purchase-money which still remains unpaid; that is, they call upon this Court to *enforce* a contract made under the circumstances herein described; and the question, therefore, is, *has the Court the power to do it?* Now, the 14th section of the 34th Geo. III., c. 68, enacts, "That no *transfer, contract*, or *agreement for transfer*, of property in any ship or vessel, made, or intended to be made, after the first day of January, 1795, shall be valid, or effectual for any purpose whatsoever, either in law or equity, unless such transfer, contract, or agreement for transfer, of property in such ship or vessel shall be made

1823.

Trustees of LANGLEY v. Trustees of DARRELL & CAMPBELL.

by bill of sale, or instrument in writing, containing such recital as prescribed by" that clause; and where an alteration of property takes place in the port to which the ship belongs, the 26th Geo. III., c. 60, requires an indorsement upon the register, the form of which is prescribed by the 15th section of the 34th George III., c. 68, which also requires such indorsement in the case of *contract* or *agreement* for sale, as well as absolute sale, and renders it essential to the validity of the sale, *contract*, or *agreement*; for it enacts, "that such indorsement shall, from and after the 1st January, 1795, be made in the manner and form hereinafter expressed, and shall be signed by the person or persons transferring the property of the said ship or vessel, by sale, or *contract*, or *agreement* for sale, thereof, or by some person legally authorized for that purpose by him, her, or them; and a copy of such indorsement shall be delivered to the person or persons authorized to make registry and grant certificates of registry, otherwise such sale, or *contract*, or *agreement* for the sale thereof, shall be utterly null and void, to all intents and purposes whatsoever." In whatever light, therefore, we may view this transaction, whether as an actual sale, or only as a *contract* or *agreement* to sell, I am bound by these two clauses, and by the interpretation given to them by Chief Justice *Abbott*, in his work on shipping (*a*), to declare it null and void to all intents and purposes whatsoever; and it is almost unnecessary for me to remark, that the Courts of equity have evinced as strong an inclination as the Courts of law, to support and uphold the principle and policy of the Registry Acts. How, then, I may ask, is it possible for this

(*a*) See *Abbott* on merchant ships, p. 44, in notes.

1823.

Trustees of LANGLEY v. Trustees of DARRELL & CAMPBELL.

Court, in virtue either of its legal or equitable jurisdiction, to give effect to a transaction which the statute has positively said shall not be valid or effectual, for any purpose whatsoever, either in *law* or *equity?* And if it cannot do that, how can it afford relief to the plaintiffs, or complainants, in this suit, who set forth in their bill an invalid sale, or contract for the sale, of a vessel, admit a partial payment to them under it, and pray the *Court* to assist them by its decree in compelling the payment of the balance which they pretend to be due to them? The more I investigate, reason, and reflect upon this question, the more satisfied I am that my first impression respecting the merits of it was correct; and having now removed every shadow of doubt from my mind, I have no longer the smallest motive to defer giving judgment for the defendants.

WILLIAM AVERY *against* NICHOLAS KENT.

August 18*th*

A tenant cannot dispute his landlord's title.

THIS action was for rent; and in answer to the plaintiff's demand, the defendant wished to dispute his lessor's title, but was immediately stopped by the *Court*. It is a principle of English law, that a tenant cannot controvert the title of his landlord, or set up one in opposition to it. There is in this case sufficient proof of the holding; and judgment must, therefore, be entered for the plaintiff.

1823.

Ex parte, TIMOTHY HOGAN in the matter of STABB, PRESTON, PROWSE & Co. Insolvents.

September 4th.

The sanction of the Supreme Court given to the payment of the *expenses* attending the protest of bills drawn for the payment of servants' wages; where it appeared that a suit for the recovery of the amount of such bills had been relinquished upon an express undertaking by the trustees to pay the same, *together with the expenses thereon.*

PER CURIAM. This petition, in substance, sets forth that the petitioner was in possession of certain bills of exchange, drawn at Renews by *Stabb, Preston, Prowse & Co.* for servants' wages, which had been returned to him under protest; that in order to obtain payment of those bills he sued out a writ of attachment against certain property belonging to that firm; that during the pendency of his action a proposition was made to him by Messrs. *Brooking, Cross & Tasker*, who had been appointed trustees to the estate of a *branch of the said firm*, which had been previously declared insolvent, to pay the amount of the bills held by him, together with the *expenses* thereon; that relying upon this undertaking on their part he immediately discontinued his suit; and that the said trustees have since, in violation of their engagement, refused to pay him the *expenses* incurred by the protest of the bills in question.

The facts disclosed in this petition are generally admitted by the trustees, who conceive themselves, however, restrained by a judgment of the late *Chief Justice* (in which Mr. *Forbes* refused to allow the *expenses* upon protested bills for servants' wages to rank as a preferable claim) from paying the petitioner the *expenses* upon the bills he holds, unless he can obtain an *order* from this Court to authorize them to do so. Two questions, therefore, arise upon this case, viz.: 1st,—Whether the trustees are not, at all events, bound to fulfil their engagement with the petitioner? and 2dly, admitting

1823.

Ex parte, HOGAN in the matter of STABB, PRESTON, PROWSE & Co. insolvents.

their engagement with him to be positively binding upon them, whether this Court can sanction the payment of the expenses upon these bills as a charge upon the estate of *Stabb, Preston, Prowse & Co.* of the same degree as the payment of servants' wages? Upon the first point, I have not the shadow of a doubt. The trustees contracted with the petitioner, in consideration of his withdrawing his action, to pay him the amount of the bills in his hands with the expenses thereon; and if, in the formation of this contract, they have exceeded the scope of their regular authority as trustees, they are, upon a well-established principle of law, (*a*) personally liable upon it. Suppose that an executor should promise, in writing, a creditor of his testator, who had commenced a suit against him, to pay the debts and costs, in consideration of the discontinuance of the action by the creditor; and that, afterwards, the executor was obliged to expend the whole proceeds of the estate to satisfy judgment-creditors, without being able to retain funds in his hands sufficient to discharge this contract; can any one believe it would be an answer to an action upon it for the executor to say, "I did indeed prevent "you from pursuing your legal remedy for "the recovery of your debt, and have thus "enabled other creditors to acquire a claim "upon the effects of my testator superior to "yours; but in the satisfaction of those "claims, I have been compelled, by the "rules of law, to exhaust the whole estate "of my testator, and cannot, consequently, "perform my contract with you?" There is no one, I think, who will not admit that the executor in this contract rendered himself personally responsible for the payment

(*a*) *Paley's* Principal & Agent, 303.

1823.

Ex-parte, HOGAN in the matter of STABB, PRESTON, PROWSE &Co's. insolvency.

of this debt; and that it is consistent with natural equity, that if a loss must arise out of this contract to one of the parties, it ought to be borne by the executor, and not by the creditor, who had been induced, upon the undertaking of the executor, to pay the debt, to abandon those legal proceedings which must have led to the satisfaction of it. But it is impossible to distinguish, in principle, between such a case, and the one now under investigation; and since the petitioner did, upon the faith of the assurance he had received from Messrs. *Brooking, Cross & Tasker*, that they would pay him the amount of the bills he held, with the *expenses thereon*, relinquish a suit which he had instituted against a concern then supposed to be solvent, I am clearly and decidedly of opinion, that those gentlemen are strictly bound by the contract they have entered into with him. It was their duty, and not his, to ascertain the extent of their authority and power as trustees; and if they have exceeded it, any inconvenience, or injury, resulting therefrom, ought certainly to fall upon them rather than upon him. This brings me, therefore, to the second head of inquiry, viz., whether this Court can sanction the payment of the expenses upon those bills, as a charge upon the estate of *Stabb, Preston, Prowse & Co.* of the same degree as a payment for servants' wages? And here I shall take occasion to *repeat* the declaration I formerly made, of my firm intention not to disturb any of the judgments of my respected predecessor in office,—"INTEREST REIPUBLICÆ RES JUDICATAS NON RESCINDI." (*b*) If, therefore, I could not relieve the trustees in this instance without departing from the line of

(*b*) See this principle adopted as a maxim of law by Lord *Coke*, in his Second Institute, p. 360.

1823.

Ex-parte, HOGAN in the matter of STABB, PRESTON, PROWSE & Co's. insolvency.

conduct pursued by Mr. *Forbes*, I should certainly leave them, though with feelings of regret, to bear the consequences of that responsibility which, by their own act, they have brought upon themselves. But, happily, there is not any decision of Mr. *Forbes* which, in the least, militates against their receiving that protection from this Court to which, under all the circumstances of the case, I conceive they are fully entitled. It is true, that he has decided that the holders of any protested bills, drawn for servants' wages, shall represent the servants as far as respects the *amount of the bills themselves*; but as regards the *expenses upon such bills*, they must rank with a different class of creditors. This decision, however, is evidently confined to those cases where the claim is preferred by the holder of the bills *after* the declaration of insolvency has taken place; and does not, in any way, apply to the present case. Here the petitioner had commenced his action against a concern which was supposed to be solvent, and would probably have obtained a judgment which would have entitled him to a full satisfaction of his debt. In this stage of the proceedings, the trustees to the estate of a branch of the same firm submit a proposition to him, which they, doubtless, considered advantageous to the estate entrusted to them; and viewing the arrangement proposed by them in the same light, I have no hesitation in giving the sanction of this Court to a proceeding which appears to me to have been, when entered into, beneficial to all the creditors of *Stabb, Preston, Prowse & Co.* I do not, however, feel myself at liberty to deviate from the *strict letter* of the agreement which the petitioner made with the trustees; and rejecting, therefore, the charge of £1 10*s.* 3*d.* which

1823.

he has inserted in his account under the head of *interest and damages*, as not forming a part of the *expenses* upon the bills, I hereby authorize and direct Messrs. *Brooking, Cross & Tasker* to pay him the several sums he has advanced for protests and postage, amounting in the whole to £6 5*s*. 9*d*.; and to take credit for this payment in their accounts, as trustees to the estate of *Stabb, Preston, Prowse & Co.*

September 8th.

MICHAEL M'LEAN LITTLE *against* JOHN BROOM, Esq.

THE following is an outline of the circumstances connected with this action:—

Upon the 9th of May, 1822, Messrs. *Broom & Blaikie*, two of the magistrates of this district, issued an Order of Session, setting forth a *presentment by the Grand Jury* of certain manure, rubbish, and other filth and putrid substances, lying, or deposited, in the streets, coves, lanes, and *other* places, in the town of St. John and its *vicinity*, as *great public nuisances*; and calling upon the proprietors thereof to remove the same within seven days from the date of such order, under penalty of forfeiture. The order also conveyed a notice to the proprietors, that upon their default in removing the subject-matter of these nuisances, the magistrates would employ men and carts to remove the same, and would take legal measures to recover any expense that might be incurred by such removal. The order was published in the *Royal Gazette* on the 18th of June following; and, after an interval of more than seven days from the publication of it, the defendant directed the constables to carry it into execution. Accord-

1823.

LITTLE v. BROOM.

ingly the constables, about the 23d July last, seized a quantity of manure lying near the road leading to the Government house, at a distance of less than a mile from the *centre* of the town; and this proceeding having, as it should seem, inspired a general alarm among the owners of the manure, the plaintiff, at an early hour the following morning, employed a number of persons to remove his heap of compost, which, as it appears by the evidence, caused a particularly offensive smell. Whilst the servants of the plaintiff were thus engaged in removing the compost, the Governor and the defendant came to the spot; and his Excellency explained to them that the depositing of manure in such a place was unlawful, and that they should not be permitted to take it away: then addressing himself to the defendant, His Excellency desired him not to allow them to remove it. The defendant immediately placed a ⇑ on the heap; and in reply to a request from the father of the plaintiff, that he might remove the manure upon condition of his becoming responsible for the legal consequences of depositing it there, the defendant told him that he would not suffer the removal of the manure by the servants of the plaintiff; and that if any injury resulted to the plaintiff by this proceeding, he, the defendant, must be answerable for it. The manure was, in consequence, removed, in common with that of several other persons, by the constables, to a neighbouring lot of uncultivated land belonging to the Crown; and the whole was, by a printed notice, purporting to be an Order of Session, dated 30th July, 1822, advertised to be sold, for the purpose of defraying the charges for its removal. At the time of sale there was only one very low offer made

1823.

LITTLE v. BROOM.

for the manure; and the sale was, in consequence, stopped. At an early period afterwards, the Governor authorized the defendant to apprize all the owners of the manure which had been seized, that it would be restored to them, free from any costs, if they chose to take it away from the government-field on these terms. Of this offer all the owners of the manure, except the plaintiff, immediately availed themselves. But the plaintiff, apparently impressed from the beginning with an idea that the proceedings of the defendant was illegal, rejected the proposal, and determined to seek redress for the injury which he conceived he had sustained, by an action against the defendant. At the time when these occurrences took place, there was no Chief Justice residing in the island; but there then was, and for some time after continued to be, an officer authorized to issue writs, returnable in the Supreme Court. The plaintiff, however, did not avail himself of this opportunity of commencing a suit in it against the defendant, but waited until the arrival of Chief Justice *Tucker*, in *April last*, when he brought an action of trespass against the defendant, *de bonis asportatis*. The trial was, however, deferred, *at the request of the defendant*, until this day, when it came on before a Special Jury. The pleas of the defendant were,

1st, The general issue, "Not Guilty;" and

2dly, The statute of the 24th Geo. II., c. 44, which enacts, in the 8th section thereof, that no action shall be brought against any Justice of the Peace for anything done in the execution of his office, unless commenced within six calendar months after the act committed.

To the last of these pleas it was urged by *Simms* for the plaintiff, 1st., that the absence

1823.

LITTLE v. BROOM.

of the *Chief Justice* was a sufficient ground for the delay, so as to prevent the plaintiff from being barred of his action by the limitation prescribed by the 24th Geo. II, c. 44; and 2dly, and *principally*, that the defendant could not entitle himself to the benefit of that statute, because he only acted, in the instance complained of, under *colour* of his office, and not in virtue of it.

This statement of facts was confirmed by the testimony of a great number of witnesses, who were examined on both sides; and the *Chief Justice* then delivered a long address to the Jury, the principal points of which are briefly enumerated in the following "*heads of his charge*" as copied verbatim from his minutes of the trial.

State reasons for referring the *whole case* to the Jury; and instruct them particularly in the *law* of it.

(Notice the case of *Brookshaw* v. *Hopkins*, Lofts's Rep. 40; cited by *Simms* in his address.)

The *confusion of the goods* no defence in this action; because the King cannot take away any man's property, except through the intervention of a jury.

Cite all the statutes which have been passed for the protection of magistrates, and comment thereon.

Two issues to try,—1st, general issue; 2dly, whether the defendant is not, at all events, protected by the 24th Geo. II. c. 44?

Under the general issue, the Jury will find for the defendant, if they are satisfied that *he acted right in removing the manure*. But, supposing they cannot find for him under that issue, on account of the irregularity of the proceedings in the Court of Sessions (and certainly those proceedings were irregular), still they must extend the bene-

1823.

LITTLE v. BROOM.

fit of the 24th Geo. II. c. 44 to him, if they were satisfied that *he acted bonâ fide as a magistrate.*

The six months having begun to run, are not, in point of law, stopped by any subsequent impediment.

The Act of the Session, although informal, seems by no means to have been tyrannical or oppressive; and this is, perhaps, one of those very cases in which the legislature particularly intended to protect magistrates.

No inference against the plaintiff is to be drawn from his not accepting the defendant's offer to take back his manure; because if he believed the proceeding arbitrary and unjust, he was even entitled to praise for resisting it. But the acquiescence of other parties furnishes a proof that they were content to get back their property on the terms offered; and certainly if the Court of Sessions had proceeded against all these parties according to law, they might have been *fined* for their conduct. The proceeding of the Court was, therefore, less penal towards them than it might have been if the Court had followed the true legal path.

The Jury, after a deliberation of more than an hour, returned a verdict for the plaintiff,—damages £12.

September 9th.

UPON the motion of *John Broom*, Esq. the following rule was granted to him by the Court:—

In the cause between *Michael M'Lean Little* and *John Broom*, Esq.: It is ordered, that the plaintiff, upon notice of this rule to be given to him by the defendant, shall, upon Thursday the 25th instant, show cause

1823.

LITTLE v. BROOM.

why the verdict should not be set aside, and a new trial allowed to the defendant.

MICHAEL M'LEAN LITTLE *against* JOHN BROOM, Esq.

November 1st.

IN arguing against the rule *Nisi*, which had been obtained by the defendant for a new trial in this cause, it was urged by *Simms*, on behalf of the plaintiff, that the defendant was not entitled to the protection of the 24th Geo. II., c. 44, on two grounds:

1st, Because the Order of Sessions was so thoroughly illegal, arbitrary, and oppressive, that it was incapable of affording any sanction to an act done under the authority of it.

2dly, Because it was apparent from the whole tenour of the evidence, that the defendant was acting throughout the proceeding which had given rise to the present action, under *colour* of his office of a Magistrate, and not, *bonâ fide*, in *virtue* of it.

And he cited several cases, and dicta of some of our most eminent judges, in support of his arguments; relying, principally, upon the great case of *Entick* v. *Carrington*. The *Court*, however (though it admitted that the Order of Sessions was *illegal*), vindicated it from the charge of being *arbitrary* and *oppressive*; by showing that, upon general principles, it contained nothing hostile to civil liberty, according to Sir *W. Blackstone's* excellent definition of it (*a*); and by advert-

(*a*) "Civil liberty is that of a *member of society*, and is no other than *natural liberty*, so far restrained by human laws (and no farther) as is necessary and expedient for the *general advantage of the public*."—Com. v. 1, p. 125. Dr. *Paley*, too, has given us another definition which,

1823.

LITTLE v. BROOM.

ing to the statute law of England, which, in more instances than one, has clothed the surveyors of high-ways and streets with much more extensive powers than were necessary to legalize the Order of Sessions which had been issued by the magistrates of Newfoundland. It also observed, with reference to the case of *Entick* v. *Carrington*, that the inference deducible from that case, was in *direct opposition* to the first position advanced by Mr. *Simms*; for there, though Lord *Camden* expressed himself in the strongest language upon the illegality of the warrant (and there could be no doubt but that all the epithets which had been applied to the Order of Sessions in Newfoundland were much more suitable to *that* warrant), yet his Lordship, and the Court of Common Pleas, did not decide that the defendants were deprived of the protection of the 24th Geo. II., c. 44, on account of the illegality of the warrant; but because *Lord Halifax was not a Justice of the Peace;* and 2dly, because the *defendants had not complied strictly with the terms of the warrant.* Now, had his Lordship been of opinion, that a warrant, of the character of the one issued by Lord *Halifax*, was so totally void that it could not afford any protection to an act done under it, even if it had been issued by a Justice of the Peace, it would have been altogether useless and unnecessary for him to labour, as he did, to prove, by so elaborate and learned an argument, that a Secretary of State is not, in reality, invested with the powers of a Justice of the Peace. It is evident, therefore, that his Lordship thought

in substance, is nearly the same as Sir *Wm. Blackstone's*: —"Civil liberty is the not being restrained by any law, but what conduces in a *greater degree to the public welfare.*"—Mor. Phil. b. vi. c. 5.

1823.

LITTLE v. BROOM.

that *that* warrant would have entitled the defendants to the benefit of the 24th Geo. II., c. 44, if it had been issued by a magistrate, and strictly complied with by the defendants: and since the Order of Sessions is not, certainly, open to greater objections, upon general principles, than Lord *Halifax's* warrant, the case of *Entick* v. *Carrington & Others*, which has been so much relied on by the plaintiff in this action, is a strong authority to show that the Order of Sessions was capable of affording protection to an officer acting *bonâ fide* under it. But there was one case, that of *Biggs* v. *Evelyn*, 2 Hen. Black. 214, which satisfied the *Court* that the defendant in this action was entitled to the benefit of the 24th Geo. II., c. 44. There the defendant, who was lord of a manor, entered, in company with his gamekeeper, the house of the plaintiff, and took therefrom a gun; for the recovery of which the plaintiff brought an action of trover against him. But the Court of Common Pleas, though they admitted that even a magistrate had no authority whatever to enter the plaintiff's house, or to take away his gun, still held, that a magistrate who should do so in virtue of his office, was entitled to notice of the action under the 24th Geo. II., c. 44; and because the defendant was, in point of fact, a magistrate, the judges thought themselves at liberty, even under these circumstances, to *presume* that he was acting as a magistrate, and accordingly nonsuited the plaintiff.—By comparing that case with the present, the *Court* found that it furnished an answer to *every* argument which had been urged on the part of the plaintiff in this suit; and accordingly the *Court* felt that the verdict could not be sustained upon the mere point of *law*. But an

1823.

LITTLE v. BROOM.

application for a *new trial* is always regarded by the Courts at Westminster, with reference to *equitable* considerations; and it has been laid down in many cases that a new trial will not be granted upon a *strict point of law*, contrary to the equity of the cause (2 Salk. 644 & 646.) Looking, then, to the *real merits of this case*, the Court perceives that the plaintiff has been deprived of his property by a proceeding which was certainly illegal; prevented for more than four months from bringing his cause to trial, by an application for the postponement of it by the defendant, upon grounds which now appear to have been frivolous; and that the damages which have been given to the plaintiff by the jury, do not exceed the actual value of the property which has been unlawfully taken from him. Under these circumstances, therefore, the *Court* considers the verdict a very equitable one; and, consequently, feels it necessary to *discharge this rule.*

WILLIAM INNOTT, administrator to the Estate of JEREMIAH HARTARY, *against* JAMES PENDERGAST & JAMES FOX, executors to the Will of JOHN M'GRATH.

September 9th.

Verbal leases for a longer term than *three* years, have the force and effect of *leases at will* only.

THIS action was brought to recover the possession of a fishing-room, held by the defendants under a parol demise to their testator by the late *Jeremiah Hartary.* The holding, and notice to quit, being admitted by the defendants, *Broom*, jun., on their behalf, endeavoured to set up a *verbal* lease for twenty-one years, of which, as he stated, four years were yet unexpired. But the *Court* held such a lease subject to the provisions of the statute of frauds; and,

1823.

therefore, as there was no other defence to the action, it was, by agreement, ordered, that a writ should issue to put the plaintiff in possession on the 20th of October next.

Ex parte, EDWARD BANKS, in the matter of GEORGE AUGUSTUS ELLIOTT'S Insolvency.

September 15th.

If partners buy *land*, for the purpose of a partnership concern, it forms part of the *partnership property*; and if *partnership property* is invested in the purchase of a real estate, such estate will be *partnership property*, though the conveyance of it may have been made to only *one* of the partners.

PER CURIAM. The petition upon which the question in this case arises, was originally addressed, in the absence of the late Chief Justice, to the Judge of the Surrogate Court in St. John's; and has been referred by him, with consent of parties, to my determination. From the evidence which has been laid before me, it appears that, in the autumn of 1819, the insolvent communicated to one *Robert Ollerhead* some commercial plans he had formed, and proposed that a partnership should be entered into between them; but this proposition was not assented to by *Ollerhead*; and the insolvent soon after left this country for England, where he obtained, upon his own credit, goods to a considerable amount, which he forwarded to Newfoundland in the early part of the year 1820, with a letter to *Ollerhead*, requesting him to take charge of them; and adding, that if he would do so as *partner*, he, the insolvent, would be *better pleased*. Under the authority of this letter, *Ollerhead* took possession of the goods; hired a store to deposit them in; and, from that period, he and the insolvent, without entering into any agreement respecting the terms of their partnership, continued to act, and carry on business, as partners in trade, under the firm of *G. A. Elliott & Co.*, until January, 1821; when it was agreed, that the partnership

1823.

Ex parte, BANKS, in the matter of ELLIOTT'S insolvency.

should be dissolved; that *Ollerhead* should be paid £211 0*s.* 4*d.*, as the balance due to him upon the statement of the account between the parties, together with £100 as a remuneration for his services during the existence of the partnership; that a notice of the dissolution of the partnership should be inserted in the newspapers; and that the insolvent should procure some friend to guarantee *Ollerhead* from any liability for the debts of the firm. It seems, therefore, quite clear, that a partnership, as to *third persons*, did, in fact, subsist between these parties for about six months; but how far *Ollerhead* was entitled to a participation of profits; and whether he ever had any vested interest in the partnership property (17 Vesey, 404) are questions which it is by no means easy to decide upon the evidence which has been adduced in this case. It is, I think, even open to some doubt, whether a partnership, *inter se*, did ever exist; and, consequently, whether *Ollerhead* could, if he had been disposed to insist upon his full rights, have supported a claim against *Elliott* for anything beyond a compensation in the nature of wages, upon the principle of a *quantum meruit*, for his labour and trouble. (*Peacock* v. *Peacock*, 2 Camp. 45.) But without dwelling farther, at present, upon these points, I will now state, from the evidence, some other facts more closely connected with the question under consideration. Before the insolvent went to England, he had a conversation with Mr. *Hoyles*, the agent of Mr. *Newman*, respecting some property belonging to the latter gentleman, which the insolvent was desirous of taking upon a building-lease; and whilst he was in England he had some communication with Mr. *Newman* upon this subject;

1823.

Ex-parte, BANKS, in the matter of ELLIOTT'S insolvency.

and he also purchased some materials for building, which were sent out by him to St. John's. He did not, however, make any agreement with Mr. *Newman;* but upon his return to Newfoundland, and subsequently to the commencement of his connection with *Ollerhead*, he renewed his negotiations with Mr. *Hoyles*, and shortly after obtained from him a lease of the premises in his *own* name, without any consultation with *Ollerhead* as to the terms and conditions of the bargain. The building materials sent out from England, were then employed in constructing a house and stores upon the demised ground; and a large proportion of the goods purchased by the insolvent, on his own credit, anterior to the formation of his partnership with *Ollerhead*, were transferred to Mr. *Kough*, the builder, in part-payment of his account. Some of the partnership property was also, it is said, expended upon the buildings; and after the dissolution of the partnership, the insolvent paid many hundred pounds towards their completion. With the interest thus acquired in the premises, the insolvent appears to have considered himself solely and exclusively entitled to the term; and accordingly mortgaged it, in July, 1821, to the petitioner, as a security for the payment of a large debt, at a time when the petitioner and a Mr. *Graham* were almost the only creditors of the insolvent, and under circumstances which induced a belief, on the part of the insolvent, that his debt to *Graham* had been liquidated. There is, therefore, no room to question the *bona fides* of the transaction; nor do I find that an attempt has been made, in any stage of the proceedings, to impeach it on the ground of a *fraudulent preference*. But *Elliott* having

1823.

Ex-parte BANKS, in the matter of ELLIOTT'S insolvency.

some time afterwards become insolvent, the trustees and general creditors of his estate dispute the validity of the mortgage to the petitioner; because they say the lease itself was the partnership property of *Elliott & Ollerhead*; and that no assignment of his interest in it was ever made by *Ollerhead* to *Elliott*, so as to enable the latter to dispose of it without the concurrence of the former. I shall, therefore, examine this subject under the three following heads:—

1st, I shall state the arguments both for and against the position, that the lease was *partnership property*.

2dly, I shall explain the reasons upon which I conceive there was a sufficient assignment to *Elliott* of *Ollerhead's* interest in the lease, if we were even to allow that he once had an equitable interest in it.

3dly, I shall show that the mortgage is, at all events, good, as against the *separate* creditors of *Elliott*, whatever objection it may be open to as respects the rights of the *joint* creditors of *Elliott & Ollerhead*.

In the first place, then, it is, I apprehend, perfectly settled, that where partners buy land for the purpose of a partnership concern, it is part of the *partnership property* (*Thornton* v. *Dixon*, 3 Bro. 199); and that if the partnership property is invested in the purchase of real estates, the property is not *separate*, because the conveyance is made only to *one partner*—(*Smith* v. *Smith*, 5 Ves. 189). If, therefore, it had appeared from the evidence, that this lease was taken for the purpose of a partnership concern; or that the buildings had been solely erected with partnership property, I should have no hesitation in declaring the lease to have been partnership property, notwithstanding it was made to *Elliott* alone. But under the real

1823.

Ex-parte BANKS, in the matter of ELLIOTT's insolvency.

facts of this case, can any one feel satisfied that this lease was originally taken for a partnership concern with *Ollerhead;* or that the buildings were erected principally with partnership property? Before the commencement of his connection with *Ollerhead*, *Elliott* enters into a treaty with Mr. *Hoyles* for a lease of this property; and concludes his bargain during the existence of the partnership, without once consulting his partner upon the propriety of the proceeding, or explaining to him the views with which he had entered into it. Surely, if *Elliott* had intended to purchase this property on account of *Ollerhead* and himself, he would naturally have advised with his partner upon the subject of the purchase; and it is still more probable that if *Ollerhead* had considered himself concerned in the purchase, he would not have remained perfectly passive and inactive whilst the negotiation for it was in progress. It was a matter of too great magnitude to be regarded by him with indifference, if he had supposed himself to be in any way a party to it. From the conduct, therefore, of both *Elliott* and *Ollerhead* an inference may be drawn, that the lease was not taken by *Elliott* for the purpose of a *partnership* concern. Let us see, then, whether the buildings became partnership property in consequence of their being constructed out of the partnership fund. Now, it appears, that a large quantity of building materials were sent out by *Elliott* from England, together with a number of other goods procured by him upon his individual credit before any partnership was formed between him and *Ollerhead*; and it is certain that *Ollerhead* was not liable for the debts thus contracted by *Elliott* (Saville *v.* Robertson, 4 T. R. 724.) But it is pro-

1823.

Ex parte, BANKS in the matter of ELLIOTT'S insolvency.

ved in evidence, that those very materials were employed in erecting these buildings, and that the principal portion of those goods was transferred by *Elliott* to the builder, in part-satisfaction of his demand upon him; and it is also proved that a very large sum of money was paid by *Elliott*, on account of those buildings, after the dissolution of the partnership. I am, therefore, strongly inclined to think that the buildings must be deemed, *ab initio*, the separate estate of *Elliott*; and that the effect of the appropriation of a small portion of the partnership fund to this purpose, would merely be to render *Elliott* a debtor to the firm for the money so advanced. and not to convert the buildings into partnership property. If, indeed, this question had arisen between the joint creditors of the firm, and the separate creditors of *Elliott*, it would have borne some resemblance to the case of *Hayes & Glynn's* insolvency; but I cannot discover that that case has any bearing whatever upon the present controversy; nor do I conceive myself called upon to decide *positively* that these buildings could not, at any time, be considered partnership property; because I am convinced that if *Ollerhead ever* had an interest in them, it ceased upon the dissolution of the partnership. Against this position it may be urged, that a mere dissolution of partnership, without any assignment to the remaining partner, will not convert joint into separate property (*ex parte Williams*, 11 *Ves.* 7); and that we have been expressly told by *Ollerhead*, that there was no assignment upon the dissolution of his partnership with *Elliott*. But if we look for a moment at the terms upon which the partnership was dissolved, we shall perceive that *Ollerhead* must be understood to mean a *written*

1823.

Ex parte, BANKS, in the matter of ELLIOTT'S insolvency

assignment; for it cannot be imagined that *Elliott* would consent to pay *Ollerhead* the balance of his account—to remunerate him for his services—and to guarantee him against any liability for the debts of the firm,—if it had not been the intention of *both* parties that the partnership property should thenceforward vest solely in *Elliott*. In fact, these acts did, in substance, amount to an assignment, though a formal assignment might not have been made; and since it is laid down, generally, that it is not necessary that the transfer should be by an instrument in writing (*Montague on Partnership*, p. 101), there is an end to any objection founded upon the irregularity of the assignment; and with reference to what has been alleged against the sufficiency of the measures taken for dissolving the partnership, I shall content myself with observing, that the agreement to dissolve, and the notice of dissolution published in consequence thereof, did effectually destroy any partnership, *inter se*, if it ever existed; although it would not have protected *Ollerhead* from any future dealings between *Elliott* and an old customer of the firm, who had not notice of its dissolution; but from this liability he had taken care to guard himself by the guarantee of Mr. *Preston*.—Upon an attentive consideration, then, of all the circumstances attending the dissolution of this partnership, I think it highly probable that, if the lease in question had been ostensibly and indubitably taken for a partnership concern, the buildings erected exclusively with partnership property, and the conveyance made to *Ollerhead* as well as to *Elliott*, a Court of Equity would, after such a dissolution of the firm, have compelled *Ollerhead* to convey his interest

1823.

Ex-parte BANKS, in the matter of ELLIOTT's insolvency.

in the lease to *Elliott*, in conformity to the rule established in equity, that whatever has been agreed to be done shall be considered as done. But in the present instance there is no occasion to resort to this principle; for as *Ollerhead* never had a *legal* title to the lease, but only (if any) an *equitable* one, his interest in it was always liable to be divested by any circumstance which would defeat that equity, agreeably to the maxim, "NIHIL TAM CONVENIENS EST NATURALI ÆQUITATI, QUAM UNUMQUODQUE DISSOLVI EO LIGAMINE QUO LIGATUM EST." There was, therefore, not the slightest necessity for a written conveyance, or assignment, of *Ollerhead's* interests in these buildings to *Elliott;* since it would naturally pass from the former to the latter whenever those equitable considerations upon which it was founded ceased to operate.

In labouring, however, to establish, by legal argument, that the lease *always* was the *separate* property of *Elliott;* or that, at all events, it *became so* upon the dissolution of his connection with *Ollerhead*, I have almost been fencing with shadows; for if the lease was not the separate property of *Elliott*, what interest have the trustees and creditors of his *separate* estate in it? To this hour *Ollerhead* has not been declared insolvent; nor is it even contended that the firm was insolvent at the period when he retired from it. The terms of the dissolution were, that *Elliott* should have the partnership property, and that he should be responsible for the partnership debts; and thus the joint property was converted into the separate property, and the joint debts into the separate debts, of *Elliott*. In point of fact, therefore, there are not two classes of creditors, joint and separate, between

1823.

Ex-parte BANKS, in the matter of ELLIOTT'S insolvency.

whom the question of joint or separate property can be raised; but all the creditors are creditors *ejusdem generis*, viz., the separate creditors of *Elliott*; and by proving their debts under *his* insolvency, they have virtually acknowledged themselves to be so. Since, then, the petitioner, as one of the separate creditors of *Elliott*, did fairly obtain a mortgage from *Elliott*, as a security for a subsisting debt, I do not see how this transaction can be impeached by the other separate creditors of *Elliott*. They may regret that they did not act with the same prudence that he did, but they cannot prevent him from reaping the benefit of it, "VIGILANTIBUS, NON DORMIENTIBUS JURA SUBVENIUNT." Under every view, therefore, of this case, I am of opinion, that the mortgage is valid both in law and equity; and as the assignment of the lease has become absolute by the non-performance of conditions on the part of the mortgagor, the only interest the trustees can claim in the lease is an equity of redemption. The *Court* will, accordingly, place the trustees in precisely the same situation in which the mortgagor would now stand if there had been no insolvency; and does, therefore, order and decree that the trustees shall, forthwith, pay to the petitioner the full amount of his debt, or otherwise permit him to enter upon, and take possession of, the mortgaged premises.

WILLIAM HENRY FRY appellant,
and
BENJAMIN REIGLES respondent.

1823.

September 22d.

The Supreme Court will not reverse the judgment of an inferior Court, founded upon the verdict of a jury, except for *error of law apparent upon the face of the proceedings* —[See 5th Geo. IV., c. 67, s. 14.]

IN affirming the judgment of the Surrogate Court in this case, the *Chief Justice* said:—

That where a judgment has been given in a Court below, founded upon the *verdict* of a Jury, this Court will not inquire into the merits of the case; receive any statement of facts contradictory of the evidence; nor reverse the judgment, except for *error in point of law, apparent upon the face of the proceedings.*

Estate of the late Rev. JOHN LEIGH.

September 25th.

Order to an administrator, *ad colligendum bona defuncti*, to pay the wages due to the servants of the deceased, and to dispose of, by public sale, such part of the goods of the deceased as were *bona peritura.*

UPON a representation from *Thomas H. Brooking*, administrator, *ad coll. bona*, of the late Rev. *John Leigh*, deceased, that he had been applied to by two servants of the said deceased for their wages; and that some of the property of the said deceased which had come to his possession, consisted of articles liable to deterioration if kept for any length of time; it is ordered that the said administrator do pay to *George Garratt* the sum of £18, and to *John Maddock* £2 5*s.*, being the amount of wages respectively due to them. And, also, that the said administrator be authorized to sell and dispose of, by public auction, such parts of the said property as may come under the description of *bona peritura.*

1823.

October 6th.

Upon the suggestion, on oath, of a judgment-creditor, that the party against whom the judgment was given, had goods and effects in the hands of a third person, that person is directed, by order of Court, to account for the appropriation of any property which may have come to his possession belonging to the judgment-debtor.

Order of Court.

UPON the petition and affidavit of *William Dearin*, setting forth that *George Harvey* was, to the best of the petitioner's knowledge and belief, possessed of goods, chattles, and effects, belonging to *Thomas Harvey*, against whom the petitioner obtained a judgment in this Court on the 29th ult. for £91 5*s.* and costs, at the time when such judgment was given: it is ordered that the said *George Harvey* be required to attend in this Court, on Thursday, the 9th instant, to answer such questions as may be put to him respecting the appropriation and disposal of the property of the said *Thomas Harvey*.

By the Court.

JAMES BLAIKIE, *C. S. C.*

October 6th.

Order upon the next of kin to show cause against the granting of administration, *cum testamento annexo*, to the sole legatee.

Order of Court.

IT is ordered that notice be given to Mrs. *Ann Skelton*, who is stated to be the next of kin to *John Hiltditch*, late of Trinity, in the Island of Newfoundland, deceased, requiring her to show cause, if any she can, why a certain written instrument, purporting to be the will of the said *John Hiltditch*, should not be proved in this Court, and administration granted, *cum testamento annexo*, to *Charles Answorth*, the husband of *Elizabeth Answorth*, the sole legatee under the said will.

By the Court,

JAMES BLAIKIE, *C. S. C.*

NICHOLAS CROAK *against* PETER BROWN.

1823.

October 6th.

Disputed accounts between parties referred to the Clerk of the Court.

IN this case the *Court* decided, that the defendant was not liable to pay the proceeds of the articles sold by defendant, as agent to the plaintiff, to *James Fox* of Harbour Grace; but directed that the accounts between the parties should be examined by the clerk of the Court, whose report thereon should decide whether any balance was due to the plaintiff; and who should, also, tax the costs of the suit, which were, at all events, to be borne by the defendant; the *Court* considering that this action was, in *principle*, an action for an account, and that the defendant was liable to the costs of it for his neglect in not rendering an account (5 *Dow's* Rep. 127.)

Petition and Order thereon.

To His Honour RICHARD ALEX. TUCKER, Esq. *Chief Justice of Newfoundland, &c. &c. &c.*

The Petition of *Goss, Butler & Goss*, of St. John's, Newfoundland, merchants,

HUMBLY SHOWETH:

That your Honour's petitioners, in the month of November, 1820, became the mortgagors of a plantation, the property of *John Williams*, situate at Petty Harbour, under a mortgage-deed duly executed by the said *John Williams*, in security for a debt due by him to the petitioners in the sum of £250; which sum the said *John Williams*, by covenant contained in the said deed, agreed to pay to petitioners by annual in-

1823.

Petition & Order thereon.

stalments of £25 each succeeding year, until the said debt should be discharged.

That on the 10th day of September last, the full sum of £75, for three years instalments, ought to have been paid, whereas the sum of £15 9*s.* 9*d.* only has been paid by the said *John Williams*, who still delays and refuses to fulfil the conditions of the said mortgage-deed; petitioners, therefore, humbly pray that your Honour will be pleased to grant a rule that the said *John Williams* may appear in this Honourable Court, to show cause why the said mortgage shall not be foreclosed for the indemnification of petitioners under the said deed; and, as in duty bound, petitioners will ever pray, &c.

For Petitioners,

JAMES SIMMS, *their Attorney.*

St. John's, Newfoundland, 9th Oct. 1823.

October 9th. Let a rule to show cause be issued and notified to *John Williams*, in order that he may appear in Court on Thursday, the 16th October, instant; and let also a copy of this petition be served on him.

By the Court,

JAMES BLAIKIE, C. S. C.

October 26th. Agreeably to the rule granted on the 9th instant, *John Williams* this day appeared in Court, and stated that he had failed in paying the yearly instalments to the petitioners for several years, and that he had no means whatever of paying the debt now due to them. Under these circumstances, the Court ordered the mortgage to be foreclosed; and directed the High Sheriff to advertise *John Williams's* interest in the mortgaged premises to be sold by public auction, at the Court-house, on an early day to be named by him.

JOHN EBSARY *against* HERNAMAN & HOWARD.

1823.

October 28th.

In a controversy between two inhabitants of this island, claiming a *permanent* possessory title to a piece of land, the provisions of the 10th & 11th Wm. III., c. 25, s. 5 and 6, cannot be set up by one of them as a bar to the claim of the other; but, as between these parties, *twenty years undisturbed and adverse possession* will confer a *perfect right of possession.*

PER CURIAM. This action is brought to try the *possessory* title to a piece of ground, on which the defendants have erected a fish-flake, and which the plaintiff claims a right to. I shall, therefore, consider it as an action of *ejectment*. Now, an undisturbed possession for more than twenty years of the ground in question by the plaintiff, and those under whom he claims, has been clearly proved; and, consequently, according to established principles of law, the plaintiff is entitled to the possession of this ground, unless there be anything in the Act of the 10th and 11th William III., c. 25., to debar him from that right which he would undoubtedly have acquired by the general rule of English law. On the part of the defendants it is contended, that the statute just cited does oppose a bar to the plaintiff's action; and they rely for their defence upon the 5th section of that Act, which enacts, "that per-"sons who, since 1685, have detained any "stage, cook-room, &c. shall relinquish the "same to the public use of *fishing ships*," *&c.*; and, also, upon the 6th section, which directs "that no fisherman or inhabitant in "Newfoundland, shall, at any time after the "25th March, 1700, seize, take up, or pos-"sess any of the stages, cook-rooms, beach-"es, or other places, which at any time "since the year 1685 did, or at any time "hereafter shall, belong to any fishing-ship "or ships." To this defence it seems, however, a very satisfactory answer, that there is no proof whatever in this case, that the ground in dispute has been used by the *fishing-ships* for curing their fish since 1685;

1823.

EBSARY v. HERNAMAN, & HOWARD.

and that this question can only be properly raised in an action between the fishing admirals and an inhabitant, (or perhaps between the Government and an inhabitant,) and not between two inhabitants, who are *equally* excluded by the 10th and 11th of William III. from any permanent interest in ground which has been applied to the use of the fishing-ships since 1685. How far the provisions of that Act may control the general rule of law, that sixty years undisturbed possession will confer a right of property which will bind the Crown itself, is a question which I am not here called upon to decide. It is the *right of possession*, and not the *right of property*, which I consider as now brought into controversy between these parties; and I am perfectly satisfied that twenty years undisturbed enjoyment of this piece of ground, is sufficient to entitle the plaintiff to the possession of it; and that the judgment of the *Court* must, accordingly, be given in his favour.

October 30th.

Order upon executors to show cause why a party claiming an interest in the property of their testator should not be permitted to receive the same,

Estate of JOSEPH STUCKLESS, deceased.

IN compliance with the prayer of the petition of *Thomas Slade*, the husband of *Susannah Stuckless*, daughter of *Joseph Stuckless*, of Twillingate, deceased, it is this day ordered by the *Court*, that *Joseph Colbourn* and *John Colbourn*, the executors named in the last will and testament of *Joseph Stuckless*, deceased, do, either in their proper persons, or by some person or persons duly authorized on their behalf, appear in the Supreme Court at St. John's, on the 15th day of May next, and show cause, if any they have, why the petitioner, *Thomas*

Slade, ought not to take a distributable share, in right of his late wife, *Susannah*, of the property of her deceased father, *Joseph Stuckless*.

1823.

Memorial, and Order thereon.

ON this day, a memorial was presented to the Court, from Mr. *Kelson*, of Trinity, accompanied by an affidavit, praying that the several suits now pending against him in the Supreme Court, might be allowed to stand over until the spring of the year, as he could not attend at St. John's with the necessary witnesses for his defence.

October 31st.

The *Court* directed the said causes to stand over until the *first day of May* next: and, in the mean time, ordered Mr. *Kelson* to pay the plaintiffs such sums as shall appear by his accounts to be due to them, without prejudice to either party.

Case of the Brig ATALANTA submitted to the consideration of the CHIEF JUSTICE.

November 10th.

THE Brig *Atalanta* sailed from Liverpool for St. John's, Newfoundland, with a cargo of merchandise, partly the property of the owner, and partly on freight belonging to different persons. On arriving on this coast, she ran on shore on Cape Ballard, in the fog, and became a total wreck. Some of the cargo floated and drove ashore, and was picked up by persons belonging to Renews and other harbours, which was sold to the gross amount of about £100; and broken spars, sails, and other parts of the vessel to

The universal rule respecting the claim of seamen to wages, seems to be, that their claim shall always be in *proportion to the freight earned*, where there has been a due performance of duty on their part.

1823.

Case of the Brig ATALANTA.

the amount of about £10. Out of these sums, the persons who saved them have claimed, and been paid, a salvage of one-half, and some one-third: this will leave a very small sum for the owners and underwriters, after paying for the hire of a boat, which the captain hired to go to the wreck, and the expenses of the master's protest, &c. A few firkins of butter that were on freight, have been picked up, which the owners have claimed, and paid the salvage for.

Decree thereon.

PER CURIAM. It is a remarkable fact, that the claims of seamen to wages in the event of *shipwreck*, have neither been settled by any English statute, nor by any decision upon them in our Courts of Law. Chief Justice *Abbott*, in his excellent work on Merchant Ships, after quoting the ordinances and rules of several countries upon this point, observes that he has not been able to find any decision of an English Court upon it, and that the Legislature has made no provision relating to it. This Court must, therefore, resort to *general principles*, in order to decide upon the claims of the seamen under the particular circumstances of the case which is now brought under its consideration. Since, then, it is an established principle, that freight is the mother of wages; and since it appears from the statement of this case that *some* freight has been earned; it follows, from the application of the general principle to the particular facts of the case, that the seamen are entitled either to the *whole*, or a *part*, of their wages. On the other hand, it is the leading principle upon which all our rules in regard to the payment of wages are founded, to make the

1823.

Case of the Brig ATALANTA.

payment thereof to depend upon the *successful termination of the voyage*; and in conformity to this principle, it seems to be the opinion of our ablest Judges, and best writers upon maritime law, that the seamen ought to contribute, out of their wages, to the salvage upon *recapture*. (*Abbott*, 466 & 467.) The same principle is equally applicable where, as in the present instance, a part of the cargo has been saved, after *shipwreck*, by strangers, without any co-operation on the part of the mariners, who had been previously compelled to abandon the vessel; and the rule deducible from the two principles already mentioned, is, that the claim of the seamen to wages must ever be (where there is no fault on their side) in proportion to the net amount of the freight earned. As, therefore, the net amount of the freight upon the goods saved, is to the whole amount of freight which would have been earned by the vessel had she reached her port of destination in safety; so is the amount of wages to which the seamen are now entitled, to the whole amount which would have become due to them in that event: and the *Court*, accordingly, directs that a payment of wages should be made to them agreeably to this proportion.

1823.

November 10th

BREHAUT & SHEPPARD complainants,
and
Trustees of LE MESSURIER's Estate
respondents.

Held, first, that the preferance given by the 49th Geo. III., c. 27, s. 7, to the creditor whose debts were contracted within two years precediog the declaration of insolvency, is, like the preference conferred on the creditor of the current season, confined to debts contracted for *supplies furnished for the prosecution of the fisheries.* And second, that where a person carries on business to a great extent as a *general merchant*, and is, at the same time, directly concerned in the prosecution of the fisheries, his property and effects, in the event of his insolvency, *will not become liable to the law of current supply.*

AFTER having heard several arguments upon this case, and taken time to consider the important points which grew out of it, the *Chief Justice* now delivered the following judgment:—

This case has raised two questions so deeply interesting to the commercial interests of the colony, and, at the same time, accompanied with circumstances of such peculiar difficulty, that after a long, and even painful, consideration of them, I am now compelled to deliver a judgment upon these points without having been able to banish *wholly* from my mind all the doubts which have presented themselves in the course of this investigation. For the sake of perspicuity, I shall first give a succinct outline of the principal circumstances which occasioned the present suit; I shall afterwards distinctly state the two important questions which have grown out of those circumstances; and I shall, lastly, explain the grounds upon which my decision on them is founded, in as clear and intelligible a manner as I can.

From the facts which are admitted on both sides, it appears, that the insolvent carried on trade to a very considerable extent, as a *general merchant*, in St. John's; and that he also conducted a *fishery*, upon a pretty extensive scale, at Burin. In the prosecution of these two objects, he contracted a number of debts; and at the period of his insolvency, which took place in 1819, there was one class of creditors who had demands upon his estate as servants,

1823.

BRSHAUT & SHEPPARD & Trustees of LE MESSURIER's Estate.

for wages: another class who, supposing that the law relating to "current supplies" is applicable to such a case as this, might claim as suppliers for the current season: a third class whose credits were given within two years before the declaration of insolvency: and the complainants in this suit, with whom the insolvent had contracted his debt several years before any of those comprised in the foregoing classes. Under a liability to claims of these four descriptions, the estate of the insolvent was transferred to trustees; who, out of the proceeds thereof, have discharged the whole amount of the servants' wages, and have also paid a dividend of five shillings in the pound upon all the debts incurred in the years 1818 and 1819, without hitherto making any distinction in favour of the current supplier (*a*); but yet refuse to permit the complainants to participate in this dividend, although they still retain in their hands funds more than sufficient to enable them to do so. The questions, therefore, that arise out of these facts, are, whether or not the persons who have become creditors within two years are entitled, under the 49th Geo. III. c. 27, s. 7, to be paid 20*s.* in the pound, before the creditors of an earlier date can claim *any* dividend?—And, 2dly, whether or not that priority in order of payment, which by the same section is conferred upon the current supplier, extends to any class of the creditors of a person largely engaged in general trade, and at the same time directly concerned in a fishing establishment? This latter point has not,

(*a*) There seems to have been an early idea among the trustees, that the law relating to supplies did not apply to such a case as this, which was probably grounded on the general tendency of Mr. *Forbes's* arguments on this subject, though the point itself was never expressly decided by him.

1823

BREHAUT, & SHEPPARD & Trustees of LE MESSURIER'S. Estate.

indeed, been absolutely mooted by the parties to the present suit; but from the accounts laid before me, I perceive it has been in some measure reserved by the trustees as a legal problem which has not yet been solved: and as the determination of it is essentially necessary to the settlement of this estate, I have been induced to examine it with a good deal of attention, and am now, probably, as well prepared to deliver an opinion upon it as I shall ever be. It is, therefore, I think, proper that I should seize this opportunity of declaring my sentiments upon it; and I shall accordingly do so, after having delivered them upon the former question, which constitutes, as I have already observed, the more immediate subject of the present suit.

Before Mr. *Forbes* came to this island, it had been uniformly holden by the Courts here, that the expression "creditor for supplies," which is used in the 49th of his late Majesty, was intended merely as a "*personarum designatio*," or a description of the *persons* who were to be entitled to a preference under that act; and that, consequently, a "creditor for supplies" had a right to a priority of payment of the *whole* amount of his account for the "current season," (which word "season" was then understood to mean the same as *year*,) although it might contain, in addition to some things necessary to the fishery, a still greater number of articles in no respect connected therewith. Soon after his arrival, however, this question was brought before him, by an appeal from the judgment of one of the Surrogates, in a case which arose out of the insolvency of Messrs. *Crawford & Co.*; and he there decided, in opposition to a long series of precedents, by which the opinion of the Surrogate

1823.

BRENAUT & SHEPPARD and Trustees of LE MESSURIER'S Estate.

was supported, that the word "supplies" must be confined to such articles as are commonly required in the *Fisheries;* and that the expression "current season" signifies only that part of the year in which the fishery can be prosecuted. In short, he construed this passage in the Act—"Every person who shall be a creditor for supplies furnished in the current season, shall be paid twenty shillings in the pound;" exactly as if it had been thus expressed:—Every person who shall be a creditor for supplies, shall be paid twenty shillings in the pound *upon the amount of supplies actually furnished by him for the fishery within that portion of the current year in which it can be carried on.* In his judgment upon that case, he takes a wide and comprehensive view of the early condition of this country, and of the peculiar usages and customs which had grown out of it; and demonstrates, by a train of the most lucid and convincing arguments, that the provisions in the 49th of the late King, relative to the distribution of the effects of insolvents, are *remedial* of the inconveniences resulting from customs no longer adapted to the existing state of things; and that it ought, consequently, to be construed liberally, and in such a way as to repress the mischief, and advance the remedy.—Satisfied, therefore, that it is impossible for me to place this matter in a clearer light than has already been done by him, I shall refer to his arguments in the case of *Crawford's* insolvency, as if they had been absolutely incorporated in this judgment; and shall content myself with offering such *additional observations* upon the design and object of the 7th section of the 49th Geo. III., c. 27, as will, I trust, justify the construction I am now about to put upon it.

1823.

BREHAUT & SHEPPARD and Trustees of LE MESSURIER'S Estate.

When a branch of productive labour is to be fostered, which requires a certain share of capital, and a particular sort of skill, and when the person who possesses the art and skill necessary for the successful cultivation of it, is almost always without money sufficient to carry it on, it is obviously a wise measure to give to men of capital a lien upon the property to be obtained by the employment of a part of that capital in such an undertaking, as an inducement to them to advance it in a concern, where the party conducting it has no other kind of security to offer them. In such a state of things a lien upon the produce of the labour, and a priority of payment in cases where debts of a different nature have been incurred, are the *true parents of credit*; and this was precisely the condition of the infantile establishments in this colony. It was, therefore, natural that such a lien, and such a preference with respect to payment, should rapidly grow into a custom (*b*); and it was also wise and proper for the Courts to sanction and favour such a custom as far as possible. But it is quite evident, that the same custom which is thus capable *of creating and supporting credit in one state of society*, will *undermine, shake, and destroy it in another*. Thus it may be advanced, as an axiom obvious to the understanding of every commercial man, that mercantile transactions could not possibly be carried on upon a *large* scale if such a custom were to be extended to them; because as the return upon these transactions is often very *slow* and *distant*, they demand

(*b*) It is worthy of remark, that the supplier's lien upon the produce of a fishing-voyage still rests entirely upon *custom*, and has never been either directly or indirectly recognized by any part of the *lex scripta* of the island.

1823.

BREHAUT & SHEPPARD and Trustees of LE MESSURIER's Estate.

a credit which must be *continued for several years;* and it is manifestly impossible that a credit of this kind can *flourish* (if, indeed, it can *exist at all*) where the creditor, by forbearing to exact payment of his debt for a year or two, will incur the greatest risk of losing it altogether. When, therefore, Newfoundland had begun to emerge from a long period of rickety childhood, into a state of more promising and vigorous adolescence; and when in addition to the '*planters*,' who for a vast number of years had constituted nearly the whole of her sedentary population, merchants with considerable capital, or credit, had fixed themselves in all the principal ports of the island, the trade of it necessarily assumed a new and different character, to which the old customs of *lien* and *priority of payment* were, as I think I have clearly proved, *decidedly adverse.* It was, consequently, found necessary to restrain those customs to their peculiar, and only proper object, the *fisheries;* and accordingly it is declared, in the 49th of the late King, that, "it will greatly contribute to the "advancement of the trade and fishery of "Newfoundland, if such effects as persons "becoming insolvent in the island were pos-"sessed of or entitled to within the said "island, should be divided among their cre-"ditors with more *equality* than hath *hi-"therto been practised.*" It is the professed design, therefore, of this Act, to introduce a more *equal* distribution of the estates of insolvents than had formerly prevailed in Newfoundland.—Let us see, then, by what means it purposes to effect this end. Now, the 7th section enacts, "that in the distri-"bution to be made of the estate and effects "of persons declared insolvent, every fish-"erman and seaman employed in the fish-

1823.

BRUHAUT & SHEPPARD and Trustees of LE MESSURIER'S Estate.

"ery, who shall be a creditor for wages, "become due in the then current season, "shall first be paid 20*s.* in the pound, so "far as the effects will go; and in the next "place, every person who shall be a credi- "tor for supplies furnished in the current "season shall be paid 20*s.* in the pound; "and in the next place, every person who "shall have become a creditor within two "years shall be paid 20*s.* in the pound; and "lastly, all other creditors shall be paid "equally as far as the effects will go."— And this is done for the sake of making a more *equal* distribution of the property of insolvents than had formerly prevailed. But surely there cannot be a person who does not instantly perceive, that if the second and third classes embrace *creditors of every description*, and are not confined to *creditors for supplies furnished in the fishery*, the mode of distribution here directed is the most *partial* and *unequal* that can almost be imagined. Natural equity strongly suggests, that the *oldest* debt should be *first* discharged —"QUI PRIOR EST TEMPORE, POTIOR EST JURE," is the maxim by which every honest man regulates his conduct in the settlement of his debts, as long as he has a reasonable hope of being able to pay them *all*; and when that hope entirely ceases, he will surrender all his property to his creditors, to be divided *equally* among them, in proportion to their respective demands upon him. This is the principle upon which our bankrupt laws are founded; and nothing, I conceive, short of such necessity as I have shown to exist with respect to the encouragement of the *fishery*, can justify the smallest departure from it. But so far are the *other* branches of our trade from requiring any relaxation of this general principle,

1823.

BREHAUT & SHEPPARD and Trustees of LE MESSURIE'S Estate.

that a deviation from it must, for the reasons I have already detailed, be inevitably attended with the most mischievous and pernicious consequences to them. Still, however, if it was manifestly the *intention* of the legislature to extend that exception, which they have unquestionably sanctioned in favour of the *fishery*, to our *commerce in general*, this Court would be imperatively bound to give full effect to that intention; and the Judge in pronouncing a decision, which he felt to be highly injurious to the interests of the colony, could only say, "HOC QUIDEM PERQUAM DURUM EST; SED ITA LEX SCRIPTA EST." (*c*) Indeed it has been observed by a learned writer, whose opinions seem to me deserving of much attention, from the sensible arguments by which they are recommended, even where they are at variance with some of our long-established legal rules, that "the exposition of a statute is imperative, and not discretionary: and to qualify "the *express provisions* of an Act, by exceptions deduced from its supposed *spirit*, "however conducive to the justice of particular cases, is a most alarming precedent:" (*d*) and to the propriety of this observation, with reference to the particular case to which it is applied by him, I give the most cordial assent. But words are merely the *signs* by which we express our ideas; and to interpret these signs correctly we must often look to the *manner* and *occasion* of using them. If their meaning was wholly independent of extrinsic circumstances, and always uniform, the Judges, whose province it is to *expound*, and not to *make*, laws, would be bound to confine themselves

(*c*) 3 Blac. Com. 530.

(*d*) The late Sir Wm. D. Evans. See his Collection of Statutes, vol. 3, p. 286.

1823.

BREHAUT & SHEPPARD and Trustees of LE MESSURIER'S Estate.

strictly to the mere words of a statute. To almost every word, however, there are *several meanings*; and all these are liable to vary materially with the *manner* and *occasion of using them*. In order, therefore, to ascertain the intention of the legislature, as expressed in a statute, regard must be had to the words—to the context—to other Acts in *pari materiâ* (*e*)—to the subject-matter of the law—to its effects and consequences—and to the reason and spirit of it (*f*): and from a consideration of all these (and not from any one of them alone) the Judges are to deduce that *intention* which, when they have once discovered it, they must closely adhere to, and rigidly enforce, without presuming to evade, or even to mitigate, the force of it, although it may be unwise, or even *unjust*; for the power of *altering* laws cannot be distinguished from the power of *making* them, which the Judges have clearly no right to do. It is upon the ground, then, that the legislature did not *intend*, by passing of the 49th Geo. III., c. 27, to give the creditor of two years (unless the debt were contracted for supplies actually advanced for the purpose of enabling the insolvent to prosecute the fishery) a preference over the creditor of the previous year, that I deem the complainants entitled to the relief they seek. The late Chief Justice has ably proved, that this Act is a *remedial* one; and it is a fundamental rule of construction (*f*), that remedial statutes shall be construed liberally, and with reference to the old law, the mischief, and the

(*e*) The 7th section of the 32d Geo. III., c. 46, is in *eâdem materiâ* with the 7th section of the 49th Geo. III., c. 27; and a comparison of the two clauses will, I think, fortify and support the judgment I have formed on this case.

(*f*) 1 Black. Com. p. 60.

1823.

BREHAUT & SHEPPARD and Trustees of LE MESSURIER'S Estate.

remedy. Nay, so necessary is it in the construction of *every* statute to attend to the mischief which it strives to remove, that although *penal* statutes are to be construed *strictly*, a deviation from the letter of them has sometimes been permitted, for the sake of repressing the mischief against which they meant to provide. Thus, "the statute of "Gloucester, c. 5, which giveth the action "of waste against the lessee for life, or "years, speaketh of one that holdeth for "term of years in the *plural* number; and "yet it appeareth, by the authority of *Lit-* "*tleton*, that although it be a *penal* law, yet "a tenant for *half a-year*, being within the "same mischief, shall be within the same "remedy, though it be out of the *letter* of "the law; for, QUI HÆRET IN LITERA HÆ- "RET IN CORTICE." (*g*) Now, the mischief which the legislature sought to remove by the 49th of the late King, was, the *unequal distribution of the effects of insolvents in this island;* and can we, then, suppose that it was their intention to substitute for the old method of distribution one still *more unequal*, and totally irreconcileable with any view of local expedience and commercial policy? The limits within which Mr. *Forbes's* judgment has confined the preference to the creditor for supplies furnished in the current season are, I believe, perfectly agreeable to the intention of the legislature; but it is much easier for me to persuade myself, that the interpretation formerly given to this clause by the Courts was correct, than to admit that the preference to the *creditor for the current season* was restricted to *supplies for the fishery*, whilst the preference to the

(*g*) Co. Lit. 54 b. Note, Lord *Coke* calls this "*an excellent example* whereupon, in many like cases, a man may settle a certain judgment."

1823.

BREHAUT & SHEPPARD and Trustees of LE MESSURIER'S Estate.

creditor within two years is extended to *debts of every denomination*; because by such a construction the Act would not only be still liable to all the objections which Mr. *Forbes* thought his judgment would remove; but would also, in addition to them, be inconsistent, and, as it were, at variance with itself. Whatever objections, on the score of policy and expedience, may be urged against a statute which should give to the creditor of the first year a preference over the creditor of the second; and to the latter a preference over the creditor of the third year; such a statute would, at least, be consistent; and it would be easy to *understand*, though, perhaps, impossible to *defend*, the principle upon which it was founded. But a statute which should prefer *one description* of creditors within the *first* year, to *another description* of creditors for the same period—neglect this *distinction altogether* when it provides for creditors of the *second* year—and yet give to the creditors of that year in general a *preference over all other creditors*—would, under every view I can take of it, be palpably absurd. Notwithstanding, therefore, the ambiguity and seeming inaccuracy of the structure of the sentences in the 7th section of the 49th Geo. III. c. 27, I am of opinion that the privileges conferred by it upon the creditor for the current season, and upon the creditor within two years, were in *both* instances intended to be confined strictly to credits for *supplies furnished to the fishery*.

I come now to the second query arising out of this case; and as my opinion upon it has been formed upon the same view of the subject which I have endeavoured to support by the preceding observations, I shall not be obliged to dwell very long upon

1823.

BREHAUT & SHEPPARD and Trustees of LE MESSURIER'S Estate.

it. By extending the law relating to "*supply*" to the case of a merchant who is primarily engaged in general trade with all parts of the world, and only collaterally connected with a branch of the fishery, I think we should give birth to the three following serious evils:—

1st. An extreme difficulty (in some cases, perhaps, amounting to an impossibility) in settling the estate of such a person upon his becoming insolvent; from the uncertainty which must generally prevail with regard to the distinction between debts contracted for *supplies*, and debts contracted in the *usual course of trade*.

2d. A severe and very prejudicial restraint upon commercial credit; from the indisposition which would be naturally felt by merchants in other countries to entrust their capital with a person upon whose estate and effects another class of creditors should possess a preferable claim.

3d. A vast increase to the number of declarations of insolvency; from the apprehension which would be always entertained by the creditors of the favoured classes of losing their "vantage ground" by delaying to enforce payment of their demands; and from a cold indifference which this would naturally generate with respect to the interests of the other creditors, provided there were assets to meet their own claims.

Of the policy of a legislative provision from which such consequences must flow, it is impossible to speak otherwise than in terms of censure; but still, as I have before remarked, Courts of Equity, as well as Courts of Law, have nothing to do with the *consequences* of an Act of Parliament, except only in as far as they afford one important medium by which they may arrive at the *true*

1823.

BREHAUT & SHEPPARD and Trustees of LE MESSURIER'S Estate.

meaning or *real intention* of it. My sole endeavour has, therefore, been to ascertain the true meaning and real intention of the 49th Geo. III., c. 27, with regard to the points now under discussion; and after a most attentive consideration of what I deem the proper indicia of its meaning, I am of opinion, that the legislature intended to restrain by it an unequal mode of distributing the effects of insolvents, originating in a custom manifestly injurious to every other branch of trade except the fishery (for the promotion and encouragement of which it was still necessary), to debts contracted for supplies furnished *exclusively* for the purpose of enabling the debtor to carry on, or to enlarge, a fishing-establishment. In other words, the article composing the account must not only be of that description which are required for the fishery, but they must also have been furnished *expressly* for it, and under circumstances to induce a reasonable belief that the creditor looked principally to the produce of the voyage for the payment of his debt. The last of these circumstances is, in fact, the only true basis upon which the creditors' lien, and right to a preference in payment, ought to stand; and I consider both of these as customs, in derogation of a general rule of law, which ought, therefore, to be construed strictly, and closely confined to their proper object. But every one must know that a credit of that nature to which I conceive the lien and priority of payment can alone attach, is never given to persons in the character of general merchants; and upon this ground I hold, that the whole of the law relating to "*supply*" is totally inapplicable to them.—In pronouncing this judgment I must, however, repeat, that I have not been able to

deliver my mind entirely from a number of doubts with which it has been impregnated during my investigation of this important case; and it is, accordingly, my most anxious wish, that it may be carried before a higher and more competent tribunal. The questions which it involves are not only momentous in their general operation upon the commercial interests of the colony, but also of some magnitude in their particular application to the present suit; (*h*) and these considerations will, I trust, induce the respondents to appeal from my decision to His Majesty in Council.

1823.

BREHAUT & SHEPPARD and Trustees of LE MESSURIER'S Estate.

STEPHEN NEWPORT *against* JAMES, THOMAS, and WILLIAM PURCELL.

November 15th.

THIS action was brought to recover the sum of £20 10*s.* 3*d.* as the balance of wages due to the plaintiff under a written agreement; and the *Court* gave judgment for the plaintiff according to the express terms of the agreement, after the *Chief Justice* had refused to admit evidence to prove what was the *meaning* of the parties at the time when the agreement was entered into, as being contrary to the rules of evidence; though his Honour, at the same time, informed the defendants that they would be allowed to adduce evidence as to any *custom* which might prevail in this island in relation to agreements of the nature of the one now under consideration.

Evidence is not admissible to prove that the *meaning* of the parties to an agreement was *different* from what it appears to be by the written terms of such agreement, taken in their usual and ordinary sense.

(*h*) The debt admitted to be due by the insolvent, to the claimants, amounted very nearly to *three thousand pounds.*

1823.

November 24th.

Order of Court upon a party who was alleged to have suffered a considerable time to elapse without taking any steps towards the prosecution of an appeal, to show cause why execution should not issue upon the judgment given against him.

ROBERT EVANS appellant,
and
The assignee to the estate of THOMAS CONGDON respondent.

AT the instance of Mr. *James Cross*, the attorney for the respondent in the above-mentioned cause—

It is ordered by the *Court*, that the above-named appellant, and his surety in the appeal, do appear in Court on Friday, the 5th day of December next, to show cause why the amount of the judgment of this Court against the above-named appellant has not been paid and satisfied; or why execution should not be forthwith issued against the goods, chattles, credits, and effects of them, the said *Robert Evans* and *William Stafford Pope*, the surety in appeal of him the said *Robert Evans*.

REX *against* GEORGE LILLY.

November 24th.

The lessee of *government ground* has a right, under the custom of this country, to surrender his lease upon the destruction of the premises by fire.

BY this action, the Government sought to recover the sum of £36 from the defendant, for one year's rent of certain premises which had been leased to him. The cause stood over for consideration from the 22d ult., and the *Chief Justice* now delivered the following judgment upon it:—

The defendant is the lessee of some Government ground, upon which there were certain houses erected, which were consumed by fire last summer; and the present action is brought to recover rent for the same. In his defence, the defendant relied upon the following objections which were taken by him to the action:—

First.—That agreeably to the decisions of

1823.

REX v. LILLY

the late *Chief Justice*, upon cases which arose out of the fire by which this town was partially consumed in 1817, he had a right to surrender his lease in consequence of the destruction of the premises thereon by fire.

Second.—That under the regulations adopted by the appraisers, appointed under the 1st George IV. c. 51, the houses which had been consumed by the late fire could not be re-built on the sites of the old ones; and that a part of the demised ground had been taken from the defendant by the said appraisers for public purposes. That these circumstances, therefore, did necessarily cancel and annul a contract which was, in its nature, entirely indivisible and incapable of severance.

Third.—That immediately after the fire, the defendant tendered to the then Attorney General, as the proper officer of the Crown, the amount of rent due up to the period of the fire; accompanied with a notice that defendant had abandoned the lease; and that this tender and notice were accepted of by him.

If the question, whether the demolition of the houses by fire gave the lessee a right to surrender his lease, and, by consequence, discharged him from his covenants to repair and to pay rent, had now for the *first* time been raised in this Court, I confess I should have felt great difficulty in deciding it in the affirmative, even under the strongest evidence of a local usage which could be brought before me. In an excellent note upon Co. Litt. 57, a. Mr. *Hargrave* observes, that "it has been doubted on the statute 6 Ann, "c. 31, whether a covenant to repair *gene-* "*rally*, extends to the case of *fire*, and so "becomes an agreement within the statute;" but in *Bullock* v. *Donmitt*, 6 T. R. 650, it

1823.

REX v. LILLY.

was solemnly decided, that a lessee of a house who covenants generally to repair, is bound to rebuild it if it be burned by an accidental fire. And it was held, almost a century ago, in *Monk* v. *Cooper*, 2 Str. 763, that the lessee is liable to pay *rent* after the destruction of the premises by fire, where there is a covenant to repair, qualified with an exception of the case of fire; which decision was recognized and confirmed by the Court of King's Bench in *Belfour* v. *Weston*, 1 T. R. 310, which was a stronger case than that of *Monk* v. *Cooper*, inasmuch as the plaintiff had neglected to rebuild the house after notice to him to do so. It was even determined in *Ellis* v. *Sandham*, 1 T. R. 705, that under a power to tenant for life to lease for years, reserving the *usual* covenants, &c., a lease made by him, containing a proviso, that in case the premises were blown down, or burned, the lessor should rebuild, otherwise the rent should cease—was void; the jury having found that such covenant was *unusual*. Neither can a tenant be relieved in these cases from his covenant to pay rent by a Court of Equity, (18 Ves. 117; Anst. 687,) unless, *perhaps*, in the event of the landlord's having received the value of his premises by insuring. (Amb. 621.)—Such, then, being the settled law upon the points in England, I repeat, that if this had been *res integra* in this Court, it would have been a subject of great doubt with me, whether evidence of a contrary practice in this country could warrant a different rule of construction upon leases of this nature? But this identical question was brought before the Supreme Court in the case of *Newman* v. *Meagher & Others* (*a*); and Mr. *Forbes*

(*a*) Ante p. 207.—See also *Carrell* v. *Carson*, 149, and *Cowell* v. *M'Braire*, 193.

1823.

REX v. LILLY.

there decided, that the lessee was entitled to surrender his lease; apparently upon the principle, that the custom of this island to surrender under these circumstances, amounted to evidence of a *general agreement* to surrender in the event of the destruction of the premises by fire. From his judgment there was an appeal to his Majesty in Council; but it was, after argument, affirmed; and it is, therefore, my duty to declare, in conformity to that decision, that the defendant in this suit was at liberty to surrender his lease.

The first objection which was raised to this action by the defendant, having thus been shown to be sufficient to entitle him to a judgment in his favour, I might reasonably decline a discussion of either of the other points urged by him; but as questions may arise as to the operation of the *1st Geo. IV. c.* 51 upon leases, in cases under different circumstances from the present, I think I may possibly prevent some litigation by distinctly stating the grounds upon which I conceive that the appropriation by the appraisers, appointed under that statute, of a portion of any demised ground to public purposes, *has not the smallest tendency whatever to avoid the lease.*

In *Hornby* v. *Houlditch* (And. 40) it was held, that an Act of Parliament, which had absolutely taken from the defendants the *whole* of the demised property, did not discharge him from the payment of rent for the same; and in his observations upon that case, Lord *Hardwicke* remarks, that "every "person is considered as *assenting* to a "*public* Act; and therefore the plaintiff "must be considered as assenting to the "assignment of the term to the trustees "according to the provisions of the statute."

1823.

REX v. LILLY.

Upon the same principle, it seems to me to be perfectly clear, that both landlord and tenant must be considered as assenting to the appropriation of a part of the demised ground to public purposes, agreeably to the directions prescribed by the 1st Geo. IV.; and as the 4th section of this Act expressly provides that a compensation shall be allowed them, "with reference to the value "of their several interests therein," it was manifestly the intention of the legislature, that the relation between landlord and tenant should not, in any instance, be disturbed or affected by the operation of that Act.

With respect to the third point, I shall only observe, that if the defendant had not been entitled to surrender his lease, I should not have deemed the acceptance of the surrender by the Attorney General binding upon Government, without further proof that he possessed competent authority to act in this matter on its behalf; but as the lease was, in fact, rendered void by the demolition of the houses, I am of opinion that the tender of the lease and rent to the Attorney General was, in the absence of the Governor, or of any person specially deputed by him to act upon such an occasion, sufficient, upon equitable considerations, to protect the defendant from incurring any liability to costs in this action.

1823.

November 24th.

EDMUND DANSON, administrator to the estate of the late TIMOTHY CANTY, appellant, and JAMES CAWLEY, Secretary to the Committee of the Friendly Insurance Society of Harbour Grace, respondent.

THIS was an appeal from the Surrogate Court at Harbour Grace; and on this day, the *Chief Justice* gave the following judgment upon it:—

Per Curiam. The judgment of the Court below upon this case seems to have been founded on the following considerations.

First. That the total loss of the vessel had been occasioned by the barratry of one of the seamen, and that by the terms of the policy, the insurers were not liable for losses arising from that cause.

2dly. That whilst the schooner was lying at Havre de Voux, the master did not do all in his power to repair the damage which the bowsprit had sustained in her passage thither; and that he was guilty of a flagrant violation of his duty in quitting the vessel immediately upon her striking against the ice, at the time when his presence was essentially necessary to stimulate, direct, and encourage the crew; and under circumstances which rendered it possible that the vessel might have been saved, if sufficient exertions had been used by the mariners.

3dly. That the vessel, at the commencement of the voyage, was not sea-worthy.

Upon the two first grounds, I shall touch very slightly; because if I am right in the opinion I have formed on the last of them, there can be no occasion for me to dwell long on the others. It is contended by the

That rule in the constitution of the marine insurance companies of this island, which directs "that there "shall be a previous survey of "every vessel, upon which an insurance is desired, by two surveyors nominated by the company, and that their certificate "shall form the "ground-work of "the policy," is intended for the *additional* security of the company; and cannot, consequently, deprive them of the right to prove that a vessel to which such certificate had been granted by the surveyors was, notwithstanding, unseaworthy.

1823.

DANSON and CAWLEY.

appellant, that the evidence which was adduced at the trial of this cause, was not sufficient to authorize the Judge to conclude that any act of barratry had been committed; and he further insists that every suspicion of such an act is now removed by the record of the acquittal of the man who was indicted for it. Now, it certainly does appear to me, that the evidence of barratry was hardly sufficient to warrant the Judge in treating it as *conclusive* proof. But allowing that the record of the acquittal of the man who stood charged with that offence is (*a*) admissible in this case, still it must be remembered that an acquittal does not ascertain facts, (*b*) and that the only conclusion to be drawn from it is, that the party was tried for the offence, and *was not proved to be guilty*. If, however, the judgment of the Surrogate had nothing to support it beyond the charge of *barratry*, I am inclined to think that it could not be sustained.

It is, unquestionably, the duty of the master to use every means in his power to keep his vessel in a sea-worthy condition during the whole period of the voyage for which she is insured; and the Surrogate, who is a naval officer of considerable professional talent,* was certainly more competent to determine whether there had been a failure of duty in this particular than I can possibly be. For the same reason, I am disposed to believe, that his censure of the conduct of the master in quitting the vessel when she struck against the ice, may be well founded; though if I had been left to draw my own inference from the representation which is given of the situation of the

(*a*) As to this point, see Phil. on Evid. 256.
(*b*) Bull. Nisi Prius, 245.

* Captain John Toup Nicolas, C. B.

1823.

DANSON and CAWLEY.

vessel at the moment, I should have conceived it to be one of such danger and desperation as to justify every person belonging to her, in acting upon the principle of "*sauve qui peut.*"

In every insurance there is an *implied warrantry*, that the vessel shall be sea-worthy when she sails on the voyage insured; and if she be not so, the policy will be void, though both the insured and the captain *believed her to be sea-worthy*; and though the insurer knew the state she was in as well as the owner. (c) But, on the part of the appellant, it is urged, that the question of sea-worthiness cannot be raised in this case, because, by the original articles under which this Insurance Association is constituted, it was agreed, that there shall be a previous survey of every vessel upon which an insurance is desired, by two surveyors nominated by the company; and that the certificate of the surveyors shall form the ground-work of the policy. The production of such a certificate must, therefore, it is alleged, operate as an estoppel, and altogether prevent the other side from going into any proof that the vessel was not sea-worthy. Hence, it becomes necessary for me to decide, what is the true force and effect of such a certificate. And here I can derive *no positive direction from the law of England*, which can furnish no rule relative to surveys which are wholly unknown to it. In the *practice of other countries*, and *in general principles*, I must seek, then, to discover that light by which my determination upon this point ought to be guided.

By the law of France, it is directed that every merchant ship, before her departure from the place of her out-fit, shall be sur-

(c) Marsh. on Insurance, v. 1, p. 161.

1823.

DANSON and CAWLEY.

veyed by certain officers appointed for that purpose, and reported to be "*en bon etat de navigation*;" but it is held by the ablest writers, that these surveys can, at most, only afford *presumptive* evidence of the sea-worthiness of the vessel. These opinions are, I grant, not at all binding upon us; and their influence must, consequently, depend solely *upon the validity of the arguments and reasons by which they are enforced*. Neither has it escaped my observation, that there is a *shade of distinction* between surveys *directed by a general law*, as a branch of national policy, and surveys prescribed *by an agreement between the immediate parties to the insurance*. But still I am of opinion, that the arguments against the conclusiveness of these surveys are, in *both* instances, irresistibly convincing. —Suppose a *life-insurance* company should declare by one of its rules, that it would not effect an insurance upon any life, unless it was furnished with a certificate from a medical man of the state of the constitution of the party who wished to be insured; and that this certificate should constitute the ground-work of the policy. I think there can be little doubt but that the Courts would construe this regulation, as intended, for the *additional security* of the company; and would, accordingly, not suffer it to uphold the policy under circumstances which would have avoided it if no such certificate had been given. In the same manner, this *marine insurance company*, aware that it is often extremely difficult to prove the want of sea-worthiness of vessels after a loss has been incurred, apparently determined, *ex abundanti cautelâ*, not to trust entirely to the chance of obtaining such proof, but to clothe themselves with a *further protection* against a loss arising from a want of sea-worthiness, by

1823.

DANSON and CAWLEY.

requiring a certificate of the state of every vessel before they would effect any insurance upon her. Their intention, therefore, seems to me to have been that the certificate should materially lessen the chances of their suffering from the want of sea-worthiness in the vessel; and not that they should be excluded by it from setting up the want of sea-worthiness as a defence to an action on the policy. In other words, this certificate, like the certificate directed by the law of France, is, at best, only *primâ facie*, or *presumptive*, evidence of sea-worthiness, which still leaves it open to the insurer to prove the contrary. But, if I am correct in the view I have taken of the force of the certificate, I can have no hesitation whatever in affirming this judgment; for the *naval* Surrogate has decided, that the spring in the foremast of the schooner, which the mate has proved to have existed before her first departure on the voyage, amounted to a want of sea-worthiness; and I apprehend I may safely venture to adopt his decision on this point,—"CUIQUE CREDENDUM EST IN ARTE SUA PERITO." It is, therefore, my opinion, that this case was properly decided by the Surrogate; and that this judgment ought to be affirmed.

1823.

December 19th.

WILLIAM DAWE *against* JOHN BROOM, WILLIAM CARTER, GEORGE HOLBROOK, PETER W. CARTER, JOHN TERRINGTON, & WILLIAM HALY, Esqrs.

A strict adherence to the FORMS of commissions used in England, is not necessary in commissions issued in this country. It is sufficient if there is no departure, in *substance*, from those principles by which alone the validity of all commissions ought to be tried and determined in a place so peculiarly situated and circumstanced as Newfoundland.

THE circumstances which gave rise to this important action, and the proceedings which accompanied the trial of it, are particularly described and detailed in the following elaborate judgment:—

Per Curiam. Urged by the plaintiff, who is on the eve of departure from this country, for a judgment in this case, I consider myself bound to comply with his request, although the extreme pressure of business upon the Court, at this season of the year, has necessarily prevented me from bestowing that time and undivided attention upon it which, in every point of view, it seems to demand. A question has, indeed, been raised by it so novel, so complex, and so important, that I should distrust my ability to decide it, even after a long, patient, and dispassionate investigation of it in all its bearings; and as I have only had leisure to look cursorily into a small number of the authorities which I was desirous of consulting upon it; and as I am entirely cut off from every communication with any professional person capable of assisting my research, or of removing the doubts which have frequently presented themselves in the progress of it, I am far from reposing entire confidence in the determination I have, at length, formed upon it. I have, however, the satisfaction to know, that there is a tribunal capable of correcting my errors, to which the parties can resort; and the strong conviction I feel that my judgment, on whichever side it may be given, will be car-

1823.

DAWE. and BROOM, &c. &c.

ried by appeal to that tribunal, considerably lessens the feelings of responsibility under which I should otherwise act; by rendering my decision of comparatively trifling moment to the interests of the parties. Having offered these observations in extenuation of those defects which, I have reason to fear, may be discoverable in some parts of the substance, as well as in the form, of this judgment, I shall now state the leading circumstances of the case upon which it is my duty, in the first instance, to decide.

The plaintiff brought an action of trespass against the defendants, and declared against them, in one count, for false imprisonment specially; in a second, for false imprisonment generally; and, in a third, for a common assault. To this declaration the defendants pleaded, *ore tenus*, first, the general issue, not guilty; and secondly, a justification; setting forth that they were regularly appointed commissioners of *Oyer* and *Terminer*, under a commission from his Excellency the Governor, which they produced; and that whilst acting as such, they did commit the plaintiff for repeated contempts offered to them by him in open Court. To the latter plea the plaintiff replied, that the commission under which the defendants acted, was altogether invalid and illegal: and in support of this replication, twelve exceptions were taken by him to the commission. The trial having thus been entered on, and a vast deal of evidence produced on both sides, I told the jury, in my charge to them, that if the defendants were appointed commissioners under a legal commission, they undoubtedly had a right to commit for contempt; and that it was not competent to this Court to inquire into the circumstances under which they exercised that right;

1823.

DAWE
v.
BROOM, &c. &c.

but that I was not then prepared to give them a positive opinion upon the legality of the commission, because my mind was by no means made up on that point. That the course, therefore, which I would recommend them to pursue, would be to determine what damages the plaintiff ought to receive, if the defendants were not entitled to protection under their commission; and to refer that question to the future decision of the Court, by a special verdict. Under this direction the jury, after a deliberation of several hours, returned the following verdict:

"The jury—finding that the defendants were appointed by his Excellency Sir *Charles Hamilton*, the Governor of this island, under a certain commission of *Oyer* and *Terminer*, dated 12th September, 1822, whereupon they did assemble and act as a Court; and did, on the 4th day of October, fine the plaintiff for an alleged contempt of Court, and on his refusing to pay the same, did commit him to prison, where they kept him in confinement until he paid the same, on the 10th day of the said month—feel themselves incompetent to say if the said Court was, or was not, legally constituted, and pray the opinion of the Court upon this point.

"The jury therefore find, specially (assuming the defendants to have been acting under an illegal commission), for the plaintiff—one hundred and fifty pounds damages."

It is upon the ground, then, that the commission is illegal, that the plaintiff must lay his claim to a judgment on this verdict; and I, therefore, gave to both sides an opportunity of submitting additional observations upon it to the consideration of the Court. In this argument, however, no new points were taken by either side; nor any further

1823.

DAWE v. BROOM, &c. &c.

authorities cited in support of those which were brought forward at the trial. Those were, on the part of the plaintiff—

1st. That the Commission does not run in the King's name.

2d. That it gives the Commissioners no authority to inquire by the oaths of good and lawful men of the island.

3d. That no day, nor place, is set forth when, and where, the commission is to be held.

4th. That no place of jurisdiction is assigned, within which the offence must have been committed.

5th. That the offences which the Court was to have power to try, are not enumerated.

6th. That none of the Commissioners are selected for a quorum.

7th. That a father and son are joined in the Commission.

8th. That the commissioners are to hear and determine according to *law and justice;* and not specifically according to the *laws and customs of England.*

9th. That the number of commissioners necessary to constitute a Court is stated to be *five* in one part of the commission; whilst, in another part, power is given to *any* of them, without restriction as to number.

10th. That it contains no precept to the Sheriff to summon a Jury.

11th. That it is not tested by the Governor.

12th. That it is under the *private seal of the Governor,* and not under the *seal of the Island.*

To these objections the defendants answer: That they are all founded upon a variance, in *point of form,* from the Commissions of Oyer and Terminer issued in Eng-

1823.

DAWE
v.
BROOM, &c. &c.

land; and that an adherence to those forms cannot be necessary in this country, because they cannot, by any means, be made to apply, in a number of particulars, to the actual circumstances and condition of it.

That the Commission under which they sat is the same (with only one very trifling difference) as *all* the Commissions of Oyer and Terminer which have been issued in Newfoundland from the first constitution of such a Court in this Island in the year 1750.

That within the long period of seventy and odd years, a considerable number of these Commissions had issued; and that several persons had suffered *capital punishment* under the sentence of Courts constituted by them.

That the proceedings of those Courts must have often come under the review of the Government at home; inasmuch as pardons had been granted by His Majesty to felons recommended by the Governor to the Royal mercy.

That *John Reeves*, Esq. who had been Chief Justice of the island, and whose legal acquirements preclude the supposition that he could have been ignorant of the form of the Commission of Oyer and Terminer used in England, had sat, as first Commissioner, under a Commission of nearly the same form as the one which the plaintiff now sought to invalidate; and that a Commission which had been sanctioned by the approbation of so good a lawyer as Mr. *Reeves*—recognized, in a number of instances, by the public departments in England—and uniformly acted upon in this colony, from the earliest institution of a Court of Oyer and Terminer—must not only be substantially right, but also suitable, in point of form, to the circumstances and condition of the country in which it has been used.

1823.

DAWE. v. BROOM, &c. &c.

The defendants further contended, that, although the Commission were *altogether illegal*, it would still furnish a justification of their proceedings under it; in the same manner that a constable, or other officer, may justify an arrest under an illegal warrant.

But they appear to me to labour here under a very great mistake; for, in the first place, there cannot, I think, be the slightest analogy between a Commission conferring a *judicial authority*, and a warrant commanding a *ministerial act*; since it is always *optional* with the Judge to exercise his authority or not, whilst the officer is under a positive obligation to execute the warrant directed to him, and is entitled to indemnity upon the principle, (*a*) "*Quicunque jussu judicis aliquid fecerit, non videtur dolo malo fecisse, quia* PARERE NECESSE EST." It is the obligation he is under to *obey*, which constitutes his claim to indemnity. And, secondly, though, in conformity to this principle, the statute of the 24th Geo. II. c. 44, does protect an officer who executes a warrant "*properly penned*," (*b*) even where the magistrate who issues it has exceeded his jurisdiction, yet the officer still continues responsible for anything done by him under a warrant void from an *irregularity in the form of it*: so that, admitting that the rules which have been established with regard to warrants may be extended to judicial Commissions, the defendants in this suit could derive no benefit from this admission; because the objection here is, that the Commission is *improperly penned*, and not that the Governor wanted *jurisdiction, or power, to issue it*. I shall, therefore, confine myself entirely to the question, whether the Commission is

(*a*) The case of the Marshalsea, 10th Rep. 70.
(*b*) Black. Com. 291.

1823.

DAWE
v.
BROOM, &c. &c.

legal or not? And this I shall endeavour to determine by a particular examination of each of the plaintiff's objections to it, in the order in which they are stated by him; premising, that the validity of those objections must, in my opinion, depend upon substantial arguments drawn from reason and sound legal principle, without regard to matters of mere form, which were never applicable to the circumstances of this country, and have even, in many instances, ceased to be so in England.

In considering the first objection to the commission, viz., that it does not run in the King's name, I shall take it for granted, that the King being the supreme magistrate, and entrusted with the whole executive power of the law, no Court whatsoever can have any jurisdiction, unless it in some way or other derive it from the Crown. (*c*) The owners of some counties palatine did certainly, at one time, possess in those counties "*regalem potestatem in omnibus*" as fully as the King hath in his palace. They appointed all judges and justices of the peace; and all writs and indictments ran in their names, as in other counties in the King's (*d*); but some of those powers were abridged, and others entirely taken from them, by the 27th Hen. VIII., c. 24; and I conceive that even if they had continued to be invested with them up to the present hour, no argument could be drawn from thence in support of this commission; because there is no real resemblance between that "*imperium sub imperio*" which they enjoyed, and the office of a Governor.—In his work on Govern-

(*c*) 2 Hawk. P. C. p. 2.—Wood's Inst. Book. IV., p. 447.
(*d*) 1 Black. Com. 117.

1823.

DAWE v. BROOM, &c. &c.

ment (*e*), *Nathaniel Bacon* observes, that in those parts of his dominions in which the King cannot be personally present, he must rule by *reflection*, as the moon in the night; and he adds, that the person who discharges his duties for him in his absence, by whatever title he may be distinguished, is "*conservient*" with him. But without entering upon a minute inquiry into the nature of the office of a Governor of a colony, it may be assumed, that he bears a very different character from that of a mere agent, whose acts must be done in the name of his principal; (*f*) for he is, undoubtedly, the *King's representative*; and may, as such, issue proclamations; convene the legislature, when the colony has one; grant some commissions; and give an assent to laws, in his *own name*. Still, however, I am prepared to maintain the general proposition, that the Courts of law throughout the whole of the King's extensive dominions must derive their jurisdiction and authority either *immediately* or *mediately*, from him; and that, consequently, this commission is an absolute nullity if it attempts to confer judicial powers upon the defendants by any other than one of these *two* modes. To ascertain this important point, let us refer, then, to the commission itself; which, after reciting a power granted to the Governor, by His Majesty's commission made letters patent, to constitute and appoint, in cases requisite, commissions of *Oyer* and *Terminer*; and certain instructions from His Majesty relative to the manner of carrying this power into effect, proceeds to appoint the defendants commissioners *by virtue of the power and authority so vested in the Governor*. It does, therefore, appear to me to

(*e*) Part 2, p. 79.
(*f*) Paley's Prin. and Agent, 221.

1823.

DAWE
v.
BROOM, &c. &c.

be perfectly clear upon the face of this instrument, that the commissioners did derive their powers from the *King* through the medium of the Governor, who was empowered and directed by the King to appoint them; and though I do wish that, in compliance with long established forms, it had run in the King's name, yet I cannot venture to pronounce it illegal upon what I deem to be nothing more than an inaccuracy in a *mere matter of form.*

The second objection, viz:—That the commission does not direct the commissioners to inquire by the oaths of good and lawful men, has always been considered by me as one of the most serious of the whole list; and I have even entertained great doubt whether this omission did not entirely vitiate it. If anything in a commission is matter of *substance*, I should say, that the direction to the Commissioners to proceed by a *jury* is most peculiarly so; and if my decision on this point were to be formed by my own estimate of the importance of it, without reference to precedent and authorities, I should almost conclude, that this omission could not be supplied by any implication or intendment whatever. But it is a remarkable fact, that the Commission of *gaol delivery* now used in England, which confers as high judicial powers upon the Commissioners as the Commission of *Oyer* and *Terminer*, does not contain, from the beginning to the end, a single allusion to a jury; and I think that if this omission can be aided by intendment in one case it may be equally so in another. Now, Serjeant *Hawkins*, (*g*) in his chapter upon justices of gaol-delivery, observes, "that it is said in some books, that they "have not, as such, power to take any in-

(*g*) 2 Hawk. P. C. p. 24.

1823.

DAWE v. BROOM, &c. &c.

"dictment; but the common opinion that "they have such power, seems much more "agreeable to reason; for surely it cannot "but be *implied* in their Commission to de- "liver prisons of their prisoners, that they "must have authority to make such deliver- "ance by *due course of law*, which cannot "be without a proclamation if there be no "prosecution, or a *proper trial* if there be "one;" and upon reason equally forcible it may be said, in the present case, that when these Commissioners are empowered to hear and determine felonies, &c., according to law and justice, it must, surely, be *implied*, that they are to do so by *due course of law*—*i. e.*, by the oaths of good and lawful men of the island. If, then, the direction to inquire by the oaths of good and lawful men of the island is *necessarily and obviously implied* in the Commission, I do not conceive that it is material in what manner this direction is conveyed.

The third objection is, that no day, nor place, is set forth when, or where, the Commission is to be held; and, certainly, if the directions upon these points had been *particular* in the Commissions used in *England*, it might have been necessary to inquire upon what principle the statement of a particular time and place had been inserted, in order to ascertain whether it should be considered as a *substantial*, or only as a mere *formal*, part of the Commission. But, in point of fact, the Commission of *Oyer* and *Terminer* used in the English circuits, only commands the Commissioners, at *certain* days and places which *they shall appoint for the purpose*, to make diligent inquiry; and surely a power to appoint a day and place for the holding of the Commission, is *necessarily included* in the authority which it con-

1823.

DAWE v. BROOM, &c. &c.

fers to inquire of, hear, and determine offences; so that the variance in this respect is most decidedly nothing more than a *formal* one; the two Commissions communicating precisely the *same* powers to the Commissioners by *different forms* of expression.

The reason which renders it essential to the validity of a Commission in England, that it should contain a particular specification of the *local* limits of the jurisdiction of the Court, may be easily assigned. From the days of Alfred the Great, the territory of England has been divided into counties; and the law has ever since been, that all offences committed within any of those counties should be tried in them by a jury coming from them; and that the sentence upon offenders should be carried into execution by the Sheriff appointed for them. In other words, a jury of one county could not possibly try an offence committed in another county; nor could the sentence upon the offender be carried into execution by any other Sheriff than the one of the county in which the offence was committed: and hence it became absolutely necessary that the local limits of the jurisdiction of every Court should be clearly stated and defined in the Commission by which it was erected; the county of Kent being, in legal consideration, as separate and distinct from the adjoining county of Surrey, as if they were situated in different quarters of the globe, and under the government of different Kings. But in this island no such division of counties obtains; (*h*) and an offence committed at *one extremity* of it, might accordingly be tried in the *centre* of it, by a

(*h*) Since this judgment was delivered, the island has been divided into three distinct districts, agreeably to the 5th Geo. IV., c. 67, s. 7.

1823.

DAWE v. BROOM, &c. &c.

jury coming from the *other extremity*; and the powers of the High Sheriff extend through *every part* of it. The jurisdiction of a Court constituted under a Commission from the Governor of Newfoundland being therefore, as I apprehend, confined, by a reasonable and necessary intendment, to this island and its dependencies, I cannot discover, in reason and in principle, any necessity for a more particular designation of its limits than what may be fairly inferred from this commission.

If that close analogy exists between a *magisterial warrant* and a *judicial Commission* which the defendants contend for, then must this Commission most unquestionably be bad; for a warrant to arrest all persons who may have been guilty of any *criminal conduct* would be so defective, that it could not afford any justification to the officer acting under it. But though it would obviously be illegal and absurd to leave it to a *constable*, or other executive officer, to determine what act would amount to *criminal conduct*, I cannot perceive there is anything of the same sort of impropriety in empowering *judges* to hear and determine all "criminal causes," without a particular enumeration of them; because it must be supposed that *they* have sufficient knowledge of the law to ascertain what acts it regards as criminal. And it is to be observed, that it is even left to the justices of Oyer and Terminer in England to determine the extent of their criminal jurisdiction from their knowledge of the law; for their commission, after enumerating a vast number of offences, goes on to authorize them to hear and determine "all *other* evil doings, offences, and injuries whatsoever;" thereby leaving it to them to decide what actions the law deems evil do-

1823.

DAWE v. BROOM, &c. &c.

ings, offences, and injuries. Nor is the expression "all criminal causes" more vague and indeterminate than the expression "all crimes and misdemeanors," by which the criminal jurisdiction of the Supreme Court is granted and defined by the 49th of his late Majesty. I am, therefore, of opinion, that there is nothing solid and substantial in the plaintiff's fifth objection to the Commission.

The next objection is, that none of the Commissioners were selected for a Quorum; and it may be proper to notice here, that this is the *only* circumstance in which the present Commission differs from the one under which Mr. *Reeves* sat; which was almost a literal copy of all the Commissions of Oyer and Terminer which have been issued in this island since 1750. It is, therefore, highly important to ascertain the materiality of this exception; because it clearly follows, that if the Commission cannot be pronounced to be vicious upon this *particular ground*, it must share the *same* fate with *all the rest*, and either stand or fall with them. Now the Commission of the peace confers two distinct characters, or offices, upon the persons named in it; the one being that of a mere *conservator of the peace*, and the other that of a *judge*, invested with a large share of criminal jurisdiction. Hence it is apparent, that very different degrees of qualification, with respect to learning, are required in the two offices; and it is probable that in the reign of Edward the Third, which is the era from which we are to date the appointment of a justice of the peace, many men would be found capable of discharging the duties of *conservator*, who were totally unfit to *preside in a Court of law*. When, therefore, persons of two distinct classes were to

1823.

DAWE.
v.
BROOM, &c. &c.

be united in the same Commission, it was most wise and necessary that a regard should be had in it to this difference of qualification; and that the powers conferred by it should be in proportion to the abilities of the party to whom they were entrusted. The cause for this distinction ceased, however, with the advancement of learning; and the quorum clause is accordingly declared by *Blackstone*, (*i*) *Burn*, (*k*) and other writers, to have long since become a matter of *mere form*. This remark, it is true, is confined to the *commission of the peace*. But we may also measure the importance of the quorum clause in other Commissions, by considering what is the real *use* of it. Conceiving, then, that no reason can be drawn, either from their education, professional habits, or rank in society, why greater powers should be given to the *first* than to the *last* of the gentlemen named in this Commission, I can discover no other motive than a respect for ancient *forms*, which has, perhaps, in some instances, been carried by us rather too far (*l*) for the insertion of a quorum clause in it.

The objection, that a father and son are joined in the Commission is entirely new to me; and is certainly made by the authority to which the plaintiff has referred in support of it, to rest upon a very sandy foundation. He cites a book entitled "a compendium of laws relating to jurors," p. 315, where it is said, that it is a good cause of challenge to

(*i*) 1 Black. Com. p. 351.

(*k*) 2 Burn's Justice, 313. It is even stated by Burn, that this distinction is not usually made of late years, but that *all* the justices are equally assigned to be of the quorum.

(*l*) For example: enchantments, sorceries, and arts-magic, are still retained in the Commission of the Peace, out of regard to ancient forms; although they are no longer punishable as offences. 2 Burn, 314.

1823.

DAWE
v.
BROOM, &c. &c.

one of the *grand jury in the attaint*, that he is related to one of the *petit jury*; and, without adverting to the circumstance, that the *grand jury* are to *try* the *petit jury* upon the serious charge of having given a false verdict, he proceeds to argue upon an analogy between the offices of judge and juror; and insists, that if it be a ground of challenge to a juror that he is related to another juror, so also it must be a good exception to a judge that he is related to a fellow judge.—Had he reflected for a moment, that the grand juror in the attaint, and the petit juror, stand in the relation to each other of *juror* and *party accused*, and not in that of *fellow judges*, he must at once have seen that the authority he quotes is wholly foreign to the case to which he attempted to apply it. No exception can be taken to a juror on the ground that he is related to another of the *same* jury; and, therefore, if judges and justices were even liable to the same challenges as jurors (which, however, they are not), (*m*) it would still be no objection to a Commission that two of the persons named in it are related to each other.

Another objection, and one of a much more serious character than the last, is, that the Commissioners are to hear and determine according to *law* and *justice*, without being specially directed to do so according to the *laws and customs of England*. In his commentary upon Magna Charta (*n*) Lord *Coke* says, that "upon the words *per legem terræ* "all Commissions are grounded, wherein is "this clause, *facturi quod ad justitiam perti-* "*net secundum legem et consuetudinem Angliæ.* "And it is not said *legem et consuetudinem*

(*m*) Co. Litt. 294.
(*n*) 2 Inst, 50.

1823.

DAWE v. BROOM, &c. &c.

"*Regis Angliæ*, lest it might be thought to "bind the King only; nor *populi Angliæ*, "lest it might be thought to bind them only; but that the law might extend to *all*, "it is said *per legem terræ*, i. e. *Angliæ*. "And aptly it is said in this Act, *per legem "terræ*, that is, by the law of *England:* for "in those places where the law of England "runneth not, *other* laws are allowed in "many cases, and not prohibited by this "Act. For example: if any injury, robbery, "felony, or other offence, be done upon the "*high sea*, *lex terræ* extendeth not to it, and "therefore the Admiral hath conusance "thereof, and may proceed, according to "the marine law, by imprisonment of the "body, and other proceedings, as have been "allowed by the laws of the realm." Here, then, is certainly a very strong authority to prove that the word "*law*" is not sufficiently determinate in its meaning to be used in Commissions, without having the words "*of England*" subjoined to it; and, I confess, I have very much doubted whether the omission of them did not vitiate this Commission. But, admitting that the expression "*law and justice*" might *originally* have been open to the exception of not pointing to the *law and customs of England*" so distinctly as they ought to do, I think they are capable of acquiring the necessary certainty in this respect by a long course of judicial construction and interpretation of them; since it would be the bounden duty of the Justices of the present day to adhere rigidly to that construction and interpretation which had been uniformly given them by former Justices. If their meaning was *clearly and manifestly an improper one*, I allow that no length of time could heal such a defect in the Commission, agreeably to the maxim, "*quod ab initio non valet, tractu temporis non conva-*

1823.

DAWE
v.
BROOM, &c. &c.

lescet;" but an expression which might *originally* have been open to the exception of being rather *too loose and indeterminate*, may, I apprehend, be thoroughly purged of this fault by a construction of it invariably followed for a considerable number of years. Finding, therefore, that all the Commissioners of Oyer and Terminer who have been appointed in this island since 1749, have, by the course of their proceedings, determined that the expression "*law and justice*" is, in is legal operation and effect upon a Commission issued in Newfoundland, equivalent to "*the law and customs of England*," I conclude, though with some diffidence in my opinion, that it is now *too late* to object to the use of it.

The last sentence in the Commission is, "And that you do make your report to me "of all such proceedings had and done in "the causes which shall be brought before "you, or *any of you*, nominated, authorized, "or appointed, as aforesaid;" upon which the plaintiff has attempted to found an objection, that it gives powers to *any* of the Commissioners to perform acts which, by previous clauses, could only be executed by *five* of them. But, in the first place, this sentence is not repugnant to the other clauses; because it does not expressly authorize the Commissioners to do *anything* except making a *report of their proceedings* to the Governor: and, secondly, the context requires that the words "*any of you*" should be inseparably united to the words "nominated, authorized, or appointed, as aforesaid; and thus it is evident, that *any* of the Commissioners could only act in the manner in which they had been previously "*authorized*" to do. This appears to me, then, to be an exception to the Commission scarcely deserving the notice I have taken of it.

1823.

DAWE v. BROOM, &c. &c.

The 10th objection may, I think, be very properly coupled to the 2d, and receive the same answer which has already been given to it. In the omission to direct the Commissioners to inquire by the oaths of good and lawful men; and to notify them that, for this purpose, the Sheriff had been commanded to cause to come before them such good and lawful men, this Commission resembles the Commission of *gaol delivery* still used in England; and if these omissions may be supplied in that case by reasonable implication and intendment, I repeat that I do not see why they may not also in the present.

Upon the next objection I shall only observe, that if it was right that this Commission should be tested by the Governor, I conceive that it has been done so by the words, "in witness whereof," &c. in a manner which excludes all cavil upon this point.

Since (*o*) there undoubtedly is no *public seal* for this island, it seems a good answer to the objection, that this Commission is not under one, that "*lex non cogit ad impossibilia.*" This objection, indeed, if it could prevail, would prove, not only that the present Commission is bad, but also that no good one could possibly have been issued; a proposition which, I imagine, hardly any person will be found to maintain who is aware, that an authority to issue such a Commission has been solemnly committed to the Governor by His Majesty, under the Great Seal of England. That an instrument of this nature, conferring as it does the power of life and death, should be executed with the highest possible solemnity; and

(*o*) Some years after this judgment was delivered, a public seal for Newfoundland was forwarded to the Governor, by the Secretary of State for the Colonies.

1823.

DAWE
v.
BROOM, &c. &c.

that, consequently, where there are *several* seals (as is the case in England) (*p*) the one of greatest weight and importance should be affixed to it, I freely admit: but at the same time I contend, that this principle has been followed upon the present occasion by affixing to the Commission the Governor's private seal, which, in the absence of a *public* one, must be accounted and esteemed of the greatest weight and importance of any seal in the island. In support of this, his last objection, the plaintiff has referred to that passage of the second institute (*q*) where Lord *Coke* says, that "Commissions "of new inquiries, and of new invention, "have been condemned by authority of "Parliament, and by the common law;" and has argued from thence, that this Commission must be illegal, because it is, as he insists, one of "new invention." But if he had adverted, for an instant, to the circumstance which gave rise to this observation respecting Commissions of "new invention," he must have perceived that the Commissions of "*new invention*," to which it is alone applicable, are Commissions authorizing an inquiry into Acts not *previously deemed criminal by the law*, or directing the trial of such as were by *new and unusual methods*; and of the illegality of such Commissions there connot be the shadow of a doubt. So far, however, is Lord *Coke* from asserting, that no alteration can be made in the *form of a commisssion*, that after telling us, (*r*) that "Sir *Christopher Wray*, the chief justice of "the King's Bench, had, with the assistance "and advice of the other judges, made di-"vers additions and alterations in the com-

(*p*) 2 Inst. 554.
(*q*) P. 478.
(*r*) 4 Inst. 171.

1823.

DAWE. v. BROOM, &c. &c.

" mission of the peace both in *matter* and " *method*," his Lordship adds, " and yet " there *needeth another reformation of it.*" (*s*) We have, therefore, the sanction of the authority of this great man for all such alterations in the Commissions now used in England, " *both in matter and method*," as may be necessary to adapt and accommodate them to the circumstances and condition of this colony.

I have now gone through the whole list of the plaintiff's objections to this Commission, without having been able to discover either in them, or in some others which have suggested themselves in the course of this investigation, sufficient grounds to justify me in pronouncing it to be illegal. In many of them there never was, as I conceive, anything substantial; and those defects which I still regard as more serious than the rest, have, I think, been cured by the construction which has, for a long period, been uniformly given to expressions originally less clear and determinate than they ought to have been. If this Commission was positively contrary to law and reason—as if it either created *new offences*, or empowered the Commissioners to inquire into *old ones* by *new and arbitrary methods*—it certainly could not derive the slightest sanction and support from the length of time during which it has been in use; because, in such cases " *non diuturnitas temporis, sed soliditas rationis est consideranda;*" (*t*) and one might even apply to a Commission which was liable to either of those objections, the declaration of Mr. Justice *Yates*, in the memorable

(*s*) It remains, however, to this day, without that reformation which Lord *Coke* thought necessary in the reign of James the First.

(*t*) Co. Litt. 141, a.

1823.

DAWE
v.
BROOM, &c. &c.

case of the warrant for seizing papers, "*that "the use of it from the foundation of ancient "Rome would not render it legal.*" (*v*) But if the defendants, whilst sitting under it, must have felt themselves bound, by the terms of it, to conduct their proceedings according to the *law and customs of England* (as it is evident to me they must), I cannot admit that a departure—in some instances necessary and unavoidable—from the *form* of an English Commission, can vitiate it. This is the opinion I expressed before I had examined it with the attention I have since done. It is the opinion which Mr. *Reeves* must certainly have entertained of it; and it is, also, I strongly suspect, the (*w*) early opinion of Mr. *Forbes* upon it. I should, therefore, I confess, have felt more than ordinary confidence in it, if it had not been officially communicated to me by his Excellency the Governor, that some of the law officers of the Crown have reported to the principal Secretary of State for the Home Department, that they consider it invalid. With a knowledge of this fact, I naturally cherish doubts which would not otherwise have assailed me. But, however profound my respect and deference for the talents and learning of those gentlemen may be, I cannot guide my judgment by their opinion, unless I had been made acquainted with the *reasons* upon which it is grounded, and been fully satisfied by them that the opinion is correct. I humbly conceive, too, it is possible they may be induced to acquiesce in the view I have taken on this subject—

First. Because it does not necessarily

(*v*) 2 Wils. 275.—11 Har. State Trials, 313.

(*w*) Whether or not Mr. *Forbes* has changed that opinion, I cannot pretend to say; but I have strong reason to believe that he must have once entertained it.

1823.

DAWE
v.
BROOM, &c. &c.

follow from their having recommended that a pardon should be granted to the persons sentenced under it, that they deem it to *all intents and purposes* invalid and illegal.—Agreeably to the rule, which has always prevailed in England, of giving to prisoners the full benefit of all nice exceptions and technical objections which can be raised to the indictment, or other parts of the proceedings, under which they have been convicted, they might have thought it necessary to give to the persons sentenced under this Commission the benefit of these *formal* objections, without thinking that the Commission itself was rendered by them so radically vicious, and positively illegal, that no Court could be constituted under it. That the distinction I here take as to the degree, or extent, to which a Commission may be invalid, is not merely a fanciful one, I think the following case will show. In his Fourth Institute (*x*) Lord *Coke* tells us, that "to Commissioners of Oyer and Terminer a writ of supersedeas was delivered, *quia* ENORMIS *transgressio non est*, for it was only for *cutting down trees*."—Now, suppose that, before the issuing of the supersedeas, a man had been tried under the Commission for cutting down trees, and sentenced to imprisonment; I apprehend that he was clearly entitled to his *discharge*, but that he could not have maintained an *action of false imprisonment* against the Commissioners; and yet the objection to the Commission in that case was stronger than in the present, inasmuch as there the Commission was *unduly granted*, and here it is, at most, only *defective in form*.

2d. Because it seems to me not very improbable but that, when these law officers

(*x*) P. 165.

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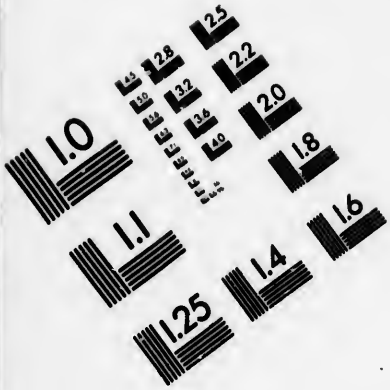

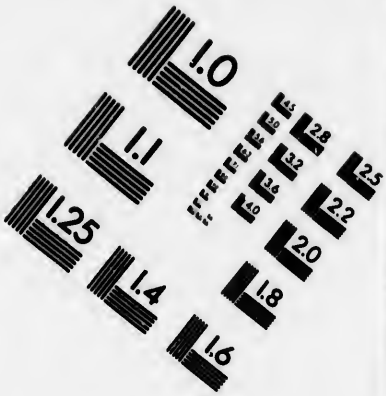

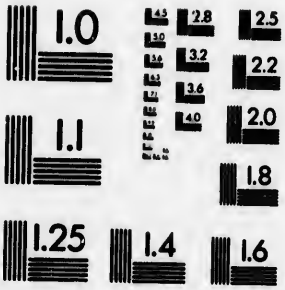

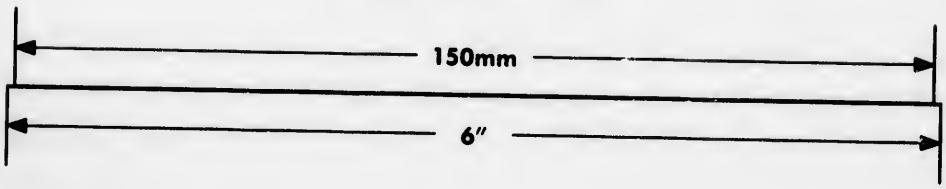

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1823.

DAWE v. BROOM, &c. &c.

of the Crown shall have learnt, that this instrument has been, as it were, "*vetustate temporis roboratum;*" and shall also have been made acquainted with the situation in which this country long was, and, I may add, *still* is, with respect to its Courts, they may become much less inclined to insist upon a rigid adherence to English formulæ in our criminal proceedings than I imagine they were when their opinion upon this Commission was formed. Treating of our American Colonies, Sir *William Blackstone* observes, (*y*) that "such colonies carry with "them only so much of the English law as "is applicable to their own situation, and "the condition of an infant colony; such, "for instance, as the general rules of inheritance, and of protection from personal "injuries. The *artificial refinements* and "*distinctions* incident to the property of a "great and commercial people, the laws of "police and revenue, the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude "of other provisions, are neither necessary "nor *convenient* for them, and therefore are "*not in force.*" And in a work upon the European Settlements in America, which is written with so much ability as to have been ascribed to the early pen of the illustrious Mr. *Burke*, it is said, (*z*) "the law in all our "provinces is the Common Law of England, "the old statute law, and a great part of the "new, which I find many of our settlements "have adopted with very little choice or "discretion. And, indeed, the laws of "England, if in the long period of their duration they have had many improvements, "so they have grown more tedious, perplex-

(*y*) 1 Com. p. 107.
(*z*) Vol. 2. p. 303.

1823.

DAWE v. BROOM, &c. &c.

"ed, and intricate, by the heaping up many "abuses in one age, and the attempts to "remove them in another. These infant "settlements surely demanded a more sim- "ple, clear, and determinate legislation, "though it were of somewhat an homelier "kind: laws suited to the time, to their "country, and the nature of their new way "of life. Many things still subsist in the "law of England which are built upon *cau-* "*ses and reasons* that have *long ago ceased;* "many things are in those laws suitable to "*England only.*" But if many of the laws of England be thus unsuitable to the *infant* condition of a colony (and, with reference to her jurisprudence and juridical establishments, Newfoundland still is in a state of the *most helpless infancy*), what shall we say to that *strictness of form* observed in all criminal proceedings in England, which caused that excellent man, Sir *Matthew Hale*, much more than a century ago, to complain, that it had "grown to be a *blemish* and incon- "venience in the law, and the administra- "tion thereof; for that more offenders "escape by the over-easy ear given to "exceptions in indictments than by their "own innocence." (*a*) Can it, I would ask, be seriously believed by any reasonable person, that the law which required that all law proceedings should be in Latin, was ever in force in a society where two Commissioners could not, probably, be found capable of construing their Commission? (*b*)

(*a*) 2 Hale. P. C. 193.—If such is the case in England, where indictments, &c., are drawn by men of education, who devote themselves exclusively to the department of *pleading*, it is perfectly clear that the extension of all the statutes of *jeofails* to our criminal proceedings would hardly be sufficient to remedy the *formal* defects in them.

(*b*) See 12 Rep. 31, where a Commission was solemnly decided to be illegal, because it was in *English*, and this

1823.

DAWE
v.
BROOM, &c. &c.

Or that an indictment might be quashed for not being written on *parchment*, in a Court where the use of parchment is, to this hour, wholly unknown? It is superfluous, however, to multiply examples of this kind; since every person who has attended our Courts must have remarked, that, even in the Supreme Court, the "*forma et figura juris*" is scarcely at all attended to; and that the Judge is frequently obliged to deal out justice to a number of ignorant suitors "*secundum bonum et æquum*," without regard to abstract rules of law. For my own part, I avow, that before I came to this island, I could hardly have been persuaded, that Courts of such a constitution as ours, in reference to the *form* of their proceedings and practice, were to be found within the whole compass of the British empire; and the impossibility I find of assimilating our proceedings, in *matters of form*, to the course of practice at home, convinces me, that it would be most unreasonable and absurd to estimate their validity by their adherence to forms which, with the machinery now belonging to our Courts, it would be utterly impracticable to introduce, or make any use of, in them.

It only remains for me to notice one important circumstance, which has had great weight and influence upon my judgment in

continued to be the law of England till, comparatively, within a very few years. Again, Lord *Coke* tells us (4 Inst. p. 164.) that the authority of Commissioners of Oyer and Terminer must be given by *Commission*, and not by *writ*; and yet Sergeant *Hawkins* declares, (P. C. Book 2d, p. 15) that he cannot ascertain what the *difference* is between a commission and a writ. Can points, then, of so fine and subtile a nature as not to be discernible by the most clear-sighted English lawyers, be supposed to be within the view of those who are appointed to administer the law in such a colony as this?

1823.

DAWE v. BROOM, &c. &c.

this case. In the progress of my investigation of this momentous question, it occurred to me, that many of the inaccuracies which appear in the Commissions of Oyer and Terminer, must, probably, also have crept into the Commissions of the *Peace:* and in looking into them, from the earliest period to which I can trace them, I accordingly find, that they are all obnoxious to many of the same objections that have been raised to this Commission; and even, perhaps, to some *greater* ones. If, therefore, I could persuade myself that this Commission was void through *irregularity in the form of it*, I must say the same of them; and thus I should, UNO FLATU, declare, that there never has been a legitimate magistracy in this island, from the first settlement of it. But this is a proposition which, I think, cannot be maintained; and I feel perfectly satisfied that when my judgment shall be carried, by appeal, before His Majesty in Council, it will be there reviewed upon principles of sound reason; and not examined by rules of law framed, for the most part, before the discovery of our colonies, and in many particulars totally inconsistent with the form of government established in them (*c*). To the decision of that august tribunal I shall bow with submissive reverence; but unless I shall be taught by it that I am wrong, I shall always hold, that this Commission is not illegal; and that, consequently, the defendants are entitled to judgment under the special verdict which the jury have found in this case.

(c) Such, for example, as that Oyers and Terminers shall not be granted but before the justices of the one bench or the other, or the justices errant—that the King cannot empower a man to make a justice, &c. &c.

1823.
December 31st.

In the cause between the Representatives of the late WILLIAM PARSONS *against* JAMES SHEPPARD and WILLIAM DANSON.

To His Honour RICHARD ALEXANDER TUCKER, *Esq. Chief Justice of the Island of Newfoundland, &c. &c. &c.*

The Memorial of *Mary Parsons*, of Harbour Grace, in the Island of Newfoundland, Spinster,

HUMBLY SHOWETH:

Where a judgment had been acquiesced in for a *considerable length of time*, the *Chief Justice* would not grant a new trial in order to let in new evidence which had since been discovered. And his Honour stated, that the present leaning of his opinion was, that the practice of granting new trials *after judgment* had been given, ought to be confined to judgments by *default*.

That in the month of October, 1818, the cause of the "Representatives of *William Parsons* v. *James Sheppard* and *William Danson*, tenants in possession," came on, and was determined, in the Supreme Court at Harbour Grace, wherein there was judgment given against memorialist; which judgment, in memorialist's opinion, was erroneous, as memorialist has since been informed that the evidence of *James Lilly*, *George Lilly*, *Elizabeth Chancey*, and *Elizabeth Long*, all of St. John's, would be most material in favour of memorialist, as by an affidavit, herewith transmitted, will more fully appear.

And memorialist further begs leave to state to your Honour, that our late worthy Chief Justice *Forbes*, on the last day of his sitting in the Supreme Court, stated in writing, upon the affidavit of the late *Lionel Chancey*, which is also inclosed, that he would allow a rehearsing of said cause, upon certain conditions therein expressed.

That your memorialist would further beg leave to state to your Honour, that during the time of the Supreme Court having been suspended, in consequence of the Chief Justice being absent, she has always kept in

1823.

Representatives of the late Wm. Parsons v. Sheppard and Danson.

view, and intimated to the agents of Mr. *William Danson*, her intention of moving the matter in dispute between them in the Supreme Court. But finding that the agents of the said *William Danson* have commenced building a store upon that part of the premises in dispute, your memorialist begs leave to pray that your Honour will be pleased, upon the perusal of the documents enclosed, to order a re-hearing of the case; and, also, that your Honour will grant an injunction to defer the erection of the store upon the disputed premises until the case is brought to issue.

Mary Parsons.

To which the *Chief Justice* gave the following written answer:—

I have perused this memorial, and the accompanying documents, with great attention, and not without some desire that I might find myself at liberty to comply with the wishes of the memorialist. But I conceive that it is utterly impossible for me to do so. In England, a new trial is sometimes, though *rarely*, granted upon the discovery of new and material evidence since the trial (Tidd's Practice, 929); but this is always *before* judgment; and when judgment has once been entered, a new trial cannot be granted there, under any circumstances whatever. In this country, however, a practice, arising *ex necessitate rei*, has prevailed, of occasionally opening a judgment for the purpose of reviewing the grounds upon which it was predicated; and, from the manner in which the *Court* is frequently compelled to give judgment by *default*, it is essential to the attainment of substantial justice that such a power should, in many instances, be exercised by it. But it is, at the same time, a

1823.

Representatives of the late Wm. Parsons v. Sheppard and Danson.

power which ought always to be exerted with great prudence and caution; and the present indication of my mind is, that it ought to be confined, strictly, to judgments by *default*. Without, however, venturing to say that a case may not arise which would warrant the Judge in granting a re-hearing of it, I feel perfectly convinced that the *present* is not one of that description. In October, 1818, a judgment was pronounced in this case by the late *Chief Justice*, and quietly acquiesced in by the parties until May, 1821. Indeed, it was not until May, 1822, that any regular application was made to the *Court* for a re-hearing of this cause. Now, suppose that, in this long interval, the defendants, in whose favour the judgment was given, had actually sold the land for a good and valuable consideration, and had afterwards become insolvent, so that the purchaser, if evicted from the premises upon a defect in their title, would have been without any real remedy over against them; could any Court have cancelled this judgment to the prejudice of such a purchaser? It is so clear that it could not, and the argument to be drawn from hence against the opening of this judgment is, in my opinion, so strong and conclusive, that I cannot help thinking that Mr. *Forbes* would not have promised to give this case a re-hearing, if time had been afforded him to reflect upon the nature of the application which was made to him during all the hurry of preparation for his departure from this country. But, at all events, the reasons against my reviewing *his* judgment are more cogent than any considerations which could have suggested themselves to him; and I therefore feel myself under the necessity of rejecting the prayer of this petition.

31st December, 1823.

BEN. BOWRING *against* JOHN HARRISON.

1834.

May 27th.

Neither the master nor the owner of a vessel is liable for any loss or damage which may happen to any gold, silver, jewels, &c., shipped on board such vessel, unless the owner or shipper shall insert in his bill of lading, or declare in writing to the master, the true nature, quality, and value of such gold, silver, &c.

THIS was an action to recover the sum of £79 14*s.* 10*d.*, as the estimated value of certain articles of jewelry shipped by the correspondent of the plaintiff, at Liverpool, in the Brig *Hero*, of which the defendant was master, and consigned to the plaintiff.

All the material facts of the case having been distinctly proved by witnesses on both sides, the *Chief Justice* said :—

It is a clear rule of law, that the master is bound to take all possible care of the cargo, from the time it is placed under his charge until the delivery thereof to the consignee; that he is liable for all injury to it arising from his neglect or want of skill; and that he is, in most cases, answerable for the embezzlement of it. But the 26th George III., c. 86, s. 3, expressly provides, "that no "master, or owner, shall be liable for any "loss or damage which may happen to any "gold, silver, jewels, &c., shipped on board "any vessel, unless the owner or shipper "shall, at the time of shipping, insert in his "bill of lading, or declare in writing to the "master, the true nature, quality, and value "of such gold, &c." Now, the bill of lading, in the present case, contains no such notice, nor has any evidence been adduced that such notice was given to the defendant, agreeably to the provisions of the said Act. It is clear, therefore, that the plaintiff cannot recover. Nor would the plaintiff have been entitled to judgment even if the 26th George III., c. 86, had never been passed; as the Court is strongly impressed with a conviction that the articles were not embezzled, whilst the cask was in the charge of the defendant, and would, therefore, have felt itself bound to give judgment in his favour

1824.

upon that ground. The probability is, that the missing articles were never put into the cask.

THOMAS BECK *against* The Owners of the Brig KELTON.

August 19th

The master and owners of a vessel are responsible for a deterioration in the quality of an article shipped on board of such vessel, arising from the article in question having been placed too near to another article, in its nature calculated to injure the former. And it seems, that a knowledge on the part of the shipper of the damaged article of the other parts of the vessel's cargo, and of the manner of stowage used on board of her, will not relieve the master and owners from this liability.

THIS action was brought to recover a compensation for damages supposed to have been occasioned by an improper stowage of some bags of bread belonging to the plaintiff, on board the vessel of the defendants.

After having heard the witnesses who were produced by the plaintiff and defendant, the *Chief Justice* pronounced the following judgment:—

There is some difficulty in deciding from what source the injury to the bread was occasioned; but, from the evidence which has been laid before me, it seems to have proceeded from a gas, or vapour, produced by the coal. Assuming, then, that the bread was shipped in perfectly good order, and became deteriorated in the course of the voyage, by a vapour arising from another part of the cargo, the question is, whether or not the master and owners of the vessel are liable for a deterioration in the quality of the bread, resulting from such a cause? And I am of opinion that they are liable.—It is stated as a rule, by *Roccus*, that "if mice "eat the cargo, the master must make good "the loss, because he is guilty of a fault. "Yet if he had cats on board his ship, he "shall be excused." And it is observed by a most excellent writer (*a*) on this subject, that "this rule, and the exception to it,

(*a*) *Abbott*, in his Treatise on Merchant Ships, part 3, chap. 3, sec. 9.

1824.

BECK v. The Owners of the Brig KELTON.

"although bearing somewhat of a ludicrous "air, furnish a good illustration of the prin- "ciple by which the master and owners are "held responsible for every injury that "might have been prevented by human "foresight or care." Now, it certainly was within the reach of human foresight to discover that bags of bread would probably be injured by being placed within a short distance of a large quantity of loose coals; and the owners and master are, therefore, clearly responsible for the damage which has arisen from the want of proper care on the part of the latter. It has, indeed, been suggested, that the consignor knew that the vessel was partially laden with coals; and that having chosen, under this knowledge of the facts of the case, to put his bags of bread on board her, he must be considered as having consented to take upon himself the risk of its being injured by the coals. But, as no *proof* has been adduced on this point, I am not now called upon to determine on the validity of this argument. I am, however, strongly inclined to think, that the defence would not have been materially aided by proof of this allegation. Public policy has, I conceive, imposed upon the master and owners of ships, the duty of stowing their cargoes in such a manner that one part shall not be injured by another; and if, after having received one article, another should be offered to them of such a nature that there was a chance of its being injured by the former, they would be bound to point out this circumstance to the owner of the second article, and, at the same time, to decline taking it without protecting themselves against this risk by a special exception in the bill of lading. It is the business of the master of the vessel, and not of the shipper of goods,

1824.

BECK
v.
The Owners of the Brig KELTON.

to make himself acquainted with the properties of the different articles in as far as their stowage is to be regulated by those properties; and the mere knowledge, on the part of the shipper, that the cargo of a vessel consisted of particular articles, can never raise a presumption against him that he was aware that some of those articles might prove injurious to his goods; nor transfer, from the master to him, the obligation of ascertaining what would be the probable operation and effect of the one part of the cargo upon another. For these reasons, I feel no hesitation in giving judgment for the plaintiff.

September 23d.

Where the trustee to an insolvent estate had obtained possession, in virtue of that character, of some goods which had been sent to the insolvent from England, and had actually conveyed them to the ultimate terminus of their destination, the *Chief Justice* held, that the vendor's right to stoppage in transitu, having been completely divested by these acts, no subsequent proceeding on the part of the trustee could defeat the claims of the general creditors of the estate to those goods.

The Trustees of the Insolvent Estate of JAMES FOX and JOHN RYAN.

THE circumstances attending this case are sufficiently explained in the following judgment:—

Per Curiam. This case involves the question of the vendor's right to stop the goods, which form the subject of it, in their transit to the vendee; and the only doubt which the Court has experienced in the determination of it, arises entirely from the mystery in which the facts relating to it are enveloped. The loose manner in which business is often conducted in this country, and the consequent relaxation from the rules of evidence observed in England, frequently render it extremely difficult for this Court to acquire a correct knowledge of *facts*; but the difficulty of doing so, resulting from these *general* causes, is, in this case, considerably increased by the *particular* conduct of some of the leading parties to this transaction. It

1824.

Trustees of the Insolvent Estate of Fox and Ryan.

is obvious, from their mode of proceeding, that both the insolvent, *Fox*, and his trustee, *Hayes*, were influenced by some private views opposite to their duty to the general creditors of the insolvent; and that, in the prosecution of their own interests, they have had recourse to measures which have brought the rights of these creditors into jeopardy; for it is clear that, if *Hayes* had acted in the manner in which his character as *trustee* required that he should have done, there never would have been an occasion for bringing this action. From the evidence of *Fox*, it seems certain that it was his intention to obtain, through the agency of *Hayes*, a fraudulent possession of these goods. And, upon the failure of this plan, *Hayes*, upon motives which do not distinctly appear, but which, to say the least of them, are open to strong suspicions, surrendered to the defendant, as agent to the vendee, the goods which, as one of the trustees to the insolvent estate, he was bound to hold for the general benefit of the creditors. Through the veil which has thus been cast over this case, the Court has, however, been enabled to trace the following prominent features of it, from the testimony of *Fox* and *Hayes*, and from a few documents which were produced at the trial.

Soon after *Fox* had been declared insolvent by the Surrogate Court at Harbour Grace, a notice of this event, and of the appointment of trustees to his estate, was inserted in the newspaper of that place; and to this notice the name of *Michael Hayes* was subscribed, as one of the trustees. The trustees did not, however, take any active part in the settlement of the estate; but, agreeably to a practice very common in this country, they devolved the onus of such

1824.

Trustees of the Insolvent Estate of Fox and Ryan.

settlement upon an agent appointed by them. In this state of *Fox's* affairs, two vessels arrived at St. John's, having on board certain articles of merchandise for him, which had been shipped by Mr. *James Gordon* of Manchester, from whom *Fox* had been in the habit of ordering goods from the commencement of his business. When the last-mentioned goods were ordered by *Fox*, he had reason to suppose that the balance then due by him to *Gordon* would have been liquidated by a remittance of fish which he had just before made to *Gordon*; but this hope was disappointed in consequence of the bad market for fish, which did not realize the *prime* cost. The goods shipped by *Gordon* to *Fox* were always insured by the former; and *Fox* was charged with the premium thereon. If they were sent to Harbour Grace, they were consigned directly to *Fox*; but if the vessel they were shipped in was *only* bound to St John's, they were forwarded to *Fox's* agent there. The goods in question were put on board a vessel bound to *St. John's and Harbour Grace*, and were consigned immediately to *Fox*. On their arrival at St. John's, after the declaration of insolvency, *Fox* (being then in the possession of the invoice and bill of lading) gave *Hayes*, the trustee, who was the master and owner of a small schooner engaged in the *carrying-trade* between Harbour Grace and St. John's, an order to receive them; but the master of the vessel having been informed, previously to the delivery of this order, of the insolvency of *Fox*, refused to comply with it until the newspaper was shown him by *Hayes*, announcing his appointment as a trustee to the estate of *Fox*; and then he suffered him to take the goods, which were conveyed by *Hayes* to Harbour

1824.

Trustees of the Insolvent Estate of Fox and RYAN.

Grace, deposited in his own store, and kept under his own direction, until they were finally given up to the plaintiff in this cause, upon his undertaking to become responsible for the consequences of such Act.

From this outline of the case, it is apparent, that *Hayes* obtained possession of these goods in his character of *trustee to the estate of Fox*, and not as a mere carrier between St. John's and Harbour Grace; nor yet as the private agent of *Fox*. This fact is, indeed, established by two circumstances, either of which would, alone, be almost sufficient to evince the truth of it; viz., 1st, the positive refusal of the master of the vessel to deliver the goods to *Hayes* before he was satisfied, by the production of the newspaper, that he was one of the trustees to the estate of *Fox*. 2dly, the high improbability that the master would have delivered these goods to a carrier, to be conveyed to the port to which his *own vessel was immediately bound*. But, if it be true, as it clearly seems to be, that *Hayes* got possession of the goods as trustee, and had them for some time in his possession at Harbour Grace, the case is entirely relieved from all the nice points which have arisen respecting *the "corporal touch"* of the consignee, or his representative; and the arrival of the goods at the *"ultimate terminus"* of their destination; because *here* the goods were in the *actual possession of the trustee* at their *ultimate terminus*; and continued so for some time before any attempt was made by the defendant to assert, even by letter, *Gordon's* claim to them. It only remains, therefore, to be considered, whether *Hayes*, having thus obtained possession of the goods, in virtue of his character as trustee, and under a demand of them as such, could afterwards

1824.

Trustees of the Insolvent Estate of Fox and Ryan.

repudiate that character, and thereby divest that right of the general creditors to them which attached, as a necessary consequence of their coming, through such means, into the hands of one of the trustees to the estate. But it is evident that their right, after it had so attached, could not be defeated by any act of *Hayes*; and that any attempt, on his part, to do so, was a gross violation of his duty, and a manifest fraud upon them.—The Court does, accordingly, give judgment for the plaintiff for £212, the admitted value of the goods, together with the costs of suit.

PAGE & NOBLE appellants,
and
ARTHUR HUNT CARTER respondent.

November 4th.

In hearing appeals, the Court will not receive any evidence that was not tendered at the trial of the cause in the Court below.

THE nature of this case, and the circumstances which prevented it from receiving an earlier determination, are sufficiently explained in the following judgment:—

Per Curiam. The hearing of this appeal has been deferred very much beyond the usual period, for the purpose of enabling the appellants to produce the copy of a letter which they consider as forming a very material part of the defence to the action in the Court below, and which the attornies for the appellants asserted to have been lost, or mislaid, through the default of the *clerk of the Court*.

That letter has, however, since been found in the office of Mr. *Dawe, who acted for the appellants*, by his clerk; and the Court is, accordingly, now in possession of all the documents upon which the judgment of the Surrogate was formed.

Its duty, therefore, is simply to inquire

1824.

PAGE & NOBLE and A. H. CARTER.

whether or not the decision of the Surrogate is warranted by the evidence which was laid before him; for an appeal being in the nature of a complaint against the determination of the judge upon the facts submitted to him, the Court of appeal is necessarily precluded from admitting any other evidence than that upon which the judgment complained of was founded.

In this respect there is an obvious and most important distinction between an *appeal* and a *new trial*.

The Court, then, being thus obliged to confine its attention to the documents originally produced at the trial of the cause, confesses itself unable, after a careful examination of those documents, to discover a single ground upon which this judgment ought to be reversed.

On the part of the appellants, it has, indeed, been contended, that the directions given to them by the respondent in the postcript of his letter of the sixteenth day of July, one thousand eight hundred and eighteen (the letter which was alleged to have been lost), to remit to Mr. *Stabb* one hundred pounds, and to pay to another individual fifty-nine pounds twelve shillings and eightpence,—is sufficient to raise a *presumption* that this direction had been complied with; and that these sums ought, consequently, to have been deducted from the balance which they admit to be due to the Respondent, if the sums of one hundred pounds and fifty-nine pounds twelve shillings and eightpence have not, in point of fact, been severally paid by the appellants, agreeably to the instructions of the respondent. But the doctrine that a mere authority to pay, without any proof of *actual payment*, or even of an *undertaking to pay*, is sufficient to en-

1824.

title the appellant to have the before-mentioned sums deducted from the balance due by them to the respondent, is so contrary to every principle of law and reason, that it would be an idle waste of time to expose the futility of it; and this *Court* does, therefore, without the least hesitation, affirm the judgment pronounced in the Court below.

AARON HOGSETT *against* JOHN BOYD.

May 2*d*,1825.

The Naval Officer is entitled to charge a fee upon the clearance of vessels employed in the fisheries. [But note, that this office has been abolished since this judgment was delivered by an Act of Parliament.]

THE right of the plaintiff, in his character of Deputy Naval Officer, to certain fees upon the clearance of *fishing* vessels, was the great question raised in this case. After having taken some time to consider it, the *Chief Justice* delivered the following judgment:—

The constitution of this Court is, I believe, entirely different from that of any other Court within the wide circle of the British Empire; and the duties of the Chief Justice of this island are not only more laborious, but, also, in many respects, more irksome and difficult, than those of the same officer in any other of our colonies. In all of these, some considerable period of time always intervenes between the commencement of an action and the trial of the cause; and the judge is also advertised, by the pleadings, what the question is which he is to determine; but here the writ is often made returnable on the same day that it is sued out; and even where a longer interval occurs between the teste and return of the writ, the judge can derive no relief from this circumstance; because there are no pleadings to apprize him of the point at issue between the parties. The division of the year, too, into

1825.

BOYD v. HOGSETT.

terms and vacations, allows the judges of other places leisure to examine, and calmly to reflect on, those cases which may have given rise to any new, or unsettled, question of law; but with us the whole year is one continued term; and the judge, being liable to sit *de die in diem*, may feelingly exclaim, "NULLUM A LABORE ME RECLINAT OTIUM." Nor are these the only disadvantages to which he is exposed. Most Courts are composed of *several* judges, who, by conferences among themselves, and by an union and combination of their separate powers, may decide very nice and delicate questions with comparative ease; whereas the judge of this Court is cut off from all communication with every person capable of assisting his research, or relieving his doubts; and, with nothing to depend on but his own store of knowledge, is required to determine the most difficult questions that can arise in every department of the extensive and complicated science of the law, with that *celerity* which is expected from a *summary course of proceeding*, and which, in truth, forms the only recommendation of it.

Such, at least, has been, and still is, the state of our judicature. But we are on the immediate eve of an important change, which will, I earnestly hope, remove, or mitigate, most of the evils to which I have here briefly adverted; and, in the expectation of the early establishment of a Court upon a very different plan from the present, I have, for some time past, been desirous of reserving all cases of great magnitude, or particular interest (on account of some *general principle* which they embrace), for the opinion of the other judges of the Supreme Court. I have not, however, considered myself at liberty to indulge this desire in

1825.

BOYD v. HOGSETT

opposition to the wishes of the parties more directly interested in the determination of any question; and, as the plaintiff in this action has applied for a judgment, I shall now pronounce it, although there are some points in the case which I should have been extremely glad to have consulted the other judges upon.

The plaintiff seeks to recover the amount of certain fees which he claims to be due to him, in his character of Deputy Naval Officer of St. John's, upon some vessels belonging to the defendant, now employed in the *seal fishery;* and the defendant resists the payment of those fees, principally, upon the ground, that the plaintiff's right to them, if it ever existed, has been taken away by the 5th Geo. IV., c. 51, s. 4. I shall, therefore, inquire, 1st, Whether the Naval Officer of Newfoundland was at *any* time entitled to the fees he now demands? and, 2dly, Whether the statute upon which the defendant relies, or any other Act of Parliament, has taken away from the plaintiff any part of those fees which were given to the office he holds by the 10th Geo. III., c. 37, s. 2?

Before the reign of Charles the Second, the colonies engaged very little of the attention of the English Legislature. The attachment which every man feels to his native land, and the difficulties and hardships always incident to every first attempt at colonization, were such powerful checks to emigration, that only a few persons of desperate fortunes, and very daring spirit, ever thought of forming a permanent settlement in America, so long as tranquillity and security were to be enjoyed in England. But the civil war, and the troubles which for many years preceded it, compelled a vast number of persons, of all ranks, to seek an

1825.

BOYD v. HOGSETT.

asylum in the new world from the dangers and misery which surrounded them at home; and those persons having, by courage and perseverance, surmounted the difficulties to which they were at first exposed, gradually acquired such a degree of importance, that the notice of the government was very particularly directed to the "Plantations in America" about the period of the Restoration. Accordingly, one of the first statutes which was made, upon the return of the King, is the 12th Car. II., c. 18., which is commonly called the *Navigation Act*; and in the three succeeding years of the same reign, those other laws were framed which contain the basis and principle of that "Colonial System," which has been followed, with very trifling qualifications, for more than a hundred and fifty years. The objects which that "system" proposes to attain were, 1st, *the exclusive supply of all the wants of the colonies by the Mother Country; 2d, the restriction of all colonial exports to England and Scotland; and, 3dly, the confining of all commercial intercourse between the Colonies and the Parent State to British Shipping*. To accomplish these ends various legislative regulations were adopted; and, as no custom-house establishment had then been formed in any of the colonies, the duty of enforcing those regulations was, at first, wholly committed to the Governors, (*a*) or (by 15th Car. II., c. 7) to persons appointed by them; who, by a later statute, (*b*) are styled 'Naval Officers.' The creation of these officers is, therefore, evi-

(*a*) They are, by several statutes, enjoined to take an oath to do all in their power to enforce these regulations; and are subject to severe penalties upon their neglect to do so.

(*b*) 7th and 8th Wm. III., c. 22, s. 5.

1825.

BOYD v. HOGSETT.

dently of great antiquity; being, in fact, coeval with the "system" which they were intended, under the direction of the Governors, to watch over and protect. In this island, the first appointment of a Naval Officer appears to have been made in 1743; (c) and to have been regularly continued down to the present moment. About twenty-one years after the appointment of a Naval Officer, a custom-house was established in St. John's; and the officers of the customs would, of course, perform many of the duties which had before been discharged solely by the Naval Officer; the preservation of the "Colonial System," as well as the collection of the revenue, being comprised within the sphere of their duty. But, without pretending to decide whether the services of the Naval Officer, in addition to those of the officers of the customs, were actually necessary for the support of the Colonial System, it will be sufficient to mention, that the former was, neither here nor, I think, in any other of the colonies, superseded by the latter. The consequence of their co-existence was, that the merchants and ship-owners were obliged to pay *two* sets of fees for entries, clearances, registers, &c.—namely, one to the custom-house, and another to the Naval Officer. To relieve themselves from this burden, the merchants used every means in their power; whilst, on the other hand, the officers of the customs and the Naval Officers were not slow in availing themselves of every circumstance

(c) Reeves's History of Newfoundland, p. 127. Mr. Reeves says he could not discover whether the appointment had been continued by Captain *Byng's* successors; but by an inspection of the books, containing an account of the early proceedings of the Government, I find that it has been regularly continued from that period down to the present time.

1825.

HOGSETT. v. BOYD

which furnished a pretext for charging *new* fees; and thus an opposition of interests naturally gave rise to controversies and disputes which grew to such a height that it at last became requisite for the legislature to put a stop to them; and, with this view, certain rules respecting fees were prescribed by the 5th Geo. III., c. 45. But as that Act only speaks of *officers of the customs*, it could not regulate the fees of the Naval Officer; and, therefore, the 10th Geo. III., c. 37, s. 2, after noticing this omission in the 5th Geo. III., c. 45, proceeds to declare, "that, from "the 1st August, 1770, every collector, "comptroller, and other officer of his Ma- "jesty's Customs, and every Naval Officer "in the colonies, shall be entitled to de- "mand and receive such fees as they, and "their predecessors, respectively, were ac- "customed to demand before the 29th of "September, 1764." Our first question, then, is reduced to this single point: Are the fees which the plaintiff claims such as his predecessors were accustomed to demand and receive before the 29th of September, 1764? To establish the affirmative of this proposition, the plaintiff has produced copies, from the government books, of a table of fees taken by the Naval Officer at St. John's, the 26th June, 1770, and of a letter from Governor *Byron* to the collector and comptroller of the customs and the Naval officer, dated 19th September, 1770, in which his Excellency directs these officers, from thenceforth, to demand the *same* fees as they had been accustomed to receive before the 29th September, 1764, agreeably to the provision of the second clause of the 10th Geo. III. c. 37. Now, a table of fees [illegible] 1770 would certainly, of itself, be but sli[illegible] evidence of what the fees were in 1764; but

1825.

HOGSETT & BOYD

such a table, in conjunction with an order from the Governor to take the *same* fees as were received in 1764, and the parole testimony of a very old officer of the customs, Mr. *M'Kie*, that the fees stated in that table had been received by the Naval Officer *as long as he can remember*, furnishes, at least, *presumptive* proof that the fees in 1770 were the *same* as in 1764. Indeed, the proof of old customs is almost necessarily confined to the evidence of facts done at a much later period; (*d*) and as the defendant has not attempted to prove that the fees stated in this table were not usually received by the Naval Officer in 1764, I apprehend that the practice of demanding them, after a positive order from the Governor, grounded upon an Act of Parliament, to take no fees but such as were taken in 1764, and the acquiescence of the merchants in this demand, after they had been informed that the Naval Officer was entitled to no other fees than such as he had been accustomed to receive in 1764, may be deemed *conclusive* evidence that the fees in 1764 were not *less* than what are set forth in the table of 1770. Yet, though I am thus disposed to allow this table to be, as far as it goes, conclusive evidence of the fees usually demanded by the Naval Officer here before the 29th Sept., 1764, I am sensible that it cannot, of itself, establish the position, that he was at any time entitled to the fees he *now claims*; because this table neither describes the *vessel*,

(*d*) See 6 T. R. 383. This is one of that class of cases in which a Court is certainly bound to raise, from *posterior usage*, a presumption of an *anterior right*; for long possession must injure a title, if, after the lapse of many years, and the decease of parties, objections should prevail which might have been answered at an earlier period, and which, if well founded, would most probably have been sooner made.

1825.

HOGSETT. v. BOYD.

nor the *voyage*, upon which those fees are payable; and it, consequently, still remains a problem, whether vessels employed *solely in the fisheries upon the coasts of this island*, were *ever* subject to the payment of any fees. To the solution of this question it is, therefore, necessary that I should next direct my attention; and here I have no hesitation in stating it as my opinion, that, before the passing of the 10th Geo. III., c. 37, the Naval Officer had no legal right to demand *any* fees for the clearance or entry of any fishing or coasting vessel, upon her departure from, or return to, any of the ports of Newfoundland. I have already succinctly traced the origin of this appointment, "*ab ovo*;" and, I think, I have clearly shown, that the duty of the person holding it was originally confined to the preservation of that system which was intended to secure to British capital, and British shipping, a monopoly of the colonial trade. I am, therefore, unable to discover any good reason why he should have interfered in a case which seems not to be connected with the proper duty of his office; and, I may add, that I am not aware of any statute which directly obliges vessels that are bound from one port in a colony to another port of the *same* colony, or vessels *without cargoes* to make entries, or take out clearances. (*e*) But, as the laws upon this head are

(*e*) The earliest statute relating to this subject, that I am acquainted with, is the 13th and 14th Car. II., c. 2; by the 7th section of which, it is enacted, that no goods shall be water-borne, or landed, without a warrant, or sufferance, and in the presence of some officer of the customs, under a forfeiture of the goods, and a penalty on the offender; and that *goods* carried from one port to another in *England* or *Wales* shall be shipped under a conquet, sufferance, and bond for the delivery and discharge thereof in some place within the Kingdom of England, Dominion

1825.

HODGETTS v. BOYD

not so plain as they ought to have been, they received opposite constructions from the public officers and merchants, corresponding to the the bias of their conflicting interests; and this led to those violent disputes between these parties to which I before adverted. In no part of the globe could those disputes have raged with more acrimony and fury than they did in this island, if we may judge from the *Government books*, which, up to the

Wales, or Town of Berwick.—The next, in order of time, is the 7th and 8th Wm. III., c. 22, which renders all ships coming into, or going out of, any of the plantations, and ladjog or unlading any goods or commodities, liable to the same rules, visitations, searches, penalties, and forfeitures, as they are subjected to by the 13th and 14th Car. II., c. 2.—Upon which I would observe, that, as it treats only of vessels *coming into, and going out of*, the plantations, it cannot include vessels going from one port to another of the *same* plantation; because they can neither be said *to come into, or go out of*, the plantation. And since both statutes are, in the most marked manner, confined to vessels with *goods* on board, their operation cannot be extended to ships in *ballast*. Nor can the 4th Geo. III., c. 15 (the only remaining statute in which I have found anything applicable to this question) be brought forward in support of the right to make vessels bound from one port to another of the same colony, and vessels without cargoes, take out clearances; for it merely directs that no *goods, wares, or merchandise whatsoever*, shall be shipped or laden on board any vessel, in any of the British colonies or plantations, to be carried from thence to any other British colony or plantation, without a sufferance or warrant first had and obtained from the collector or other proper officer of the customs. Indeed, this last statute affords an invincible argument that vessels sailing from one port to another of the *same* colony are not included in the 7th and 8th Wm. III., c. 22; for, since vessels going from colony to colony did not fall within its provisions, vessels going from one port to another port of the same colony, a *multo fortiori*, could not. But whether the 15th Geo. III., c. 31 s. 7, which privileges boats and other craft from making any entry or clearance at the custom-house, in the *particular case* there mentioned, can be considered an admission of their liability to do so in *all other cases*, according to the maxim, *expressio unius est exclusio alterius*, is a point which I am not now called upon to decide.

1825.

HOOSETT v. BOYD.

year 1771, abound with remonstrances and replies, in which the writers heap upon their antagonists all the abuse which their angry passions could suggest. To these long-forgotten contests I should not have made any allusion, if it had not been necessary for me to make use of the information they afford upon the subject of the present controversy; and I shall, accordingly, only touch upon one or two documents which seem to throw very considerable light upon it:—In 1766, a number of the merchants addressed a memorial to Sir *Hugh Pallisser*, the then Governor, in which they complain of the conduct of the custom-house officers, and naval officers, as being "particularly detrimental to vessels carrying on the *fishery*." They remonstrate, indeed, generally, and with much bitterness, against the hours of business observed, and the fees exacted, by those officers; but the *gravamen* of their charge is the injury resulting from such conduct to *fishing* vessels; and in his answer to this representation, the Governor states it to be his opinion, "that to establish proper "rules and fees for a custom-house in this "country, a material distinction ought to "be made between *fishing* ships, lawfully "qualified as such with fishing certificates, "who, with their crews, are employed only "in the fishery, and trading ships carrying "on a trade created by the late great in-"crease of people staying in this country "after the fishery is over." But his Excellency does not feel himself empowered to make any such regulations.—There is, therefore, I conceive, the strongest grounds for inferring from these documents, that, at that time, and always before it, vessels engaged in the *fishery* had been held liable to the *same* rules as other vessels; and that the

1825.

HODGETT v. BOYD.

Naval Officer had, accordingly, been in the habit of charging the *same* fees upon *both* classes previously to the 29th September, 1764. But this proposition being once established, it will follow, as a direct corollary from it, that the Naval Officer was once entitled to demand fees upon vessels employed in the fishery; for the 10th Geo. III., c. 37, s. 2, authorises him "to take and receive "such fees as he and his predecessors were "and had been generally and usually ac- "customed to demand, take, and receive, "before the 29th September, 1764;" without making any distinction whatever between these fees, which, before that period, he had a *strictly legal right to demand*, and those which he *had not*. From the passing of that statute, therefore, he was invested with a right to all the fees he had been accustomed to receive before the 29th September, 1764, by the highest title-deed under which a British subject can enjoy any sort of estate—an *Act of Parliament*—and it now only remains for me to ascertain whether that right has been since divested by an authority equal to that by which it was conferred.

In the investigation of this branch of the subject, I shall confine myself to the 15th Geo. III., c. 31, and the 5th Geo. IV., c. 51, which are, if I am not mistaken, the only statutes which can supply even the colour of an argument for supposing that any part of the fees which were secured to the Naval Officer by the 10th Geo. III., c. 37, have since been taken from him. The former of these is known among us by the name of Sir *Hugh Pallisser's* Act; and the striking affinity which exists between the sentiments expressed by him in his answer to the remonstrance of the merchants, and the enact-

1825.

HOGSETT v. BOND.

ments of the 7th sec. of that statute, affords the best ground for believing that that clause, at least, was framed by his suggestion. In the passage I have quoted from his letter, he avows an opinion, that *fishing* vessels ought to be exempt, as well from the *delay* attending entries and clearances at the custom-house, as also from the *payment of the fees* usually charged thereon; and, conformably with this opinion, the 7th section of the 15th Geo. III., c. 31, declares, "that "all vessels fitted and cleared out as fishing "ships, or any boat or craft whatsoever em- "ployed in carrying coastwise to be landed, "or put on board any ships or vessels, any "fish, oil, salt provisions, or other necessa- "ries, for the use and purpose of the fishery, "shall not be liable to any restraint or "regulation with respect to days or hours "of working, nor to make any entry at the "custom-house at Newfoundland, except a "report to be made by the master on his "first arrival there, and at his clearing out "from thence; and that a fee, not exceeding "two shillings and sixpence, shall and may "be taken by the officers of the customs at "Newfoundland, for each such report; and "that no other fee shall be taken, or de- "manded, by any officer of the customs "there, upon any other pretence whatsoever, "relative to the said fishery, any law, custom, "or usage, to the contrary notwithstanding." Now, under this Act, it might have been contended, as it has been by the defendant under the 5th Geo. IV., c. 51, that it was the particular and express object of the clause to relieve the vessels employed in the *fishery* from restraints and charges to which they were before liable; and that it was unreasonable to imagine that, in the pursuit of this end, it would greatly reduce

1825.

HOGSETT v BOYD.

the fees of the *officers of the customs*, and yet leave the *Naval Officer* at liberty to compel fishing-ships to make the same entries and clearances at his office, and to charge the same fees for them, as before: that such a construction would really contravene the *policy*, and, in a great measure, defeat the *utility*, of the statute. To this I answer, that where words of an ambiguous and doubtful meaning are employed in an Act of Parliament, Courts of Law may, and ought, to look to the *general intent* and *scope* of it, in order to ascertain the true interpretation of them; but, where the words are clear, I cordially agree with an able and most excellent writer, (*f*) "that the permitting the "exposition of an Act to be influenced by "any opinions respecting its policy, or utili- "ty, is not less repugnant to general conve- "nience, than to the maintenance of a due "subordination of JUDICIAL INTERPRETA- "TION TO LEGISLATIVE AUTHORITY." If, then, there is no doubt that a Naval Officer is not an officer of the customs, it is certain (as Mr. *Simms* has very justly observed) that he is not included in this clause, and cannot, therefore, be affected by it, whatever the

(*f*) The late Sir *William David Evans*. The passage I have quoted is taken from an admireble note of his on the Statute of Frauds, published in the 1st volume of his Collection of Statutes, p. 223. In another note, of equal excellence, upon the 34th Geo. III., c. 68th (vol. 2d, p. 725), he says, "in most of the cases upon the Act, the "*policy* of it is dwelled upon in the highest strains of com- "mendation; with regard to which topic of argument, it "has always appeared to me, that a COURT OF JUSTICE "is not exactly the place for discussing questions of policy "with the greatest propriety or advantage; but that "*every* Act, which has the sanction of the legislature, "should *equally* be carried into execution and effect, ac- "cording to its apparent intent, and the established rules of "legal construction, without either extending or contracting "its operations upon any collateral views of its *utility* or "*inconvenience*."

1825.

HOGSETT v. BOYD.

intention and *policy* of it may be. But the legislature has, in the most direct and positive manner, declared that he is *not* an officer of the customs; for the 10th Geo. III., c. 37, s. 2, asserts that he is *not* included in the 5th Geo. III., c. 45, which authorizes "every collector, and *other* officer of His Majesty's Customs," to charge for fees in the manner there pointed out. And if he was *not* included among "*every Officer of the Customs*" in an Act which *conferred a title* to fees, upon what principle of law, or equity, can we say that he shall be comprised within the same designation in an Act which *takes away* the right to them?

The observations I have here offered upon the 15th Geo. III., c. 31, s. 7, apply with *equal force* to the 5th Geo. IV., c. 51, s. 4; which, like the former, speaks only of the *custom-house* and *officers of the customs*, without containing any allusion to the *Naval Officer* or *his office*; and I should, therefore, have given the plaintiff judgment for the whole sum which he seeks to recover, if I had not discovered some variance between the fees charged in his bill of particulars and those stated in the table, which I consider as exhibiting the fees to which he is lawfully entitled. In that table, the fee of the Naval Officer for a clearance is stated to be two shillings and sixpence; but in his bill of particulars the plaintiff charges five shillings for a "*general* clearance." The practice of granting "general clearances" to fishing vessels, both at the custom-house and in the naval office, grew, I am told, out of the clause in Sir *Hugh Pallisser's* Act, which has been recited and commented on by me. With respect to the *custom-house*, [the practice being entirely put an end to by the 5th Geo. IV., c. 51,] it would be indelicate and

1825.

HOGSETT. v. BOYD

improper for me to pass any opinion upon it; but with reference to the Naval Officer, I am bound to declare, that there is nothing in that clause to sanction any such proceeding. It could, therefore, at most, be only binding so long as it suited the convenience of parties; and, since the defendant now resists the payment of it, this Court can have no power to enforce it. The plaintiff must henceforth charge the same fees upon fishing vessels as upon other ships; and can only obtain a judgment for £3 3*s*. 4*d*., which is the sum to which he is entitled under the table of fees, which, for the reasons I have already detailed, I believe his predecessors were accustomed to demand and receive before the 29th September, 1764,—which were confirmed to them and their successors by the 10th Geo. III., c. 37, and the several statutes by which it has been continued, and, at length, made perpetual,—and which, as I conceive, have never been taken away, altered, or in any degree affected, by any subsequent Act of Parliament.

JOHN BROOM, Esq. complainant,
and
JOHN PRESTON and THOMAS STABB, respondents.

1825.
August 12th.

UPON this important and very interesting case, the *Chief Justice* now delivered the following decree:—

This case comes before the *Court* upon a petition, which states, that the plaintiff, on the 6th of December, 1814, leased from the defendants a certain dwelling-house and ground in Water-street and Queen-street, for thirty years, at the annual rent of £34.

That soon after the plaintiff had taken possession of the demised premises, he erected and finished two other houses on the ground, in rear of his dwelling-house, at an expense of more than £1000.

That on the 3d of June last, a fire totally destroyed the two dwelling-houses erected by plaintiff, together with the out-house and cellar belonging to the original dwelling-house, which was then in his personal occupation, and which was also *materially injured* by the fire, and by the measures which were adopted to check the progress of the flames.

That under these circumstances the plaintiff considered himself entitled to *surrender his lease*; and, accordingly, gave an immediate notice of his intention to do so to Mr. *Vallance*, the agent of the defendants; but that the tender of the lease having been refused, the plaintiff is obliged to apply to this Court for an order to compel Mr. *Vallance* to accept the surrender.

All the facts set forth in this petition are fully admitted by Mr. *Vallance*; but he totally denies that they do, in any manner,

The *partial* demolition of premises by fire will not entitle a lessee to surrender his lease. And though an exception of fire in his covenant to repair will relieve the *lessee* from the obligation to repair where the damage has been occasioned by fire, yet such an exception does not cast the onus of repairing upon the *lessor* during the continuance of the term.

1825.

BROOM v. STABB & PRESTON.

avoid the lease. And, assuming that they do not, he further contends, in the nature of a cross-bill, that Mr. *Broom* is answerable for the damage done to the house, which was built before the date of the lease; because that damage has been occasioned by the wrongful acts of the plaintiff, 1st, in building, without any authority from the defendants, two houses on the vacant ground in rear of the principal dwelling-house, which might not have been at all injured by the fire if those buildings had not been erected: And, 2dly, in destroying the stair-case, window-sashes, and other parts of the house, for the purpose of removing, with greater ease, the furniture and other property belonging to the plaintiff.

The points thus submitted to the consideration of the *Court* are so interesting to the public in general, as well as to the immediate parties to this suit, that I am exceedingly anxious that the *principle* upon which I profess to decide them should be perfectly understood; and as the determination of all cases in this country must depend partly on the *law of England*, and partly on our own *particular customs*, I shall, first, give a pretty extensive sketch of that portion of the English law of landlord and tenant which is applicable to the questions here raised; I shall then review the leading cases in the records of this Court which have been referred to by the plaintiff in support of his petition; and I shall, afterwards, endeavour to deduce from those sources the *principle* which ought to guide my judgment on these points.

At the Common Law, lessees were not answerable to landlords for accidental burning, or for any other injury to the premises resulting from *accident*—"*Fortuna et ignis*

1825.

BROOM v STABB & PRESTON.

"*vel hujusmodi eventus inopinati omnes tenentes excusant*" (*a*) is the early rule delivered by the writer of Fleta; and the reason assigned for it by Lord *Coke* is, that "as "they (*b*) came in by the *act of the lessor*, "he might have provided, upon the making "of the lease, against waste; and he that "might, and would not, provide for himself, the Common Law will not provide "for." (*c*) What the *common law* would not do, the *statute law*, however, afterwards did; for the statute of Marlebridge, c. 24, renders lessees for life, or years, responsible for waste; and the statute of Gloucester, c. 5, which was passed about ten years after, increased the damages for waste, and added a forfeiture of the thing wasted. Thus stood the law for nearly four centuries and a half; but the more ancient law respecting casual fires was restored by the 6th Anne, c. 81, which exempts all persons from actions for accidental fire in any house, *except in the case of special agreements between landlord and tenant*. Under this statute it was long considered doubtful, whether a covenant to repair generally extended to the case of fire, and so became an agreement within the statute; (*d*) but in *Bullock* v. *Dommitt* (*e*) this question was directly brought before the Court of King's Bench, and it was then finally settled, that *a general covenant to repair did include the case of fire*. And though an exception of fire will protect the

(*a*) Fleta, lib. 1, cap. 12.

(*b*) *Lessees* must be carefully distinguished from *tenants in dower*, and *tenants by the curtesy*, who hold their estates by *act of law*, and were always answerable for waste.

(*c*) 2 Inst. 145 and 299.

(*d*) Har. Co. Litt. 57, a.

(*e*) 6 T. R. 650. See also an excellent note upon this subject by Serjeant *Williams*, in his edition of Saunder's Reports, Vol. 2, P. 422.

1825.

BROOM v. STABB & PRESTON.

lessee from his covenant to *repair*, yet he is liable under a covenant to *pay rent*, notwithstanding the premises be burnt down and not rebuilt by the lessor. In one instance, indeed, where the premises had been insured by the landlord, and their value received from the insurance-office, the chancellor granted an injunction to restrain the lessor from suing for the rent until the house should be rebuilt; (*f*) but it has since been determined, that there is no equity in favour of the lessee of a house liable to repair, with the exception of damage by fire, for an injunction against an action for payment of rent upon the destruction of the house by fire. (*g*) Now, the plaintiff is a lessee liable to repair, with an exception of damage by fire; and, therefore, by the *law of England*, he continues liable upon his covenant to pay rent, during the residue of his term, without the possibility of obtaining relief from a Court of Equity.

Let us, then, next inquire, how far the *law of Newfoundland* differs, in these points, from the *law of England*; and, to this end, let us first examine all the cases upon record which seem to be capable of imparting any information upon the question. These are, I think, only three (*h*) in number. The first was an action for rent, brought by Mrs. *Carroll* against Dr. *Carson* on the 7th December, 1818. It was there admitted, that the house for which the rent was claimed had been *wholly destroyed* by fire; and several witnesses proved, that *such* an event was considered, by the uniform custom of this country,

(*f*) Amb. 620.
(*g*) 18 Ves. 115.
(*h*) Four have been cited by the plaintiff; but the principal point in one of them is foreign to the matter here in dispute.

1825.

BROOM v. STABB & PRESTON.

to cancel the lease so entirely that the landlord would have a right to re-enter, although the lessee should wish to retain the land. In giving judgment for the defendant, the *Court* appears disposed to sustain the custom; but the particular ground of the judgment is, that the lessor had done that which was equivalent to an *acceptance of the surrender of the lease*; and had, thereby, *estopped himself from contesting the validity of the custom.* This case, however, was soon after followed by that of *Cowell & Lewis* v. *M'Braire*, where the *Chief Justice* expressly held, that there was an usage in this country which exempted the tenant from the liability to pay rent, and enabled him to surrender his lease after the *total destruction* of the premises by fire. And in *Newman* v. *Meagher*, which succeeded very rapidly to the last, Mr. *Forbes* considered the defendant discharged, by the custom of this town, from any obligation to repair, in case of fire, under a covenant to repair generally. He has thus furnished me with some precedents which I shall scrupulously follow; although I frankly avow, that I am not perfectly satisfied with his judgments in the *two last* cases. The evidence of custom should, I conceive, be extremely strong and convincing to induce the *Court*, in *any* case, to depart from the rules observed in England; but there are circumstances connected with *these* cases which rendered it, in my opinion, incumbent on the Court to investigate the alleged custom with *peculiar caution and vigilance.* The doctrine, *that a fire cancels a lease*, is open, among others, to these striking objections:—that it holds out a temptation to every lessee, who wishes to get rid of his term, to destroy the premises,—that it

1825.

BROOM v. STABB & PRESTON.

thus adds to the *risks of fire*, (*i*) and thereby increases the charge of insurance,—and that it may lead to ill-founded suspicions, and distressing prosecutions for *arson*. Of its tendency to produce the last of these evils, a remarkable example has fallen under my own observation, in the case of a person who was tried before me for his life upon a charge of having wilfully set fire to a house, which turned out to be so thoroughly groundless that, I believe, every one present at the trial must have been convinced that the unfortunate man would never have been placed in that painful situation if he had not happened to be the lessee, at a *very extravagant rent*, of the premises which were accidentally burnt. That a custom, pregnant with such consequences, was not entitled to favour from the *Court* must, I think, be obvious; and I confess that I was, therefore, surprised upon examining Mr. *Forbes's* notes, to find that he had adopted it upon evidence which seems to be very loose and inconclusive. Some of the witnesses assert, that a fire cancels the lease so entirely, that the *lessee cannot retain it if he even wishes to do so*; while others as stoutly maintain, that it is *optional* with the tenant to surrender or not, as he pleases. But, surely, these are not consistent customs; and, therefore, cannot *both* be good. And, supposing *either* of

(*i*) The *advantage* of fire-insurance is, that by dividing the loss among a number of persons, it prevents the ruin of individuals. The *objection* to it is, that it holds out to wicked characters a temptation to insure their premises beyond their value, and then to burn them, with the hope of defrauding the insurance company; and between the benefits and evils thus resulting from the practice, some have doubted how the true balance stands.—(Marsh. on In. vol. 2, p. 785.) Can there, then, be found an advocate for a custom which is open to the *same objection* that fire-insurances are, without producing any share of the *public benefit* with which they are attended?

1825.

BROOM v. STABB & PRESTON.

them to be so, I suspect it ought to have been confined to *building leases;* to which it probably owes its origin; and, in its application to which, it is not open to the same objections, or, at least, not in the same degree (*k*) that I have pointed out in regard to other leases. In admitting it, therefore, upon such vague testimony, and without any qualification as to its extent, Mr. *Forbes* appears to me to have acted under the influence of a bias created by the calamitous events of which he had been a recent spectator; and, perhaps, the astonishing load of business which pressed upon him about that period made it impossible for him to examine this subject with very great attention. At all events, if he has fallen into a slight error, every one who has had an opportunity of seeing the proofs which the records of this Court supply of his genius, application, and integrity, will be inclined to say of it what a candid critic has said of one defective line in the works of a beautiful and most distinguished author:—that it ought to be covered by the thousand excellencies which surround it—"*Nec est notandus unus in tot millibus.*" Fortunate, indeed, (and, in particular allusion to *myself*, I will add, *beyond expectation fortunate,*) will the successors of Mr. *Forbes* be, if their mistakes shall not *greatly exceed* the number of those committed by him? With this opinion of Mr. *Forbes's* merit; and under a strong conviction, that the inconvenience resulting from *uncertainty* in rules of law is far greater than that which is occasioned by a *few defects* in them, I long ago declared an inten-

(*k*) Because it can rarely become the interest of the person who has expended money on buildings to burn them merely for the sake of relieving himself from the payment of ground-rent.

1825.

BROOM v. STABB & PRESTON.

tion to adhere rigidly to his decisions; and, accordingly, I should have afforded the plaintiff the relief he claims from the *Court*, without the smallest hesitation, if he could have brought his case within the letter, or spirit, of any of the cases he has cited in support of it. But those cases all differ from his in this important particular—viz., that the fires which gave rise to them had *totally consumed* the houses; whereas the house which forms the principal subject-matter of the plaintiff's lease has been only *partially* injured; and that, too, as the defendants insist, either wholly, or chiefly, through the plaintiff's default. And, granting that the *total annihilation* of the premises will annul a lease, we cannot, I imagine, deduce, as a necessary corollary from this proposition, that a *partial injury* must be attended with the same effect. The real question, then, is, does the custom of the country oblige a lessor to accept the surrender of the lease of a house which has received *some* damage by fire? And with a view to the determination of it, several witnesses have been examined before me. With a single exception (*l*) they all state, that no case in any respect like the present has ever come within their knowledge; and their ideas concerning the respective rights and liabilities of the parties to this suit are, consequently, excessively crude; for though they all concur in saying that, as *lessees*, they would have tendered the surrender of

(*l*) In that case the witness was the lessee of extensive and valuable premises which were consumed by fire, with the exception of a small part of, comparatively, very trifling value. Under these circumstances he tendered the surrender of his lease, which was accepted by the lessor. —Now, putting aside the consideration that the *lessor* and *lessee* were *sister* and *brother*, what can one solitary instance of this kind amount to?

1825.

BROOM v. STABB & PRESTON.

their lease under Mr. *Broom's* circumstances, yet the majority of them acknowledge that, as *lessors*, they would have contested his right to do it. Is not this, then, the strongest possible evidence, that there is neither usage, nor recognized principle, to govern the present case? But the argument against the custom which the plaintiff has attempted to set up does not, by any means, stop here; for the witnesses whose testimony he most relies on declare, that a *small* degree of damage to a house from fire would not, in their opinion, cancel a lease, although a *considerable* injury would; and that they are utterly unable to define the quantum, or proportion, of damage which would entitle a tenant to surrender his lease. The custom, therefore, in fact, amounts to this:—That some damage (without ascertaining how much) will entitle the tenant to surrender; and some damage will not. Now, it has been well observed by an eminent judge, (*m*) "that every man who contracts under an "usage, does it as if the point of usage "were inserted in the contract *in terms*;" and I will, therefore, suppose, that the following clause had been inserted in this lease: "Provided always, that, in case *some* damage "shall be done to the premises, the lessee "may surrender; but it is, nevertheless, "understood, and mutually agreed on, by "the parties, that the lease shall continue "to be valid, and binding upon them both, "notwithstanding *some* damage shall, at any "time, be occasioned to the premises by fire." Is there any man who does not perceive that such a clause would be contradictory, uncer-

(*m*) Lord *Mansfield*—in the case of *Mason* v. *Skurray* which was tried before his lordship at N. P. after Hil. 1780.

1825.

BROOM v. STABB & PRESTON.

tain, and absurd? And must not a *custom* of the same nature be equally so? Mr. *Forbes*, we have seen, has supported a custom which enables the tenant to surrender where his house is *entirely burnt*; and if there had been a custom that *any* burning, or a burning to a *definite extent*, would confer the same right upon him, I would also have sustained it, however unwise I might consider such a custom to be; but a custom which must drive parties into litigation, without furnishing the Court with a rule by which their disputes ought to be adjusted, must deserve reprobation instead of countenance; and I accordingly feel myself obliged, after an attentive, and even painful, consideration of the circumstances of this case, to adhere to my original opinion, that the plaintiff cannot compel the defendants to accept the surrender of his lease.

I come now to the question of *the liability to repair*; and I shall commence with the two arguments by which the defendants strive to throw that burden on the plaintiff. By the first, the defendants charge the plaintiff with malfeazance, in erecting, upon the vacant ground in rear of his house, two other houses; to which conduct, on his part, they ascribe the injury the principal house experienced from the fire; and they contend that he is, consequently, answerable for it. But I apprehend that, in the absence of a *direct* authority to erect those buildings, the acquiescence of the defendants in their construction would have been abundantly sufficient to exonerate the plaintiff from the responsibility which the defendants seek to cast upon him; for it would be most unjust that they should stand by, and quietly permit him to erect buildings, which might have added considerably to the value of their

1825.

BROOM v. STABB & PRESTON.

property; and afterwards, upon the accidental burning of these buildings, turn round upon him, and complain of their erection as a grievance. In point of fact, however, there is no necessity to resort to the doctrine of *implied* authority; because, in his covenant to repair, the plaintiff has agreed to maintain, and deliver up, in good order, as well the dwelling-house then built, as also "all such erections and buildings as may be "made upon the demised premises;" and it would be ridiculous that he should bind himself to keep those future buildings in repair, if the lessors were not likewise bound to permit him to erect them. The first position of the defendants is, therefore, altogether untenable; and their second does not appear to me to be a much stronger one. They contend that the plaintiff is, at any rate, responsible for a *part* of the damage; because *some* of that damage was done by the attempt to remove the plaintiff's furniture when the adjoining houses were on fire, and when the flames had actually communicated to a portion of the premises in which the plaintiff resided. But I think that, under these circumstances, the fire ought to be considered as the CAUSA CAUSANS of the whole damage, within the true spirit and meaning of the exception of the case of fire in the plaintiff's covenant to repair; and that the distinction between what the *fire did*, and what it *compelled the plaintiff to do*, ought not to be allowed. I do not say, generally, that it *never* should; but with reference to the particular facts of this case, I am of opinion that it should not.

It yet remains for me to decide, whether the onus of repairing the house does not fall upon the defendants; since there seems to be a pretty general impression upon the

1825.

BROOM v. STABB & PRESTON.

minds of the witnesses, that the landlord is bound to repair the injury occasioned by fire in those instances in which the tenant is not at liberty to surrender his lease. And, certainly, if the defendants *knew* that the plaintiff contracted with an idea that such was the nature and effect of the contract, they are, in a moral sense, (*n*) bound to repair. But, to use the elegant expression of Lord *Rosslyn*, (*o*) "*legal objections* are, from their nature, more circumscribed than *moral duties*;" and, as the impression upon the minds of these witnesses is not supported by any proof of a corresponding practice, or usage, I must construe the contract between these parties by the *same* rules which the Courts have adopted with respect to other contracts. Now, under this lease the plaintiff has covenanted to pay rent, and to keep the premises in repair, during the continuance of his term; and it is clear that, if there had been no exception in these covenants, he would have been obliged both to pay rent, and also to rebuild the house, in the event of its being consumed by fire. But there is in his covenant to repair an exception of the case of fire; and the question, therefore, is, what is the benefit which he ought to derive from this exception? The answer to it must depend upon the rules which have been established for the construction of deeds; and "the general mode "of construing deeds to which there are "exceptions," (*p*) says Lord *Kenyon*, "is "to let the exception control the instru-

(*n*) The moral rule on this subject is thus laid down by Dr. *Paley*:—Whatever is *expected by one side*, and *known to be so expected by the other*, is to be deemed a part, or condition, of the contract. See his Moral Philosophy, chap. vi. p. 92.

(*o*) In *Parsons* v. *Thompson*, 1 Hen. Black. 322.

(*p*) In *Bowring* v. *Elmslie*, at N. P. after Tr. 1790.

1825.

BROOM v. STABE & PRESTON.

" ment as far as the words of it extend, and " *no farther*; and then, upon the case being " taken out of the *letter of the exception*, the " deed operates in *full force*." What, then, is the effect of the exception in the present case, according to this rule?—The plaintiff covenants to repair with an exception of fire; and there are no words in the exception to charge the defendants with the obligation to repair. The force of the deed, therefore, independently of the exception, is, that the lessee should pay rent during the whole term, and deliver up the premises, at the expiration thereof, in good condition; but the exception relieves him from the latter obligation in the event of fire. The plaintiff may, therefore, repair the house or not at his option; but I hold that the operation of the lease is in no other way influenced by the distressing circumstances which have occurred; and that, under it, the plaintiff will accordingly be liable to pay rent during the residue of his term. Nor have I arrived at this conclusion without some struggle with my strong feelings of sympathy for the severe misfortune which has befallen the plaintiff; and, I confess, it would afford me infinite satisfaction to lessen the weight of his heavy loss, if I could do so without a violent departure from those principles and rules upon the preservation of which the peace and happiness of society materially depend.

1825.

Trustees of WALLER *against* J. BROOM, Jun.

August 29th.

A partnership may be defined to be A PARTICIPATION OF PROFITS AND LOSSES. A participation of *profits* will, however, induce a participation of *losses*, so as to constitute a partnership with respect to *third persons*, although the parties themselves had no intention to share any losses that might arise; but a partnership, *inter se*, can only exist where there is an *express* agreement between the parties to divide *both profits and losses* in certain proportions between them; or where such agreement to divide losses may be *implied* from the fact of a joint ownership of the capital and stock in trade:

THIS action was brought to recover from the defendant the sum of £198 8*s.* 11*d.*; and, in delivering his judgment upon it, the *Chief Justice* said: —

Few cases have given me more trouble than the one I am now about to decide. It turns upon the point, whether *a partnership existed between the insolvent and the defendant?* And I may venture to assert, that a more difficult question can hardly be brought before a *Court*. Indeed, Lord *Eldon* has said, (*a*) "the cases have gone to this "nicety upon distinction so thin, that I "cannot state it as established upon due "consideration—that, if a trader agrees to "pay another person for his labour in the "concern a sum of money, *even in proportion to the profits*, equal to a certain share, "that will *not make him a partner*; but if he "has a *specific interest* in the profits themselves, as profits, *he is a partner*. It is "clearly settled," continues his Lordship, "though I regret it, that if a man stipulates "that, as the reward of his labour, he shall "have, not a specific interest in the business, "but a given sum of money, even in proportion to a given quantum of profits, that "will not make him a partner; but if he "agrees for a part of the profits, as such, "giving him the right to an account, though "having no property in the capital, he is, "as to third persons, a partner." Rules which have thus been constructed upon such subtile and minute distinctions will always be found difficult in their practical application, even where the *facts* of a case are plain and undisputed; but where these are rendered doubtful and uncertain, through

(*a*) Ex-parte *Hanper*, 17 Ves. 404.

1825.

Trustees of WALLER v. BROOM

the ignorance of parties in framing their contracts, or through their dishonesty in attempting to conceal, or misrepresent, the terms of them, it becomes almost impossible for the human understanding to surmount the difficulties which then present themselves on every side. And, unhappily, *ignorance* has concurred with *fraud* in casting a deep veil over the transaction which I am now called upon to investigate; for, as was justly observed in the course of the argument, the original agreement was so loose that it must almost necessarily have led to controversy between parties who were evidently not aware of the real extent of their respective rights and liabilities under it; and, instead of a frank, candid, and ingenuous disclosure of all the material facts of the case, there has been a shameful attempt to embarrass and mislead the *Court* by opposite and conflicting statements. The plaintiffs rely entirely on the testimony of the insolvent; and as the painful task has devolved on me of pronouncing that either he or the defendant must have been guilty of very gross falsehood, I shall first advert to some circumstances which, in my opinion, detract considerably from the credit of *Waller*. Immediately upon the declaration of his insolvency, the trustees to his estate adopted a course of proceeding which indicated, in the strongest manner, their general disapprobation of his conduct, and their total want of confidence in his veracity. The natural tendency of this treatment was to inspire him with an apprehension that his certificate of discharge would be withheld; and it would probably occur to him that such an evil might be averted, if he could only contrive to conciliate his creditors by increasing their dividend beyond their early

1825.

Trustees of WALLER v. BROOM.

expectation. Thus greatly exposed by his situation to the influence of corrupt motives, he was brought before me by the trustees to give evidence respecting his partnership with *Broom, before he had obtained his certificate,* upon a suggestion that he was about to depart on a distant voyage, without any intention of returning to this country for a long period; and to his statement of his dealings with the defendant an answer has been given, upon oath, by *Broom,* denying most positively some important points in *Waller's* deposition. Now, it is stated by the highest judicial authority (*b*) of the present day, that "a defendant in a Court of "Equity has the protection arising from his "own conscience in a degree in which the "*law* does not affect to give him protection. "If he positively, plainly, and precisely "denies the assertion, and one witness only "proves it as positively, clearly, and pre"cisely, as it is denied, and there is no "circumstance attaching credit to the asser"tion, overbalancing the credit due to the "denial, as a positive denial, a Court of "Equity will not act upon the testimony of "that witness." Had *Waller,* then, been perfectly free from any taint of suspicion, his testimony, opposed, as it is, by the positive contradiction of the defendant, would not be sufficient to ground a decree upon; unless it either carried internal evidence of its truth, or was corroborated by other witnesses. With respect to the former, I consider the one statement just as likely to be true as the other; because I cannot perceive that a partnership would have been more advantageous to *Broom* than the connection he admits he formed with *Waller;* and the evidence of Mr. *Vallance* (the only other

(*b*) Lord Eldon. See 6 Ves. Jun. 184.

1825.

Trustees of WALLER v. BROOM.

witness adduced by the plaintiffs) is not, I conceive, inconsistent with the truth of *either* statement. On the other hand, it is so impossible to reconcile some of the assertions of *Waller* with the testimony of Mrs. *Broom*, that I cannot give credit to them, unless I was convinced that she, as well as her son, had committed perjury. I feel myself, therefore, bound to reject many parts of *Waller's* testimony, and to adopt the facts admitted by the *defendant* as the basis of my judgment.

It appears, then, by the admission of *Broom*, that *Waller* had, in the summer of the last year, about £200 worth of shop goods in his possession; and believing that he could procure a larger quantity on credit, he mentioned to the defendant his intention of hiring a small vessel, then in the harbour, for the purpose of carrying those goods to some of the settlements on the coast, and exchanging them there for the productions of the island. To this scheme the defendant suggested, as an improvement, the propriety of *purchasing* instead of *chartering* the vessel, at the same time professing his readiness to become a joint purchaser of the vessel, and to convey such goods in her as the insolvent could procure, to the *Westward*, where he could, by his influence with his friends, materially assist in the disposal of them, on condition that he should have *half the profits arising from the speculation*. The vessel was accordingly purchased for £120, partly for cash and partly on credit; and £45 were immediately advanced by the defendant towards the payment of his half of her. Goods, to the value of more than £600, were also put on board her by *Waller*; and, on the 9th of August, the defendant left St. John's upon the voyage which had

1825.

Trustees of WALLER v. BROOM.

been agreed on between him and the insolvent. Very soon after his departure, however, he encountered a violent gale of wind; and in consequence of his being exposed to a great deal of rain, in his exertions to save the vessel, he caught a dreadful cold, which entirely deprived him of the use of his limbs, and compelled him to return to this port as quickly as possible in quest of medical aid. This misfortune obliged *Waller* to go in place of *Broom*; and he actually made two trips without entering into any new arrangements with the defendant, and without its being settled between them how far the original agreement was to be adhered to; Nor was any demand made by the one upon the other until *after Waller's insolvency*, when *Broom* interposed a claim for freight; and the trustees, thereupon, instituted the present proceeding to force him to contribute, as a partner, to make good the loss which had accrued upon the speculation. Two questions, therefore, arise in this case, viz., 1st, Is the defendant liable to share in this loss?—2d, If he be not, is he entitled to freight?

If the solution of the first question depended merely upon the fact of the existence of a partnership, without regard to the *nature* of it, I should have no hesitation in declaring that he is liable; because there was here a clear agreement for a share of the profits, *as such*; and the *Lord Chancellor* of England has said, in the passage I have already quoted from him, that, as to *third* persons, such an agreement does constitute a partnership; and a long string of cases might easily be cited in support of this dictum. But I apprehend there is an essential difference between *a partnership as to third persons* and *a partnership between the*

1825.

Trustees of WALLER v. BROOM.

parties; and that this distinction is strongly applicable to the circumstances of the present case. The person who contracts with a trader for a share of his profits, contracts for a part of that fund to which his creditors look for the payment of their debts; and this, through the favour that is always shown to commerce by our Courts of Law, has been deemed sufficient to impose an obligation on such person to pay for those articles from which this profit was expected to result. In other words, a contract to that effect has been implied between them, founded on the consideration that he who lessens this fund on which the creditors depend, ought to make good any loss they may experience in consequence of the deficiency of such fund. This is a partnership, therefore, created upon principles of *natural justice*, or, at least, of *commercial policy*, without reference to the *views or intentions of the parties* any further than as such views affect the *public interest*; and, consequently, such a partnership is extremely distinct from a partnership between the parties, which cannot exist *contrary to their intentions*; because it is founded exclusively upon their engagements with each other. It has been said (*c*) to be very difficult to find an exact definition of a partnership; but I think it may be accurately defined to be A PARTICIPATION IN PROFITS AND LOSSES, if we attend to the distinction, that in partnerships as to *strangers* a participation in losses may result out of an agreement to share profits *only*, contrary to the meaning and intention of the parties to that agreement; whereas a partnership *inter se* can only take place where it is the manifest intention of the parties to share *both* profit and loss; which

(c) In Wraugh v. Carver, 2 Hen. Black., 233.

1825.

Trustees of WALLER v. BROOM.

intention may either be *express*, as where A promises B, that if he will employ his capital in a certain way, and allow A half the profits which shall arise from such employment of it, A will bear half of any losses that may result from the adventure; or it may be *implied* from there being a *joint ownership* of the partnership stock. In the case now under consideration, the insolvent himself allows that *there was no agreement about losses*; and, therefore, if my ideas on this subject are correct, there could not be a partnership, as *inter se*, between him and the defendant, unless there was a joint interest in the property which was the ground work of the speculation. And there is one circumstance which thoroughly convinces me that there was no joint ownership of any part of the property except the *vessel*.— On the 8th August, 1824, the very day before the defendant left St. John's, the insolvent furnished *Broom* with an account which contains a charge for the purchase of the vessel, and seems to convey a full statement of the dealings between the parties, but yet takes no notice of the *goods* which had been procured by *Waller*; and, contemporaneously with the delivery of this account, the insolvent also gave the defendant an invoice of those goods, which are therein stated to have been shipped by *William Waller*, and not by *Waller & Broom*. Now, these documents are, I apprehend, true expositors of the motives and intentions with which the parties embarked in the concern; and as they were drawn up at the very inception of the agreement, and before it had become the interests of either to misrepresent the conditions of it, I deem them entitled to implicit credit. And what do they prove? Most clearly, I think, that both *Waller &*

1825.

Trustees of WALLER v. BROOM.

Broom considered the goods which the latter was to dispose of as the *separate property* of the former, and not as their *joint property*. It is true, *Waller* has told us that the invoice was *afterwards* altered, at the request of *Broom*, so as to express the interest which he claimed in the goods; and an account has since been prepared by *Waller*, in which *Broom* is debited with half the supposed value of the goods. But the story about the alteration of the invoice I *totally disbelieve*; not only because it is denied by *Broom*, and is at variance with the testimony of his mother, but also because I am persuaded, that the *identical invoice* in which *Waller* pretends that the alteration was made is now among the papers which have been shown to the *Court*, free from any such alteration and interlineation as he represents himself to have made in it; and the difference in the mode of making out the two accounts affords a strong argument that *Broom's* situation was not originally regarded by *Waller* in the light in which he has subsequently endeavoured to exhibit it. I am, therefore, of opinion, that *Waller* had no right whatever to call upon *Broom* to participate in the loss which has grown out of this transaction; and that, consequently, his trustees, who are merely clothed with the same rights which before belonged to him, cannot do it.

In the determination of the second point in this case, I shall be wholly guided by what I believe to have been the *real intentions* of *Waller & Broom* when the connection between them commenced; and I shall, therefore, state the terms of their contract according to my conception of them. I do, then, most firmly believe, that the goods were to be procured by *Waller*, and were to

1826.

Trustees of WALLER v. BROOM.

continue his separate property; that the vessel was to be purchased by the two, fitted out by them at their joint expense, and belong to them in equal moieties; that she was, afterwards, to be employed in the transportation of *Waller's* goods to several parts of the western coast of Newfoundland; that, whilst so employed, the charge of navigating her should be borne and defrayed out of the proceeds of her cargo; that *Broom* should assist in navigating the vessel and in selling the goods; and that the *compensation for his interest in the vessel*, and the *reward for his services*, should consist of *half of the net profits of the adventure*. Upon the return of the vessel to St. John's, and on *Broom's* being rendered incapable, by illness, of performing the service required of him under this contract, *Waller* might, unquestionably, have insisted upon a corresponding change in the terms of it, if he had chosen to do so; but, without pretending to know the exact motives which influenced him, it seems to me clear, that he waved his right to do it; and, as no new agreement was entered into relative to the second voyage, I think that it must also be governed by the first contract. The conclusion, then, that I draw from this view of the case is, that *Broom* cannot claim freight for either trip; that the whole expense of the vessel during the period she was so employed, ought to be defrayed out of the proceeds of her several cargoes; and that *Broom* must pay to the trustees the balance of half the amount of her prime cost and first out-fit, after deducting the £45 already advanced by him on account. It can hardly be necessary for me to add, that I consider the vessel as belonging, in equal proportions, to *Broom* and the trustees; and that, if any

freight has been earned by her since the termination of *Waller's* second voyage, it must, in like manner, be divided between them.

1825.

NEAL REDDY *against* Trustees of JAMES HACKETT.

August 20th.

If A supplies B with money and credit to carry on trade, upon the condition of receiving a proportion of the profits of such trade, A cannot, upon the bankruptcy of B, participate in a dividend of his effects until all the other creditors shall have been paid the full amount of B's debts to them.

PER CURIAM. The plaintiff seeks, by the present suit, to establish his right to a dividend upon the sum of £5,818 1*s.* 3*d.*, which he states to have been due to him by the insolvent at the period when the insolvency was declared; and the defendants resist this claim, upon the grounds that there was either a *partnership* between the plaintiff and the insolvent, or that the plaintiff carried on an extensive trade in this island in the *name*, and through the *agency*, of *Hackett*. It has become my duty, therefore, to inquire what was the real nature of the connection which subsisted between these parties; and for this purpose I have examined, with close attention, the numerous papers which have been laid before me. From these, together with the parol evidence which has been adduced by the defendants, I collect that *Hackett* first came to this country in the spring of 1816, with a Mr. *Burke*, who was jointly entrusted with him with the management and sale of a quantity of merchandise belonging to *Reddy & Varschoil*, who had joined in this speculation, though each of them was carrying on a separate and distinct business in Ireland. That *Hackett* returned in the autumn of the same year, carrying with him a cargo of the produce of Newfoundland; and that *Reddy*, being pleased with the result of his first

1825.

REDDY v. Trustees of HACKETT.

trial of this market, sent *Hackett* back, the following spring, with a larger quantity of goods, which *Hackett* was to dispose of according to his own discretion, and to receive, as the reward for his services, a *fifth part of the net profits arising from the sale thereof*. That a settlement, accordingly, took place between *Reddy & Hackett*, agreeably to this agreement, at the end of the year 1817, under which the latter received from the former £40, being a fifth of £200, at which sum *Reddy* estimated the profits upon his Newfoundland adventure for that year. That *Hackett* was again sent out at an early period in 1818, with a still larger amount of merchandise; and with a promise from *Reddy*, that if he, *Hackett*, could realize the property to which he represented himself to have become entitled, through a marriage he had contracted here, his share of the profits should be advanced to a *third*, or even to *half*, if his wife's fortune should turn out equal to his expectations. That in the summer of 1818, *Hackett* sent *Reddy* a good deal of oil; and at the same time informed him that a part thereof, which he valued at about £600, and had marked with the letters I. H., was purchased with his *wife's money*, and was sent on his, *Hackett's separate* account; but that the rest was procured from the proceeds, or upon the credit, of the goods he brought out with him. That in consequence of this remittance, and of the golden prospects held out to him by *Hackett*, *Reddy* was induced to send out, in the years 1818 and 1819, several extensive consignments to *Hackett*, who, upon the strength of this support, had entered largely into the seal-fishery and other usual branches of business in this country; had made shipments of produce to foreign countries, with directions to

1825.

REDDY v. Trustees of HACKETT.

the consignees to forward the proceeds to *Reddy*; and had assured *Reddy*, in a number of letters, that he was in a fair way to do great things for them both. That, buoyed up by these flattering and delusive representations, *Reddy* continued to honour *Hackett's* drafts, notwithstanding the repeated failure of his promise to put him in funds to meet them, until the year 1820, when he found it necessary to refuse some bills which *Hackett* had drawn on him, and to send out a person to look after the property which was in the hands of *Hackett*. And that the knowledge of these circumstances immediately led to the declaration of *Hackett's* insolvency.

This is, I believe, a faithful copy of the transactions between these persons; but there are several important facts to be extracted from their correspondence, which seem to me to deserve particular notice. In the first place, I observe that *Reddy* sends out one of his *own clerks* as an assistant to *Hackett*; and that this person, after a short residence in Newfoundland, returns in charge of some produce for *Reddy*, and is paid by *him* an extra sum for his services abroad. The inference I should draw from this is, that *Reddy*, considering *Hackett* either as a partner or an agent, was desirous of obtaining accurate information respecting his proceedings; and, with that view, sent out this person to make a verbal report thereon.

Again, *Reddy* repeatedly urges *Hackett* to come home, in order that a settlement may take place between them; and even in 1820 he desires him to leave Mr. *Selman* (whom *Reddy* had sent out to take charge of the property) to conduct the business, and to repair himself to Ireland, that they

1825.

REDDY v. Trustees of HACKETT.

may settle their accounts. Could he have made such a proposal as this to any man whom he did not regard in the light of a partner or servant? And why was the presence of *Hackett* necessary to adjust their accounts, unless it were to fix the proportion of profit (for *Reddy* had not even then entirely awoke from his *dream of profits)* which *Hackett* was to have?

But the letters of *Hackett* furnish the strongest possible evidence that he considered *Reddy* either as the principal for whom he acted, or as a partner in all his *chief* concerns. He advises him that he had drawn bills upon him for the payment of his *servants' wages*. He requests and directs him to pay one or two persons the amount of some small consignments he had received from them. He begs him to introduce him to some houses in the ports of either Spain, Portugal, or Italy; and at the same time he positively assures *Reddy* that he shall be made acquainted with whatever shipments he may make to any of those places, and that the proceeds shall also be forwarded from them to him. He professes to acquaint *Reddy* with every particular relating to his trade so minutely as to send him more than once a statement of his *stock in hand*, and of the amount of his *book-debts*. And, what is more than all the rest, he importunes *Reddy* for further supplies by an assurance, that the *whole success of the concern* depends upon their early arrival; and after the receipt of them he triumphantly congratulates *Reddy*, that he could then obtain credit for *thousands* where he would not before have dared to ask for a *shilling*; and distinctly intimates an intention *to use this credit in procuring produce to send to him.*

Without deeming it necessary, then, to

1825.

REDDY v. Trustees of HACKETT.

decide whether *Hackett* was the *partner*, or merely the *servant*, of *Reddy*, I am satisfied that it would be gross injustice to the other creditors to allow him to take any part of that fund with which he permitted *Hackett* to trade, and upon which they relied for the payment of the debts *Hackett* contracted with them. I am, therefore, most clearly of opinion, that the plaintiff ought not to receive any dividend on his debt, untill the other creditors shall have received the full amount of theirs.

1826.

August 22*d*.

The following classes are exempted from payment of the Greenwich Hospital duty:

1st. Apprentices who have been bound agreeably to the provisions of the 2d Anne, c. 6.

2d. Persons employed in boats, whether *decked* or *open*, in taking fish which are brought *fresh* on shore to be *consumed* in the island.

3d. Persons employed in boats (of *any size* or *description*) and vessels that *trade* within any of the rivers of Newfoundland.

4th. Persons employed in *open* boats in fishing, or in any other pursuit, upon the coast of Newfoundland; provided that the open boat is employed *without any dependence upon, or connection with*, a larger vessel.

In the following cases, all the questions which have hitherto arisen in this island, upon the construction of the several Acts of Parliament imposing a duty upon seamen and others for the support of Greenwich Hospital, are carefully investigated and elaborately determined by the Supreme Court.

PETER WESTON CARTER, Esq. *against* NATHANIEL WOODLEY.

CASE submitted to the *Court* by the parties:—The defendant occupies a fishing-plantation in St. John's, and keeps boats and skiffs, and hires fishermen and shoremen to carry on the fishery. Among others, he hires three fishermen on wages, who, in an open skiff, the property of defendant, proceed daily, during the season, to the fishing-ground near St. John's, and in the evening deliver their catch of fish, fresh, on shore at defendant's room, to the shoremen, in order to its being cured. When cured, defendant sells it to a merchant, who sends it chiefly to a foreign market; but also sells some small parcels of it to resident inhabitants of St. John's, for home-consumption by their families and servants.

The plaintiff contends that the said fishermen are subject to the 6*d* duty, and that the defendant is obliged to stop or detain it out of the men's wages, and pay it over to plaintiff on account of Greenwich Hospital, under the requisitions of the Acts of 2d Geo. II. c. 7, and 10th Anne, c. 17.

The defendant resists the demand, on the ground that fishermen and persons employed in *open* boats, as aforesaid, are within the

1826.

CARTER v. WOODLEY.

exemptions contained in the 1st section of the statute of 2d Geo. II. c. 7.

The decision of this case is humbly submitted to the *Court*.

JAMES SIMMS, for plaintiff.
WILLIAM DAWE, for defendant.

THE SAME *against* THE SAME.

THE defendant is a planter, prosecuting the fishery, and is the owner of an *open* boat, which he employs in customary course in the shore fishery; daily going out himself, during the fishing-season, as boat's-master, carrying with him, for assistance in his pursuit, his son, a boy of the age of fourteen years, and also an apprentice, a youth of sixteen years of age. The son receives no wages, but is maintained and clothed by defendant, his father. The apprentice is not paid wages, but is also fed and clothed by defendant, who, by the terms of his contract, is bound to pay the apprentice £10 at the end of his servitude, when he has completed his seven years, and becomes twenty-one years of age.

At the close of the season of the fishery, the fish caught and cured is delivered by defendant to his merchant-supplier, in payment of the necessary provisions and supplies taken up by defendant during the preceding winter and the fishing-season.

The plaintiff contends, that defendant is subject to the payment of the 6*d*. duty for *himself*, his *son*, and his *apprentice, during their employment in the fishery*. The defendant resists such demand, on the ground that the son and apprentice receive no *wages*,

1826.

CARTER v. WOODLEY.

profits, or *shares*, and that, in fact, they are *all exempted* from the said 6*d* duties, under the provisions of exemption contained in the 1st section of 2d Geo. II. c. 7, having been employed fishing in an *open* boat on the coasts of the colony. That, moreover, the *apprentice* is also exempted from the duty by the statute of 2d Anne, c. 6, s. 7.

The question of liability, under these facts, is respectfully submitted to the decision of the *Court*.

JAMES SIMMS, for plaintiff.
WILLIAM DAWE, for defendant.

Chief Judge Tucker. These are two of several cases which have considerably occupied the public attention; and, as they differ only from each other in some *particular circumstances* of comparatively small moment, the *Court*, in pronouncing judgment upon these, will endeavour to explain the *principles* which appear to be common to them all; satisfied that if these principles are once correctly expounded, and clearly understood, the *application* of them to every case that can occur will be perfectly simple and easy.

The plaintiff, in his character of Receiver of Greenwich Hospital, has brought the present action, as well as some others, which will be constantly referred to in the course of these observations, to compel the payment of a duty of sixpence per *mensem*, by a number of persons variously employed in the different departments of the fishery of this Island; and, viewed together, they give rise to the two following important questions:

1st. Who are liable, under the 10th Anne, c. 17, and 2d Geo. II., c. 7, to *pay* sixpence a month to Greenwich Hospital?

2d. Who are bound, by the same Acts,

1826.

CARTER v. WOODLEY.

to *deduct* the said duty from the wages, shares, or profits of the persons subject to the payment of it?

The solution of these problems must depend upon the just construction of the statutes from which they proceed; and, as the interpretation of a statute is always materially advanced by an acquaintance with the *causes* which occasioned it, we conceive it may be useful to trace, with a rapid touch, the principal circumstances to which the Acts of Parliament now under consideration owe their existence.

Until the reign of Charles II. the British colonies which began to be planted in America soon after the discovery of that continent, attracted very little notice from our Government; and, though some laws were passed, almost immediately upon the restoration of that monarch to his throne, which strongly indicate that navigation and a colonial commerce had then become leading national objects in the estimation of the legislature, it was only towards the *close of the seventeenth century* that the spirit of commercial enterprize, which has since exalted Great Britain beyond all the nations of the world, displayed a considerable portion of its native energy and vigour. At that memorable era of our history, the three great branches of our constitution—the legislative, the executive, and the judicial—all exerted themselves with equal zeal in favour of commerce; which, thus fostered and encouraged, soon spread her wings over every corner of the globe, and returning, enriched with the *knowledge*, as well as with the *treasures*, of all the people of the earth, quickly produced an astonishing change in our feelings, our habits, and our laws. Her influence over the last of these was materially assist-

1820.

CARTER v. WOODLEY.

ed by the exertions of Sir *John Holt*, who at that period presided in the Court of King's Bench, and who successfully employed the great powers of his mind to accommodate a system of laws, erected wholly upon the foundation of a *feudal tenure of landed property*, to the condition of a rising *commercial state*. These efforts on his side, seconded by those of succeeding judges, and, where necessary, sanctioned by the legislature, have wrought such a revolution in the practice of Westminster Hall, that, as has been truly observed by an acute and excellent writer, if Lord *Coke* could be suddenly replaced on the bench there, he would not, with all his depth of legal learning, be able to comprehend a *tenth part of what he would hear*. Nor has the change which commercial prosperity has produced in our feelings and habits of life been less remarkable than that which it has effected in our laws. But the statesmen who, under the auspices of William III., laid the foundation of this commercial prosperity, were too wise and enlightened not to perceive, that a great COMMERCIAL navy would require the protection of a great NATIONAL navy; and that *wealth* without *adequate means of defending it*, must ever prove an *evil*, and not a *blessing*, to those who possess it. They accordingly laboured to make our *national strength* keep pace with our *commercial wealth*, by giving large encouragement to seamen to enter into the Royal Navy; and among the earliest measures adopted for that purpose was the passing of the 7th and 8th William III., c. 21. By that Act it was directed, that a register should be kept of seamen for the Royal Navy; and, besides many other motives which were held out as inducements to seamen to enter their names in the books of

1826.

CARTER, v. WOODLEY.

registration, a *hospital* was assigned for the reception of such *registered* seamen as should be disabled by wounds, sickness, or age, from going to sea. To support this hospital it was at the same time enacted, "that every seaman whatsoever that shall serve His Majesty, or any other person or persons whatsoever, in any of his Majesty's ships, or in any ship or vessel whatsoever, belonging, or to belong, to any of the subjects of England, or any other of His Majesty's dominions, shall allow, and there shall be paid, out of the wages of every such seaman, to grow due for such his service, sixpence per *mensem*, for the better support of the said hospital." And, in order to enforce the payment of this duty, a power was the next year given (by 8th and 9th William III. c. 23, s. 6) to certain commissioners to examine masters of ships on oath as to the number and wages of persons serving in their vessels. But the plan of a registry of seamen having been found difficult of execution, and open to other objections, those clauses of the two last-mentioned Acts which relate to it were *repealed* by the 9th Anne, c. 21, s. 64; and thus the advantages of Greenwich Hospital, which were before confined to *registered* seamen, were extended to *all seamen in the Royal Navy*. The argument, therefore, that the defendant has attempted to maintain, "that the title to relief in the Hospital was originally commensurate with the liability to the payment of the duty for its support," is clearly not tenable. Indeed the contrary to this is expressly asserted to be the fact in the preamble to the 20th Geo. II. c. 38; and a perusal of all the statutes which had before then been passed in relation to this subject, must convince every unprejudiced person, that they are all

1826.

CARTER v. WOODLEY.

grounded upon the principle, obviously just, of making the sailor in the MERCHANT vessel contribute, as the price of the security he enjoys, something to the comfort of the GALLANT TAR, who often purchases that security for him at the expense of his blood. In pursuance of this principle, and in extension of it, the 10th Anne, c. 17, renders "*other persons*" employed in ships or vessels liable to the payment of the same duty which the statutes of William had imposed upon *seamen*; and also provides a more effectual mode of levying it than had been given under those acts, by requiring the master, owner, or commander of such ship or vessel to *deduct* the amount of the duty from the wages, shares, or profits, of every seaman or other person employed in her. And, as this Act, although expressed in very broad and comprehensive terms, was considered not to be in force in the *colonies*, the 2d Geo. II. c. 7, extended it, with some alterations and additions, to them. Under these Acts, then, the plaintiff, in the first place, contends that fishermen employed in catching fish in *open boats*, upon the coast of Newfoundland, for exportation, are liable to the payment of the duty to Greenwich Hospital; whilst the defendant, on the other hand, insists that they are not so liable, 1st, because the duty is only to be levied, by the *positive provisions of the Act*, upon persons employed in *ships* or *vessels*; and *open boats* are not, as he asserts, included under either of the expressions "*ship*" or "*vessel*;" and 2dly, because *open* boats, if they ever could be comprehended under either of the words "*ship*" and "*vessel*," are expressly mentioned among the *privileged classes* which are *exempted* from the operation of the Act. To the former of these propositions it might,

1826.

CARTER v. WOODLEY.

perhaps, be a sufficient answer, that the word *ship* is a *generick* term, comprising within itself every possible species of water-conveyance, from the "ALTA NAVIUM PROPUGNACULA"—the lofty three-deckers of the British navy—to the "BIREMIS SCAPHA—the two-oared skiff, with "weak, untimbered sides;"—and that, consequently, *every description of boat* ought to be considered to be included in it, when it is made use of in a statute which is intended to provide a fund for the support of a noble and highly beneficial public institution. The legislature have, however, taken care to furnish a *still more convincing argument* of their *intention* to include *boats* under the general denomination of *ship*, both in the 10th Anne, and the 2d Geo. II.; for by each of those Acts, "boats," and "open boats," are, in the particular cases there stated, exempted from the payment of the duty; and, since they are only *specially exempted* in some cases, they must, undoubtedly, be subject to it in all other cases—"*expressio unius est exclusio alterius.*" Assuming it, therefore, to be an incontrovertible position, that *open boats* are liable to the payment of the duty, unless they can be distinctly brought within some of the particular exceptions to the rule, the great question in the cases now before the *Court* will be, whether or not the defendant's boats belong to any of the excepted classes? for, as Lord *Kenyon* has said, (*a*) "the general mode of construing "*deeds*, to which there are exceptions, is to "let the exception control the instrument "as far as the *words* of it extend, and no "farther; and then, upon the case being "taken out of the *letter of the exception*, the

(*a*) In Bowring *v.* Elmslie, at N. P. after Trin. Term, 1790: cited 7. T. R. 210.

1826.

CARTER v. WOODLEY.

"deed operates in full force;" and *Acts of Parliament*, to which there are exceptions, must, we apprehend, be construed by the same rule. The question, then, we repeat, for the *Court* to determine, is reduced to this single point: Do the boats of the defendant come strictly within the *letter* of any of the exceptions contained in the 2d Geo. II. c. 7?—And we are clearly and unanimously of opinion that they do.

After describing the persons who are to pay the duty, the first section of this Act excepts "such apprentices under the age of "18 years, as are exempted by the 2d Anne, "c. 6; and such person or persons as shall "be employed in any boat upon any of the "coasts of the said islands, colonies, or do-"minions, respectively, in taking fish, which "are brought *fresh* on shore, to be *consumed* "in the said islands, colonies, or domi-"nions, respectively; and every person or "persons employed in boats or vessels, that "*trade* only from place to place, within any "*river* of the said islands, colonies, or do-"minions, respectively, or in any *open* boats "upon the coast of the same." Now, the Receivers of the Greenwich duty in England have suggested, (*b*) that the exception of open boats applies merely to open boats employed upon the coasts, or shores, of "RIVERS;" and the Attorney General has argued, with some ingenuity, that the exception of open boats is confined to open boats that TRADE on the coasts of this island; so that, according to his idea, open boats that *fish only*, do not fall within it. But the suggestion of the Receivers is at once destroyed by a reference to the words of the Act; for, since *all* boats that trade within any river

(*b*) See their letter to Sir *Charles Hamilton*, dated 30th June, 1819.

1826.

CARTER v. WOODLEY.

are exempted, this exemption must certainly embrace *open* boats; and, consequently, that part of the clause which relates to them would, under the Receiver's construction of it, be altogether idle, inoperative, and impertinent.—Nor do we consider the Attorney-General's construction, though more specious, in any degree more sound; because we think it evident that, if the legislature had intended to connect a *trading* with the employment of open boats, they would never have made use of the disjunctive "*or*," which completely separates and severs the boats that *trade*, from the *open* boats on the coast.—To us it appears, after a most careful examination of the statute, that the exemptions from the payment of the duty extend *expressly* to these classes:

1st.—Apprentices who have been bound agreeably to the directions of the 2d Anne, c. 6; and not any other description of apprentice.

2d.—Persons employed in boats, whether *decked* or *open*, in taking fish, which are brough *fresh* on shore *to be consumed* in the island.

3d.—Persons employed in boats (of *any size* or *description*) and vessels that *trade* within any of the rivers of Newfoundland.

4th.—Persons employed in *open* boats, in fishing, or in any other pursuit, upon the coast of Newfoundland; provided that the open boat is employed, *without any dependence upon*, or *connection with, a larger vessel.*

And as the cases which have been submitted to us bring the open boats of the defendant most satisfactorily within the last of these classes, we feel that neither of the actions against him can be supported. In these cases, therefore, there must be judgment for the defendant.

1826.

August 22d.

PETER WESTON CARTER, Esq. *against* WHITEWAY & MUDGE.

The Greenwich hospital duty is not payable by persons employed in the seal-fishery where there has been *an absolute and total failure of success*: but the duty does attach *if any seals have been caught*, even though the party's share should amount to *less* than the sum he paid for his birth.—And the period for which it is payable includes the whole time from the first preparation of the vessel for the voyage until the final termination of it.—The persons who go from hence to the Labrador, and fish there in *open* boats, connected, by their engagements, with the schooners which carried them round, are liable to the payment of the Greenwich Duty from their quitting St. John's to their return to it after the completion of the voyage.

CASE submitted by the parties :—

The defendants are resident merchants of St. John's, carrying on the trade and fisheries of the island, and are owners of an open boat which they hire for the fishing-season to three fishermen. Defendants receive for hire of the boat £5, to be paid in fish. Defendants also furnish the necessary supplies of provisions, as customarily allowed to servants, for prosecution of the voyage, and receive one half of the catch of fish in consideration of such supplies; and the three men take the other half of the fish in lieu of wages. The men catch their fish on the neighbouring coast, and deliver it daily to the defendants, to be cured on their room. At the close of the season, defendants deliver to, or credit the fisherman with, one half of the catch of fish, deducting boat-hire and curing.

In the course of the fishing-season two of the men, who have families living in St. John's, take up, on their own account, provisions and articles of clothing for their families' support, to an amount equal to the value of their shares of fish. The third fisherman, being a single man, does not take up more goods than a few articles of necessary clothing, some rum and tobacco; and has a balance due to him of £10, which defendants pay over to him.

Plaintiff claims the six-penny duties upon the *three men* during *the whole period of the above fishing-contract*, which embraces the period from the first May till the last October; and contends, that defendants are *employers* of the three men, within the con-

1826.

CARTER v. WHITEWAY & MUDGE.

struction of the Act of 10th Anne, c. 17, and are answerable to plaintiff to stop and detain from the men, out of their several shares of fish, the sixpence per *mensem* on each, and pay the same over to plaintiff for the use of Greenwich Hospital.

Defendants contend,

First, That all the men are exempted from the duties, as fishing in an *open* boat on the coast, &c.

Secondly, That with the two men who consumed their catch of fish, during the process of catching, in the necessary support of their families, there were no profits derived to them.

Thirdly, That if the men are in fact subject to the payment of the six-penny duties, defendants are not strictly their masters or employers, so as to be responsible over to plaintiff to stop and detain the six-penny duties, and pay the same over to him.

Under these facts, &c. the case is respectfully submitted to the judgment of the Court.

JAMES SIMMS, for plaintiff.
W. DAWE, for defendant.

Chief Judge. In this case, as in the two preceding ones, the persons from whom the defendants have been called upon to deduct the amount of the Greenwich duty, were all employed in catching fish in *open* boats, upon the coast of Newfoundland; and, the facts being precisely the same, there must be a similar judgment for the defendants.

PETER WESTON CARTER, ESQ. *against* JOHN BOYD.

CARTER v. BOYD,

CASE submitted by the parties :—

The defendant is owner of several schoon-

1826.

CARTER v. BOYD.

ers employed exclusively in various branches of the trade and fisheries of this island; for the crews of which vessels, plaintiff maintains defendant is subject to pay, under the provisions of the several statutes, (*a*) sixpence per *mensem*, per man, while the crews or persons on board the said vessels were employed *therein*, or in *anywise directly in furtherance* of the *adventures or voyages of the said vessels*.

The vessels in question were employed under one or other of the following classes:

First.—*Sealers*.—These vessels were fitted and provisioned for the adventure at owner's (defendant's) cost. The crews were, according to custom, hired on the shares, and were employed in and about the said vessels in out-fitting, on the voyage in search of seals, and in discharging the cargo, &c. for a period of about eight weeks. *No money as wages* was paid to any of the crews on board, except to the masters, who were each paid £5 per month, and had also *sixpence* per seal on all caught and delivered to defendant. One half of all the seals taken were, as customary, divisible among the respective crews (master excepted.) The men also paid to defendant, as owner of the vessel, 30*s*. each for their births, according to custom. Four of defendant's schooners made successful voyages, and the men received on their respective shares of the produce of the voyage, sums of £8 to £18 each. *Two* of defendant's schooners fitted out on the foregoing terms, *caught no seals*; the voyage having altogether failed.

One of defendant's schooners, fitted out on the same terms, caught so few seals, that the men shared only 15s. each, having paid

(*a*) 10 Anne c. 17.—2 Geo. II c. 7.

1826.

CARTER v. BOYD.

or been debited to the owner of the vessel, 30*s.* each for their births.

On these facts, it is respectfully submitted to the Court to determine,

1st, Whether the *masters* and *crews* employed in the four first vessels, which were successful in catching seals, and shared £8 to £18 per man each, are liable to pay the duty of *sixpence* per *mensem?* And if they are liable, for what period of time?—whether for the *whole* time *they were working in the preparation and outfit of the vessel for the voyage*, and *for the period of their being at sea*, and *until the vessel was discharged of her cargo and voyage;* or for *that time alone which was occupied in the actual pursuit of seals*; namely, *from the period of the vessel's departure from her port of out-fit, until her return to it at the end of the voyage?*—or how otherwise?

2d, Whether the sealers on board the schooners which *caught* no seals, are subject to the payment of the duty; they having received nothing out of the voyage, save their diet, and having paid or been indebted 30*s.* per man for their births?

3d, Whether the masters of the same unsuccessful sealing vessels are subject to pay the sixpenny duty, the said vessels having failed to take any seals, but the said masters having received £5 per month wages.

4th, Whether the master and crew of the schooner which yielded only 15*s.* to each man for his share of the voyage, are all liable to pay the sixpence per month duty; the men having *paid* 30*s.* each for their births, and the master having *received* his wages of £5 per month, and a small sum for his allowance of sixpence per seal on the small number caught?

Secondly.—*Coasters.*—The defendant is

1826.

CARTER v. BOYD.

also the owner of a schooner which was fitted out with a *master and three men*, all hired at wages by the month, and employed on owner's account, on a trading voyage or voyages coastways from port to port in this island, bartering divers merchandise in exchange for fish and oil, with which they returned to defendant's, in this port, having been so employed about the period of four months.

It is respectfully submitted to the decision of the Court, whether the master and men so employed are subject to the payment of the 6d duty which the plaintiff claims.

Thirdly.—*Collecting Schooners.*—The defendant is also the owner of a schooner fitted out by him, and manned with a master and three men, hired on wages by the month, and employed by him in order to go from St. John's to several out-ports and places where certain planters reside, and carry to them necessary supplies for the fishery; and also to collect and receive from them fish and oil, in return for supplies already advanced to them on the faith of the voyage; the said planters and defendant standing for that season in the relation of merchant-supplier and fish-catchers,—the said schooner having been so employed about three months.

It is respectfully submitted to the decision of the Court, whether the master and men so employed are subject to the payment of the 6*d* duty demanded by plaintiff.

Fourthly.—*Labrador Schooners.*—The defendant is also the owner of a schooner fitted out about the 1st June for the Labrador fishery, which is carried on upon that coast by open boats or skiffs. On board this schooner are embarked six men, in the ac-

1826.

CARTER v. BOYD.

tual employment of defendant, three of whom are hired on wages for the season, say from 20th May till last of October; and three on the shares for the same period of time. One of such servants takes charge of the schooner, as master, to navigate her to the Labrador, and carry the supplies and fishing crews to a certain place where defendant has a fishing-room, where, on the vessel's arrival, she is moored in safety, and laid up, unused, *for a time*, except as an occasional store for salt, &c. The master and men are then employed in skiffs, or open boats, catching fish, which they carry on shore to defendant's room, to be cured by a shore crew of defendant's. As soon as enough fish is caught and cured to load the schooner, a sufficient crew from the men so hired and on shares, is put on board to navigate the vessel to St. John's; from whence, after delivering her fish there, she again returns to the Labrador, and remains till the end of the season, and then brings the residue of the fish and oil, the produce of the voyage, to St. John's, together with the fishing and shore crews, returning about the middle of October. But besides the aforesaid men, the hired servants of defendant, the said vessel carried also to the Labrador *ten other fishermen* (besides defendant's shore crew, who were employed solely in curing the fish ashore); and which fishermen were *supplied by defendant*, who also contracted to cure on his room the fish they caught, and freight it to St. John's. On the vessel's arrival at the Labrador, these men, forming three separate crews, employed themselves in their own skiffs, or open boats, catching fish on their own account; and, as they caught it, daily delivered it on shore upon defendant's room to be cured. When cured, defend-

1826.

CARTER v. BOYD.

ant's said schooner carried the fish on freight to St. John's; and out of it took the value of his supplies furnished to the catchers, together with the price of curing and the amount of freight; and delivered the surplus to the said fish-catchers to sell where they pleased, or purchased the same from them at current price. Defendant has *promised* to pay the 6*d.* duty of these ten men, *provided they are found liable to pay the said duty*. But plaintiff does not contend that the *defendant himself* was originally liable to pay the said duty, inasmuch as the only relation subsisting between defendant and said fishermen was that of merchant-supplier and fish-catcher, and not that of master or employer and servant.

It is respectfully submitted to the *Court* to decide whether all, any, and which, of these fishermen, so *hired by defendant*, and so *supplied by him*, are subject to pay the said 6*d.* duty,

JAMES SIMMS, for plaintiff.
WILLIAM DAWE, for defendant.

Chief Judge. The defendant is charged as the owner of four different descriptions of vessels, viz. "*Sealers*," "*Coasters*," "*Collecting Schooners*," and "*Labrador Schooners*;" but as the questions which were raised respecting the *second* and *third* of these classes have been voluntarily relinquished by him, the attention of the *Court* will be confined to the *first* and *last* of them.

From the case submitted by the parties, we perceive that some of the *sealing vessels* belonging to the defendant made voyages which entitled the crew to shares *considerably above* the price paid by them for their "births;" that the shares in some instances were *less* than the amount of the birth-money,

1826.

CARTER v. BOYD.

and that in others there was actually *nothing* to be shared. Upon these facts we are called on to decide,

1st, By *which of these crews* is the Greenwich duty payable?

2d, For *what length of time* does it attach?

The *second* point seems to us to be free from every particle of doubt; for the shares which accrued from catching the seals were unquestionably derived from the *means by which the seals were caught*; and we are, therefore, decidedly of opinion, that the crews are liable to pay the duty, where they are subject to it at all, from the period of their first entering *upon the preparation of the vessel for the voyage, until the final termination of it.*

On the *first* point, we think it too clear to admit of an argument, that the persons whose shares *exceed* the price of their "births," are liable to the duty; and we hold it to be *equally certain*, that those who have neither wages, shares, nor profits, are *not* so. The middle case between these two extremes is the only one which has presented any difficulty to our minds; and we believe that this has been occasioned principally by the influence which the *feelings* frequently exercise over the *understanding*; for if we could only divest ourselves of the seeming hardship of exacting a duty from men who have already paid more than they are to receive, we apprehend there could be no hesitation in determining this question. By the terms upon which the seal-fishery is prosecuted, the persons employed in catching the seals also contribute, in the form of "birth-money," something to the out-fit of the voyage; and this sum they are bound to pay, even though there should be a *total failure* of success. The "birth-

1820.

CARTER v. BOYD.

money" and the "share" are, therefore, *quite independent* of each other; and, consequently, a duty which an Act of Parliament has imposed upon the one, cannot, in any way whatever, be affected by the other.—Suppose the Act had also imposed a duty upon the *owner's* share—would he not have been obliged to pay it upon half of the seals caught, which by the terms of the contract appertain to him, notwithstanding his disbursements upon the vessel may have *exceeded* the value of his proportion of the seals; and must not the same rule apply to the case of the crew? Again: two men pay each 30*s.* for a birth; and they are both employed for a month. From a total want of success, the one is not entitled to anything—but the other shares 15*s.* Can it be said that, as respects the payment of the duty, these two men stand on the *same* footing? Most assuredly they do not; since the one has a share out of which the duty may be satisfied, whilst the other has none. It is consistent, therefore, with equity as well as law, that a distinction should be drawn between them, and that in the one case the duty should be paid, and in the other not. If *equity*, however, were even directly opposed to *law*, our decision must still have been governed by the latter; for, in the emphatic language of the great Lord *Bacon*, (*b*) "*Above all things* it is of the "greatest moment to the certainty of the "law that Courts should keep from *swelling*" and *overflowing*; lest, under pretence "of mitigating the *rigour* of the law, they "should *cut* its *sinews* and *weaken its strength* "by wresting all things to their own dispo-"sal; and no Court should have a right of "decreeing against a statute under any

(*b*) See his Aphorisms, 43 and 44.

1826.

CARTER v. BOYD.

" pretext of equity whatever: otherwise the " *judge* would become the *legislator*, and " have all things dependent upon his will." Professing, therefore, to be guided strictly by our view of the *law*, but, at the same time, rejoicing in the belief that our decision, though it may at first sight appear somewhat harsh, is yet capable of being reconciled to principles of *equity*, we are of opinion that the persons whose shares are *less* than the amount of their " birth-money" are liable to the payment of the Greenwich duty. The masters of the sealing vessels, who receive a stated rate of wages, without reference to the success of the voyage, must, *procul dubio*, in every instance be subject to it; and the defendant is as clearly bound to *deduct* it, both from the wages of the master and the shares of the crew.

In the schooner which was employed at the " *Labrador*," two descriptions of persons proceeded to that fishery; the one being in the actual service of the defendant, and the other intending to fish upon their own account, under a contract with him that he should cure their fish and bring it to St. John's. The liability of the *latter* to pay, and the obligation of the defendant to deduct from their earnings, the amount of the duty, form, however, the only questions which have been raised upon this division of the case, as neither of those points are disputed in regard to the *first* class. Before we proceed further, we deem it necessary to notice a custom which has often been proved before us to prevail in the Labrador fishery, viz. that *all* the persons who go round in the vessel are bound to assist in navigating her; and that an interchange of duties takes place between the *crew of the vessel*, the *fish-catchers*, and the *fish-curers*, whenever the ge-

1826.

CARTER v. BOYD.

neral interest of the whole can be promoted by it. Connecting, then, this usage with the facts detailed in the statement of this case, we think that it runs "*quatuor pedibus*" with the case which was referred to Sir *Philip Yorke* respecting the whale-fishery formerly carried on upon the coast of Carolina; and, convinced as we are, not merely by the high authority of his name, but also by an attentive consideration of the subject, that his opinion is correct, we hold, in conformity to it, that *all* the persons who went from hence in the defendant's schooner to the Labrador are liable to the payment of the Greenwich duty, from the time of their quitting St. John's to their return to it after the completion of the voyage. And as we deem them liable solely on account of their *connection with the schooner*, and not in consequence of their *fishing in open boats*, so we think that the defendant, as *owner of that schooner*, is bound by the Acts of Parliament to *deduct* the amount of the duty from the proceeds of the voyage, which, by the very terms of the contract subsisting between him and them, are to pass through his hands.

JOHN DUNSCOMB & Co. *against* THOMAS BECK.

1827.

December 14th.

A covenant to pay rent in lawful money of Great Britain, or sterling money, cannot now be discharged by a payment in dollars at five shillings each; although at the time of entering into the covenant dollars were generally received at that rate. For where a covenant is express, there must be a strict performance of it. [See *Hany v. Gaden*, ante p. 336, and *Bladeston v. Thomas*, ante p. 379.]

THIS was an action of covenant (tried before a special jury), in which the plaintiffs sought to recover from the defendant the sum of £116 19*s.* sterling; being the balance of rents due by defendant to plaintiffs for three tenements held under three several demises; the defendant having covenanted by the said leases, viz. in two of them to pay the rent reserved in lawful money of Great Britain; and in the third in sterling money.

The jury returned a special verdict, finding the sum of £116 19*s.* due to the plaintiffs; and raising, for the consideration of the Court, the question whether the defendant was liable, under his covenant, for the payment of that sum in sterling money, or in dollars at five shillings each?

December 19th.

THE case was argued this day by the *Attorney General*, for the plaintiffs, and by Mr. *Lilly*, for the defendant.

December 22d.

Acting *Chief Judge Brenton*. The question arising in this case, and submitted by the special verdict for the consideration of the *Court*, is one of no small importance, inasmuch as the opinion now about to be given upon it will, in all probability, set the matter at rest, and be considered as the law in all future cases where the same point may occur. The plaintiffs found their action upon the covenants entered into by the defendant, under the leases produced at the trial, to pay the rent reserved in lawful money of Great Britain, and in sterling money—terms which are synonymous, and have the

1827.

DUNSCOMB & Co. v. BECK.

like meaning. In order to discharge himself from his liability to pay the rent in the express terms of the contract, the defendant contends, that at the period when these leases were entered into, as well as before, and for some time afterwards, dollars were considered as five shillings sterling, and so received by the plaintiffs in payment of these rents; and the jury, by the terms of their verdict, have so found this fact. But this answer does not appear to me to be one that can avail the defendant in the present action. I must construe the defendant's covenants, under which arises his liability to pay the plaintiffs' demand, according to the known and established rules of law; and those rules will not allow me to take into my consideration matters foreign to, and not making part of, the instrument in which the covenants are contained, in order to seek for the meaning of such covenants in direct opposition to their express terms. In this case nothing can be more express than the covenants entered into by the defendant; and where they are express, they are to be taken more strictly than others, and there must be an absolute performance, which shall not be discharged by any collateral matter.(a) In the construction of covenants it has been held, that where the law creates a duty, or charge, and the party is disabled from performing it, without any default on his part, and has not any remedy over, the law will excuse him; but where the party, by his own contract, imposes on himself a duty, or charge, he is bound to make it good, notwithstanding inevitable accident, because he might have provided against it by his own contract.

This rule which, in *Selwyn*, is extracted

(a) Bull. Nisi Prius, 161.

1827.

DUNSCOMB & Co. v. BECK.

from the case of *Paradise* v. *Jane Alleyn*, 27, has been recognized in many subsequent cases; and in one of modern date, *Chambre* Judge said, in speaking of that case, "the "Court took a rational distinction, that "where an obligation is imposed by rule of "law, and there is not any express covenant, "the law introduces a reasonable exception, "namely, that an act of irresistible violence "will excuse the party; but if a party enter "into an absolute contract, without any "qualification or exception, and receives "from the party with whom he contracts "the consideration for such engagement, he "must abide by the contract, and do the "act, or pay damages, his liability arising "from his own positive and direct underta-"king."

Applying, then, these established rules in the construction of covenants to the case now before the *Court*, in which the defendant has covenanted to pay his rent in sterling, or lawful money of Great Britain, he cannot, against his own positive and direct undertaking to pay in sterling, be permitted to tender dollars at five shillings, for such payment, notwithstanding at the time of entering into such contract, dollars were considered equal to, and received as, five shillings sterling. As long as the lessor agreed to consider dollars as five shillings sterling, he would, of course, receive them, and the lessee pay them, at that rate; but when, from any cause whatever, but more especially, as in the present case, from one independent of the lessor's control, the dollar's relative value to sterling was differently established, the lessor could immediately claim from the lessee the fulfilment of his contract according to its express terms; because he (the lessee) might have provided

1827.

DUNSCOMB & Co. v. BECK.

against the contingency that afterwards happened, and of which he now complains.

On these grounds, therefore, I feel no hesitation in declaring my thorough conviction that, in law, the plaintiffs are entitled to recover in this action; and I am the more confirmed in this opinion, by knowing that it is in accordance with the sentiments expressed by Chief Judge *Tucker* on this question, when the same has come, in more than one instance, incidentally before him.

Judges *Des Barres* and *Cochrane* concurring in opinion with the Acting *Chief Judge*, judgment was entered up for the plaintiffs, for the amount found by the verdict.

Appendix.

PETER WINSOR *against* EWEN STABB. *October 4th*. 1827.

Under a bill of lading, by which it is stipulated, that freight shall be paid by the *consignee*, the master of a *general* ship delivers the article to the consignee; and, having received from him part payment of freight, afterwards sues the shipper for the balance of the freight still due to him. Held, that he is not entitled to recover it from the shipper. *It seems* that freight ought only to be paid on fish (even where it has been properly taken care of, and faithfully delivered), according to its weight at the *time of delivery*, and not according to its weight *at the time of shipment*.

THIS case was tried in the Southern Circuit Court at FERRYLAND, on the 4th October, 1827, before Chief Judge *Tucker*, who afterwards entered the following judgment upon it.

Per Curiam. It seldom happens that the importance, or difficulty, of a legal question can be estimated by the *amount* of the sum in dispute between the parties to the action in which the question at first arises.

The truth of this observation is forcibly illustrated by the circumstances of the case now under consideration; for, trifling as the subject-matter of it undoubtedly is, the determination of it is connected with two points, upon one of which a difference of opinion has prevailed among the most distinguished Judges of Westminster Hall, whilst the other seems hardly yet to have received a direct judicial decision.

The following is a short outline of the material facts of the case, as they appeared in evidence upon the trial:—A quantity of fish was sent by the defendant to England in a GENERAL ship, of which the plaintiff was owner and master; and, by the bill of lading, it was stipulated, in the usual terms, that the freight should be paid at the port of

1827.

WINSOR v. STABB.

delivery, by the consignee, Mr. *Thomas Stabb*. On the arrival of the vessel in England, the whole of the fish, as the plaintiff alleges, was accordingly delivered to the consignee; but the weight was considerably *less* than at the time of its shipment. This difference, the plaintiff contends, arose from the nature and condition of the fish when it was put on board; and it appears, from the testimony of several well-informed persons, that fish shipped in the state this was, will always lose considerably in weight. Indeed, there seems to be *no ground whatever* for imputing either fraud, or neglect, to the plaintiff; and I shall, therefore, consider this case as establishing a *strict performance of duty on his part*.

After the delivery of the fish to Mr. *Thos. Stabb*, the plaintiff received from *him*, in several sums, twenty pounds; and also accepted a ton of fish, valued at twelve pounds, from the agent of the defendant. The whole freight, estimated *according to the weight at the time of shipment*, amounted to thirty-nine pounds two shillings and sevenpence; and the plaintiff, after giving the defendant credit for thirty-two pounds, seeks, by this action, to recover a balance of seven pounds two shillings and sevenpence.

In order, therefore, to entitle him to do so, it is, in the first place, necessary that the stipulation in the bill of lading for payment of the freight by the *consignee*, and the acceptance of a partial payment from him, should not prevent the plaintiff from having recourse to the defendant, as the shipper of the fish; and, secondly, that the freight should be payable according to the weight of the fish *at the time it was shipped*, and not according to its weight *at the time of its delivery*; for unless the law shall be in his

1827.

WINSOR v. STABB.

favour upon *both* these points, it is clear he cannot maintain his suit.

Recollecting, then, that Lord *Kenyon* had held, in a case which was tried before him at Nisi Prius, that the master of a ship, which was hired by the defendant under a *charter-party*, could not recover from him the amount of freight, after having neglected to exact the payment of it from the consignee, according to the terms of the bill of lading; but that this opinion of his lordship had afterwards been overruled by the other judges of the Court of King's Bench; and not being able to satisfy myself, during the hurry of a trial, how far the rule which had thus been established in regard to a *chartered* ship was applicable to a *general* one, I told the parties that, as the facts were conceded on both sides, I would recommend that a juror should be withdrawn, and judgment entered according to my view of the law of the case, after I should have been able to discharge from my mind the doubts which I then entertained on the subject. In this suggestion, the plaintiff and defendant immediately acquiesced; and I have, accordingly, at various times, directed a large portion of my attention to the consideration of the first of these questions.

If this had been the case of a CHARTERED ship, I should have felt myself bound by the decision of the Court of King's Bench in *Penrose and others* v. *Hicks*, and in some later cases (*b*) which have proceeded on the same principle, to hold, that the stipulation in the bill of lading did not discharge the defendant; although Lord *Kenyon* did, to the last, express his dissent from this doc-

(*b*) *Japley* v. *Martins*, 8 T. R. 451.—*Christy* v. *Row*, 1 Taunton, 300; and *Sheppard* v. *De Bernales*, 13 East, 565.

1827.

WINSOR v. STABB.

trine; but it occurred to me that there was a wide difference between a *chartered* ship and a *general* one, which might well warrant the application of different rules to the two cases; since, in the former, the charterer is bound by express covenants, independently of any liability he may incur under the bill of lading; whilst, in the latter, this instrument contains the only contract under which the goods are shipped. My object, therefore, has been to ascertain how far this distinction has been recognized by the Courts of Westminster Hall; and after a careful research into all the authorities which touch upon this point, and an anxious pursuit after the *principle* which has guided the determination of cases of this sort, I at length feel myself bound to declare that the plaintiff must look to the *consignee*, and not to the *defendant*, for any balance that may be due him for the freight of this fish.

As my opinion on the first point must carry along with it a judgment for the defendant, I shall not dilate on the second; though it is intimately connected with a question, viz. the right of the merchant to abandon his goods when brought to the place of destination, and, by so doing, to discharge himself from the freight; upon which, very learned writers have maintained conflicting opinions, and which has never been settled by any judicial decision in England. With respect to the particular branch of this general proposition which grows out of the facts now under consideration, I find it asserted in a work of the highest character, (c) that "in "our West India Trade the freight of sugar "and molasses is regulated by the weight "of the casks at the *port of delivery*, which, "in fact, is, in every instance, *less* than the

(c) *Abbott*, on Merchant Ships, 290 (fifth edition.)

1827.

WINSOR v. STABB.

" weight at the *time of shipment*; and, there-
" fore, the loss of freight occasioned by the
" leakage, necessarily falls upon the owners
" of the ship, by the nature of the contract."

The usage of the *West India trade* would not, however, decisively regulate that of Newfoundland; and, therefore, if my opinion had been favourable to the plaintiff on the first point, I would have left it open to him, upon a second trial, to prove that a different practice prevailed in this trade; but at the trial I should have told the jury, that unless it was clearly proved to them that the usage here was for the freight to be paid according to the weight of the fish at the time of shipment, I should recommend to them to adopt, by their verdict, a rule which already prevailed in a part of the British Empire, under circumstances precisely similar to those which they were called upon to investigate.

After this expression of my sentiments on both points, it only remains for me to add, that judgment must be entered for the defendant.

1828.

June 21st.

A prohibition to restrain the Vice Admiralty Court from proceeding against a vessel for the recovery of a sum of money advanced for her repairs, &c. in a foreign port, and secured by an hypothecation deed, by which the said vessel was pledged, and the sum so advanced was to be repaid with maritime interest at 15 per cent, refused, on the ground that such an hypothecation was a subject solely of Admiralty jurisdiction.

In the case of the Schooner MARGARET & ISABELLA.

In the Central Circuit Court

THE *Attorney General* applied, by petition of *William Walsh*, for a prohibition to stay the proceedings instituted against that vessel in the Court of Vice Admiralty; and after argument by him in support of the application, and by Mr. *Row* in opposition to it, Acting *Chief Judge Brenton* delivered his opinion as follows:—

In the case of the Schooner *Margaret & Isabella*, in which an application has been made to this *Court* for a prohibition to stay the proceedings instituted against that vessel in the Court of Vice Admiralty, I have given to the subject the best consideration in my power since the matter has been brought before me; and, aware how important it is to all the parties concerned that I should deliver an early opinion upon it, I am now prepared to do so, and to state the result of my deliberations. The schooner *Margaret & Isabella*, owned by *William Walsh*, of St. John's, having met with considerable damage on her voyage from St. John's to Bristol during the course of last year, was obliged to put into Cork to refit, and the expense attending such refitting exceeding any funds the master, *Michael Farrel*, could command, either on his own account or that of his owners, he was under the necessity of hypothecating, or mortgaging, the vessel, as a security to the persons (Messrs. *Ryan & Mara*) who advanced the money necessary to defray those expenses. By the terms of this hypothecation, the vessel was pledged as a security that the owner should pay the amount of the said advance, viz., £650, together with maritime interest,

1828.

Case of the Schooner MARGARET & ISABELLA.

at the rate of 15 per cent., on the 1st day of December last, or immediately after the arrival of the vessel at St. John's. Upon her arrival there, which was not until after the said 1st of December, the money not being paid, proceedings were instituted against the vessel by Messrs. *Ryan & Mara*, upon the hypothecation deed, in the Court of Vice Admiralty; and the question for my consideration now is, whether this instrument, viz., the hypothecation, mortgage, or by whatever other name it may be designated, and on which the proceedings in the Court of Vice Admiralty are founded, is such as gives to that Court jurisdiction over the subject-matter of it? The jurisdiction of the Court of Admiralty, in cases of hypothecation of vessels by the master in foreign ports, (and such any port in Ireland, the owner of the vessel living in England, or in the Colonies, has been decided to be,) for the repairs and refitting of his vessel, has been so fully recognized by the Courts of Westminster Hall, in a variety of cases, and is now so completely established, that no doubt can be entertained of it, and it must, therefore, be unnecessary to cite authorities in support of it.

The main consideration, then, in this case is, whether this hypothecation, from the nature and terms of it, is one of those which the Courts of Law have usually held to be subject to the jurisdiction of the Courts of Admiralty.

In the treatise of that able Judge, Lord *Tenderden* (then Mr. *Abbott*), on the Law of Merchant Ships and Seamen, it is laid down, p. 150, "that with respect to bottomry bonds, and hypothecations, there is no "settled form of contract in use; they may "be by bond, bill of sale, or any other differ-

1828.

Case of the Schooner MARGARET & ISABELLA.

"ent shape; but that, whatever be the "form, the occasion of borrowing, the sum, "the premium, the ship, the voyage, the "risk to be borne by the lender, and the "subjection of the ship itself, as security "for the payment, all usually are, and pro- "perly ought, to be expressed." Assuming, then, that these are the requisites to constitute such an hypothecation as will make it the subject of Admiralty jurisdiction, let us see whether the instrument now under consideration, and by which this vessel has been hypothecated, will answer to these tests.

It begins by stating (after the usual description of the parties to the deed) that *Michael Farrell* was the master of the vessel on the voyage therein described; it then recites the register, which fixes the ownership of the vessel in *William Walsh*; the damage the vessel met with in her voyage is next stated, which obliged them to put into Cork; the repairs and refitting absolutely necessary for the further prosecution of the voyage, are also stated; and the declaration of the master of his inability, on his own or the credit of his owner, to raise the money requisite for paying the expenses of such repairs and refitting; together with the necessity of pledging and mortgaging the vessel in order to raise money for that purpose. The instrument then proceeds to state the sum borrowed from Messrs. *Ryan & Mara*, viz., £650; and that, for the repayment of this sum, with maritime interest, at 15 per cent. on 1st day of December last, or immediately after the arrival of the vessel in Newfoundland, the vessel was subjected, as a security, by being mortgaged and pledged. Here, therefore, is expressed as fully and clearly as language

can express it, all that is required to be expressed in hypothecations or bottomries, so as to constitute this instrument (by whatever name it may be called) in fact and in *substance*, if not in *form*, a bottomry bond, so as to give the lender of the money under it, the same advantages and the same remedies, and in the same Court, to which he would have been entitled if the form of a bottomry bond had been strictly and literally complied with.

The distinction which the Attorney General, in arguing for the prohibition, has endeavoured to establish between bottomry bonds and hypothecations, appears to me far more ingenious than solid, and cannot avail his client in the present case. By a bottomry bond (which is under seal, be it observed) the master, by the policy of our maritime law, is allowed, in a foreign port, to pledge or hypothecate his vessel for the repayment of money borrowed for her necessary repairs and refitting, together with maritime interest; but then the money so borrowed, where it is to be repaid with maritime interest, is only payable on the termination of the voyage; and in such case, the lender takes upon himself the risk of the ship's return; for if she is lost, he loses the money he has so lent, and has no recourse whatever, either against master or owner.

So it is with hypothecations, where the form is not that of bottomry, but where it is that of deed, bill of sale, or any other, even though it may be under seal. If the vessel is by such instrument pledged for repayment of the money borrowed, with maritime interest, and the money so borrowed appears upon the face of the instrument to have been raised in a foreign port

1828.

Case of the Schooner MARGARET & ISABELLA.

for repairing or victualling the ship, or for any other purpose necessary to enable the master to complete the enterprize in which he is engaged, the hypothecation is one which the master can legally make; the ship being the thing pledged, as security for the repayment of the money borrowed with maritime interest at the termination of the voyage; and in such case, as in the case of bottomries, the owners are never personally responsible; the remedy of the lender being against the ship and the master (*a*).

In cases of this description, therefore, whether of bottomry or hypothecation, it has never yet been made a question that they were not solely subject to the jurisdiction of the Court of Admiralty.

Then, in what respect does the instrument of hypothecation under which *Ryan & Mara* found their claim to proceed against this vessel in the Court of Vice Admiralty, differ from the one I have last described, or even from bottomry bonds.

In all its essentials it completely corresponds with them; the money lent, is lent in both cases on the credit of the ship; it is also so lent for the repairs and refitting of her, and for other purposes necessary (for anything that appears to the contrary) to enable the master to prosecute his voyage to its termination; and should the vessel not terminate her voyage and be lost, in both cases the lender would lose his money, and be without his remedy. If, then, the resemblance is so complete between the hypothecation now under consideration, and the other instruments of the like nature to which I have referred, it must be governed by the same rule of law which is applicable to them; and if, as I have already shown, they have

(*a*) *Abbott*, 149.

1828.

Case of the Schooner MARGARET & ISABELLA.

been uniformly held as ~~a loan~~ subject to Admiralty jurisdiction, this hypothecation must be equally so.

But it has been argued by the Attorney General, on the part of the persons applying for this prohibition, that there is a personal covenant on the part of the master in this hypothecation; and that according to what was said in the case of *Meneton* v. *Gibbon*, (3 T. R.) such covenants are not cognizable in the Courts of Admiralty. What Judge *Buller* has said in that case on this point, is merely this, "that in the struggles which "have taken place between the Courts of "Common Law and Courts of Admiralty as "to the extent of their jurisdiction; the "former have said, that if the *parties* have "bound themselves to answer *personally*, "the latter cannot take cognizance of the "question." But the parties here alluded to must, evidently, mean the persons for whose benefit the act is done, or money advanced, for which such persons bind themselves to answer; but could never be meant by the learned Judge to refer to the master of a vessel pledging that vessel for the benefit of his owner, and making himself responsible, as he does in every bottomry bond, to the lender of the money advanced under it; and what immediately follows is conclusive on the subject; for the Judge says, "In such a case as the present, "(which was the case of a bottomry bond, "and where, we must presume, according "to the usual form of it, the master had "personally bound himself), (*b*) the party "could have no remedy in a Court of Com- "mon Law, for the contract is merely *in rem*, "and there is no personal covenant for the "payment of the money."—personal cove-

(*b*) *Abbott's* Appendix, No. 1.

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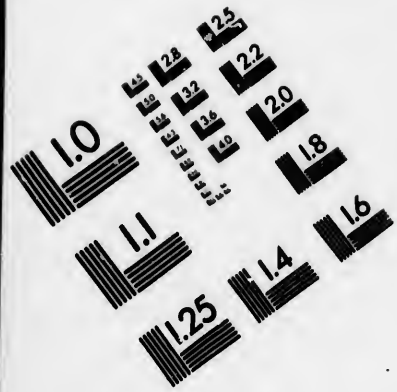

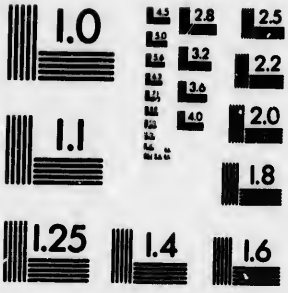

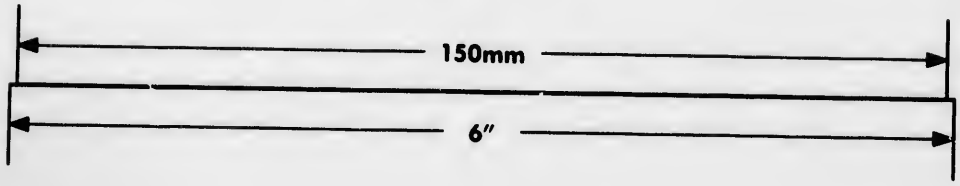

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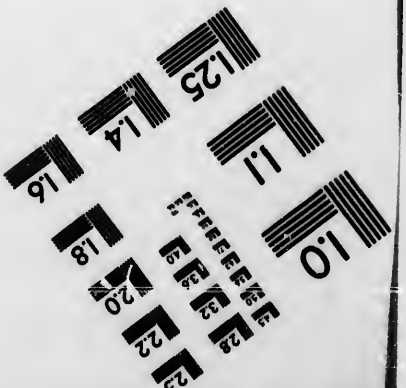

1828.

Case of the Schooner MARGARET & ISABELLA.

nant by whom?—by the owner, undoubtedly; for the personal covenant must have been by the master on the face of the bond; and it is laid down in every treatise on the subject, that the master, as well as the ship, is personally liable to the lender, which he only could be on his personal contract.

But it has been further argued in favour of the prohibition, that this instrument is materially distinguished from a bottomry bond, inasmuch as that it does not state that the vessel on which the money was lent was to be at the risk of the lender. It is true this instrument does not in express terms so state the risk of the vessel to be the lender's.

But there is enough upon the face of the instrument to warrant me in concluding, that not only such was the intention of the parties at the time of entering into it, but that such would be the effect of it, had it been tested by the loss of the vessel. After an attentive perusal of this hypothecation, I am satisfied that the instrument has been drawn up with great care by a person well acquainted with deeds of this nature, and equally well aware of all the consequences which would result from the terms and expressions which are used in it.

By the express terms of the deed, the lender is to be repaid his money, together with maritime interest, at the rate of 15 per cent. Now, it could not have escaped the observation of any person at all conversant in transactions of this description, that the very stipulation for maritime interest, fixed immediately upon the lender the risk of this vessel; for maritime interest being so much beyond the usual and common rate, can only be legally recognized where the risk is such as that, according to the policy of our

1828.

Case of the Schooner MARGARET & ISABELLA.

maritime law, the person taking upon himself that risk is, as in the case of bottomry, allowed to charge it.

On no other ground whatever could he be entitled to claim it; and, unless, therefore, the risk of the vessel in this case was the lender's, the whole would have been an usurious transuction, and one which could not be supported. The framer, therefore, of this deed, aware of the legal consequences following from the stipulation for the payment of maritime interest, did not think it necessary to say, in express terms, that which was necessarily implied, and resulted, from the conditions of the hypothecation, viz. that the vessel was at the risk of the lender.

That she was so, I have no doubt whatever, and as little hesitation in saying, that had this vessel been lost, the lender's money, as well as his remedy, was altogether gone; and whatever opinion may be entertained with regard to the master's liability in such event as the loss of the vessel, I am satisfied, that in any action brought against the master upon his covenants, the plea that the lender's remedy was gone with the vessel, or otherwise that the contract was an usurious one, would be an effectual bar to such action.

For such a contract, viz. to pay maritime interest in any other event than the arrival of the vessel, would be considered by any Court of Common Law as usurious, and could not, consequently, be enforced against the master. But it has been, lastly, urged by the *Attorney General*, on the part of the applicants for the prohibition, that it appears by the instrument of hypothecation, that the money lent, which makes the consideration of the mortgage, was not altogether

1828.

Case of the Schooner MARGARET & ISABELLA.

for the repairs of the vessel, but for other purposes which would make it a consideration not cognizable by the Admiralty Courts.

Whether any part of the money here lent was intended to be used by the master for purposes for which he was not warranted in pledging this vessel, I have not the means of judging. It is laid down in *Abbott*, 149, that besides the money necessary for the repairs or victualling of his vessel, the master, if he finds it necessary to raise money for other purposes, in order to enable him to complete the enterprise in which he is engaged, whether the occasion arises from any extraordinary peril or misfortune, or from the ordinary course of the adventure, may borrow money at maritime interest, and pledge the ship.

From the terms of this instrument, I think myself warranted in concluding (in the absence of any other information on the subject than that afforded by the instrument itself), that the sum lent, and for which this vessel was pledged, was lent and pledged for the purposes of enabling her to complete her voyage to Newfoundland.

But of this, I am clearly of opinion, that whether it were so or not, a large sum having been advanced for that very purpose, this part of the consideration will give jurisdiction to the Court of Admiralty over the other, supposing it even to be of a doubtful description, and it is only in that Court, in defence to the suit instituted against him, that the owner of this vessel can object to any part of the consideration, but that this objection cannot avail him upon this application.

Under all the circumstances, therefore, of this case, viewing this instrument as nothing more nor less than an hypothecation of

1828.

Case of the Schooner MARGARET & ISABELLA.

the vessel for the re-payment of money advanced for the repairs and refitting, with maritime interest, and that the stipulation for such interest necessarily placed the vessel at the risk of the lender, I cannot but consider this to be a case where, from the nature of the contract, the proceedings are confined to the thing in specie, and where the Courts of Admiralty have the sole jurisdiction. In the language of the Court of King's Bench, in the case of *Menetone* v. *Gibbons*, the party here, that is, the lenders of the money, cannot have their remedy in a Court of law, the contract being merely *in rem*, and there being no personal contract, that is, on the part of the owner, for the payment of the money.

I am, therefore, of opinion, that the prohibition payed for, cannot be granted,

COPY OF THE

Royal Charter

FOR ESTABLISHING THE SUPREME AND CIRCUIT COURTS OF NEWFOUNDLAND, TESTED NINETEENTH SEPTEMBER, 1825.

GEORGE THE FOURTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith:—To all whom these presents shall come, greeting:—

WHEREAS, by an Act of Parliament passed in the 5th year of our reign, intituled "an Act for the better administration of justice in Newfoundland, and for other purposes," it is amongst other things enacted, that it shall and may be lawful for us, by our charter or letters patent under the great seal, to institute a superior Court of judicature in Newfoundland, which shall be called "the Supreme Court of Newfoundland." And it is thereby further enacted, that the said Supreme Court shall be holden by a chief judge and two assistant judges, being respectively barristers in England or Ireland of at least three years standing, or in some of our colonies or plantations. And

it is thereby further enacted, that it shall and may be lawful for us, by any such charter or letters patent as aforesaid, to institute Circuit Courts in each of the three districts into which the said colony may be so divided, as in the said Act mentioned. And it is thereby further enacted, that it shall be lawful for us, our heirs and successors, by such charter or letters patent as aforesaid, or by any order or orders to be thereafter issued, by and with the advice of our or their privy council, to make and prescribe, or to authorise and empower the said Supreme Court of Newfoundland, under such limitations as we shall deem proper, to make and prescribe such rules and orders, touching and concerning the forms and manner of proceeding in the said Supreme Court and Circuit Courts respectively, and the practice and pleadings upon all indictments, informations, actions, suits, and other matters to be therein brought, or touching or concerning the appointment of commissioners to take bail and examine witnesses; the taking examinations of witnesses, *de bene esse*, and allowing the same as evidence; the granting of probates of wills and letters of administration; the proceedings of the Sheriff and his deputies, and other ministerial officers; the summoning of assessors for the trial of crimes and misdemeanours in the said Circuit Courts; the process of the said Courts and the mode of executing the same; the empannelling of juries; the admission of barristers, attornies, and solicitors; the fees, poundage, or perquisites, to be lawfully demanded by any officer, attorney, or solicitor, in the said Courts respectively; and all other matters and things whatsoever, touching the practice of the said Courts, as to us, our heirs, and successors shall seem meet, for the proper conduct of business in the said Courts; and such rules and orders from time to time to alter, amend, or revoke, as to us, our heirs and successors, shall seem requisite. And it is hereby further enacted, that it shall and may be lawful for us, by our said charter or letters patent, to allow any person or persons aggrieved by any judgment, decree, order, or sentence of the said Supreme Court, to appeal therefrom to us in council, in such manner, within such time, and under and subject to such rules, regulations, and limitations, as we, by such charter and letters patent,

shall appoint and direct. Now know ye, that we, upon full consideration of the premises, and of our especial grace, certain knowledge, and mere motion, have, in pursuance and by virtue of the said Act of Parliament, thought fit to grant, direct and appoint, and by these presents do accordingly, grant, direct, and appoint, that there shall be within our said colony of Newfoundland a Court, which shall be called "the Supreme Court of Newfoundland." And we do hereby create, erect, and constitute the said Supreme Court of Newfoundland to be a Court of record; and do direct and appoint that the same shall be composed of and holden by one chief judge and two assistant judges. And we do hereby give and grant to our said chief judge rank and precedence above and before all our subjects whomsoever, within the colony of Newfoundland aforesaid, and the islands, territories, and places dependent thereupon, excepting the Governor or Acting Governor for the time being of the said colony, and excepting all such persons as by law or usage take place in England before our chief justice of our Court of King's Bench. And we do hereby give and grant to our said assistant judges, rank and precedence within our said colony, and the islands, territories, and places dependant thereupon, next after our said chief judge, the said assistant judges taking precedence between themselves according to the priority of their respective appointments to the said office, or, where they may be both appointed at the same time, then according to their seniority as barristers. And we do further grant, ordain, and appoint that the said Supreme Court of Newfoundland shall have and use, as occasion may require, a seal bearing a device and impression of our royal arms, within an exergue or label surrounding the same, with this inscription, "The seal of the Supreme Court of Newfoundland." And we do hereby grant, ordain, and appoint that the said seal shall be delivered to, and kept in the custody of the said chief judge. And we do further grant, ordain, and declare that the said chief judge and assistant judges, so long as they shall hold their respective offices, shall be entitled to have and receive the following salaries, (that is to say) our said chief judge, a salary of one thousand two hundred pounds, sterling money, by the year; and each of our assistant

judges, a salary of seven hundred pounds, like sterling money, by the year. And our Governor or Acting Governor for the time being of the said colony, is hereby directed and required to cause such salary to be paid to the said chief judge and assistant judges, out of the revenue of the said colony, by four quarterly payments, at the four most usual days of payment in the year. And we do further grant, ordain, and declare that the said salary shall commence and take place, in respect to any person who shall be resident in Great Britain or Ireland, at the time of his appointment, upon and from the day on which any such person shall thereupon embark, or depart from Great Britain or Ireland, for Newfoundland, and to take upon him the execution of the said office; and that the salary of any such chief judge, or assistant judges, who shall at the time of his appointment be resident in Newfoundland, aforesaid, shall commence and take place from and after his taking upon him the execution of such his office, and that such salary shall be in lieu of all fees of office, perquisites, emoluments, and advantages whatsoever, and that no fee of office, perquisite, emolument, or advantage, whatsoever, other than and execpt the said salary, shall be accepted, received, or taken by such chief judge or assistant judges, in any manner, or on any account or pretence whatsoever. Provided, nevertheless, that it shall be lawful for the said chief judge or assistant judges to occupy and inhabit any official house or residence, within the said colony of Newfoundland, which hath been, or may hereafter be provided for their or any of their residence and occupation, without paying to us, our heirs and successors, any rent for the same, and without being obliged to repair, uphold, or maintain any such house or official residence at his own cost and charges. And we do further grant, appoint, and declare that no chief judge or assistant judges, of the said Supreme Court of Newfoundland, shall be capable of accepting, taking, or performing any office or place of profit or emolument, on pain that the acceptance of any such other office, or places aforesaid, shall be and be deemed in law, *de facto*, an avoisance of the office of such chief judge or assistant judge, as the case may be; and the salary thereof shall cease, and be deemed to have ceased accordingly, from the time of such acceptance of any such other office or place. And

we do hereby constitute and appoint our trusty and well-beloved *Richard Alexander Tucker*, Esq. to be the first chief judge of the said Supreme Court of Newfoundland, the said *R. A. Tucker* being a barrister in *England* of three years standing and upwards. And we do hereby constitute and appoint our trusty and well-beloved *Augustus Wallet Des Barres* and *John William Molloy*, Esquires, to be first assistant judges of the said Supreme Court, the said *Augustus Wallet Des Barres* and *John William Molloy* being respectively barristers of three years standing and upwards. And we do hereby grant, direct, and appoint, that there shall be within our said colony of Newfoundland three Circuit Courts, to be held in each of the three districts into which the said colony may be divided, in pursuance of the said Act of Parliament. And we do hereby erect, create, and constitute the said Circuit Courts respectively to be Courts of record; and do direct and appoint that each of the said Circuit Courts shall be holden by the chief judge or one of the assistant judges of the Supreme Court of Newfoundland, aforesaid. And we do direct and appoint that the chief judge of the said Supreme Court shall be always at liberty to decide which of the three Circuit Courts shall be holden by him, and that the senior assistant judge shall be always at liberty to decide which of the two remaining Circuit Courts shall be holden by him. And we do hereby ordain, appoint, and declare, that there shall be and belong to the said Supreme Court and Circuit Courts, respectively, such and so many officers as to the chief judge of the said Supreme Court for the time being shall, from time to time, be deemed necessary for the administration of justice, and the due execution of all the powers and authorities which are granted and committed to the said Supreme Court and Circuit Courts respectively by the said Act of Parliament, or by these our letters patent. Provided, nevertheless, that no office shall be created in the said Courts, or any of them, unless the Governor or Acting Governor, for the time being, of our said colony shall first signify his approbation thereof to our said chief judge, for the time being, in writing, under the hand of such Governor or Acting Governor as aforesaid. And we do further ordain and direct, that all persons who shall and may be appointed to the several offices of master, registrar, accountant-general, or protho-

notary, of the said Supreme Court or Circuit Courts of Newfoundland, or to any office in the said Courts, or any of them, whereof the duties shall correspond to those performed by the master, registrar, accountant-general, or prothonotary of any or either of our Courts of record at Westminster, shall be so appointed by us, our heirs and successors, by warrant under our or their royal sign manual, to hold such their offices during our or their pleasure; and that all persons who shall and may be appointed to any other office within the said Supreme Court of Newfoundland, or within the said Circuit Courts of Newfoundland, shall be so appointed by the chief judge, for the time being, of the said Supreme Court, and shall be subject and liable to be removed from such their offices by the said chief judge upon reasonable and sufficient cause. And we do hereby authorize and empower the said Supreme Court of Newfoundland to approve, admit, and enrol such and so many persons, having been admitted barristers at law, or advocates, in Great Britain and Ireland, or having been admitted writers, attornies or solicitors, in one of our Courts at Westminster, Dublin, or Edinburgh, or having been admitted as proctors in any Ecclesiastical Court in England, to act as well in the character of barristers and advocates, as of proctors, attorneys, and solicitors in the said Supreme Court of Newfoundland, and which persons so approved, admitted, and enrolled, as aforesaid, shall be, and are hereby authorized to appear, and plead, and act for the suitor of the said Supreme Court, subject always to be removed by the said Supreme Court from their station therein, upon reasonable cause. And we do further authorize the said Supreme Court of Newfoundland to admit and enrol as barristers, advocates, attorneys, proctors, or solicitors therein, such and so many persons as may have served a clerkship, under articles in writing, for the term of five years at the least, to any barrister, advocate, proctor, attorney or solicitor of the Supreme Court aforesaid. And we do declare that no person or persons, other than the persons aforesaid, shall be allowed to appear, plead, or act in the Supreme Court of Newfoundland for and on behalf of the suitors of the said Court, or any of them. Provided always, and we do ordain and declare, that in case there shall not

be a sufficient number of such barristers at law, advocates, writers, attorneys, solicitors and proctors, or of persons so admitted and enrolled, as aforesaid, to act as such within the said colony, competent and willing to appear and act for the suitors of the said Supreme Court, then and in that case the said Supreme Court of Newfoundland shall, and is hereby authorized to admit so many other fit and proper persons to appear and act as barristers, advocates, proctors, attorneys and solicitors as may be necessary, according to such general rules and qualifications as the said Supreme Court shall for that purpose make and establish. And we do hereby authorize the said Supreme Court to make and prescribe such rules and orders as to them may seem expedient and necessary, with regard to the admission of persons to practice the law, and appear and act in the character of barristers and advocates, proctors, attorneys, and solicitors in the said Circuit Courts respectively. And we do hereby ordain and declare, that the Governor or Acting Governor, for the time being, of the said colony of Newfoundland, shall yearly, and on the Monday next following the first day of January in each year, by warrant under his hand and seal, nominate and appoint some fit and proper person to act as, and be, the sheriff for our said colony of Newfoundland and its dependencies, other than except the coast of Labrador, for the year ensuing, which sheriff, when appointed, shall, as soon as conveniently may be, and before he shall enter upon his said office, take before the Governor or Acting Governor of our said colony an oath faithfully and impartially to execute the duties of such his office; and such sheriff shall continue in such his office during the space of one whole year, to be computed from the said Monday next following the first day of January in each year, and until another sheriff shall be appointed and sworn into the said office. And in case any such sheriff shall die in his said office, or depart from our said colony of Newfoundland and its dependencies, then and in such case another person shall, as soon as conveniently may be after the death or departure of such sheriff, be in like manner appointed and sworn in as aforesaid, and shall continue in his office for the remainder of the year, and until another sheriff shall be duly appointed and sworn

into the said office. And we do further direct and appoint that it shall and may be lawful for the Governor or Acting Governor of the said colony to renew from year to year the appointment of the same person as sheriff for our said colony and its dependencies; and that in selecting the person to be appointed to the execution and discharge of the said office, the said Governor or Acting Governor shall conform to such written instructions or commands as may from time to time be signified by us, our heirs or successors, to him through one of our or their principal secretaries of state. And we do further direct that, before entering upon the execution of the duties of his said office, the said sheriff shall enter into a recognisance to us, in the said Supreme Court of Newfoundland, in the sum of five thousand pounds, with two good and sufficient sureties, in the sum of two thousand pounds each, for the due and faithful performance of the duties of such his office, and for the due and punctual payment of all such sums of money as may by him or his lawful deputies be levied or received by virtue of any process, rule, or order of the said Supreme Court and Circuit Courts, or any of them. And we do further direct that the said sheriff shall, on the first Monday of each calendar month, produce before the chief judge or one of the assistant judges aforesaid, a written account of all the money by him or by his lawful deputies received during the calendar month last preceding, and stating the application thereof, so far as the same may by him or them have been applied, and also stating the exact balance of such monies then remaining in the possession of himself or his said deputies, so far as the returns received from such deputies enable him to make out the said accounts. And we do further order that the said chief judge or assistant judges, as the case may be, shall cause the said account to be publicly exhibited in the office of the prothonotary or registrar of the said Supreme Court for the space of one calender month next after the same shall have been so rendered, and shall then cause the same to be enrolled among the records of the said Court. And we do further order, direct, and appoint that the said sheriff and his successors shall, by themselves or their sufficient deputies to be by them appointed and duly authorized under their respective

hands and seals, and for whom he and they shall be responsible during his or their continuance in such office, execute, and the said sheriff, by himself or his lawful deputies, is hereby authorized to execute the writs, summonses, rules, orders, warrants, commands, and process of the said Supreme Court and the said Circuit Courts, and make return of the same, together with the manner of the execution thereof, to the said Supreme Court and Circuit Courts respectively, and to receive and detain in prison all such persons as shall be committed to the custody of such sheriff by the said Supreme Court and Circuit Courts respectively, or by the chief judge or assistant judges, or either of them. And we do further direct, ordain, and appoint that whenever the said Supreme Court, or any of the said Circuit Courts shall direct or award any process against the said sheriff, or shall award any process in any cause, matter, or thing wherein the said sheriff on account of his being related to the parties, or any of them, or by reason of any good cause of challenge which would be allowed against any sheriff in England, cannot or ought not by law to execute the same; then, and in every such case, the said Supreme Court or the said Circuit Courts, as the case may be, shall name and appoint some other fit person to execute and return the same. And the said process shall be directed to the person so to be named for that purpose; and the cause of such special processes shall be suggested and entered on the records of the Court issuing the same: provided always, and we do hereby ordain and declare, that the said Supreme Court and the said Circuit Courts shall respectively fix certain limits beyond which the said sheriff shall not be compelled or compellable to go, in person or by his officers or deputies, for the execution of any process of the said Courts respectively; and upon occasion, when the process of any of the said Courts shall be to be executed in any place or places beyond the limits so to be fixed, we grant, ordain, and direct that the said Supreme Court or Circuit Courts respectively, as the case may be, shall, upon motion, direct by what person or persons, and in what manner such process shall be executed, and the terms and conditions which the party at whose instance the same shall be issued shall enter into, in order to prevent any improper use or abuse of the process of the said

Courts. And the said sheriff shall, and he is hereby required, to grant his special warrant or deputation to such person or persons as the Court making any such order shall direct for the execution of such process; and in that case we direct and declare that the said sheriff, his heirs, executors, or administrators, shall not be responsible or liable for any act to be done in or any way respecting the execution of such process under and by virtue of such special warrant; and that any person or persons being aggrieved under or by virtue of such special warrant, shall and may seek their remedy under any security which may have been directed to be taken upon the occasion, and which the Court issuing such process is hereby authorized to direct to be taken. And it is our further will and pleasure, and we do hereby, for us, our heirs and successors, grant, ordain, establish and appoint, that the said Supreme Court shall grant probates, under the seal of the said Court, of the last wills and testaments of all or any of the inhabitants of the said colony and its dependencies, and of all other persons who shall die and have personal effects within the said colony and its dependencies, and to commit letters of administration, under the seal of the said Supreme Court, of the goods, chattels, credits, and all other effects whatsoever of the persons aforesaid who shall die intestate, or who shall not have named an executor resident within the said colony and its dependencies, or where the executor being duly cited shall not appear and sue forth such probate, annexing the will to the said letters of administration, when such persons shall have left a will, and to sequester the goods, chattels, credits, and other effects whatsoever, of such persons so dying, in cases allowed by the law, as the same is and may be now used in the diocese of London; and to demand, require, take, hear, examine and allow, and, if occasion require, to disallow and reject the accounts of them, in such manner and form as is now used or may be used in the said diocese of London, and to do all other things whatsoever needful and necessary in that behalf. Provided always, and we do hereby authorize and require the said Supreme Court, in such cases as aforesaid, where letters of administration shall be committed with the will annexed for want of an executor appearing in due time to sue forth the probate, to reserve in such letters of administration full power and

authority to revoke the same, and to grant probate of the said will to such executor whenever he shall duly appear and sue forth the same. And we do hereby further autho.. rize and require the said Supreme Court of Newfoundland to grant and commit such letters of administration to any one or more of the lawful next of kin of such persons so dying, as aforesaid, being then resident within the jurisdiction of the said Supreme Court, and being of the age of twenty-one years. Provided always that probates of wills and letters of administration to be granted by the said Supreme Court shall be limited to such money, goods, chattels, and effects as the deceased person shall be entitled to within the said colony and its dependencies. And we do hereby further enjoin and require, that every person to whom such letters of administration shall be committed, shall, before the granting thereof, give sufficient security by bond to be entered into, to us, our heirs and successors, for the payment of a competent sum of money, with one, two, or more able sureties, respect being had in the sum therein to be contained, and the ability of the sureties, to the value of the estate, credits, and effects of the deceased, which bond shall be deposited in the said Supreme Court, among the records thereof, and there safely kept; and a copy thereof shall be also recorded among the proceedings of the said Supreme Court; and the condition of the said bond shall be to the following effect:—"That if the above bounden "administrator of the goods, chattels, and effects of the "deceased, do make, or cause to be made, a true and per- "fect inventory of all and singular the goods, credits, and "effects of the said deceased which have or shall come to "the hands, possession, or knowledge of him the said ad- "ministrator, or to the hands or possession of any other "person or persons for him; and the same so made do ex- "hibit, or cause to be exhibited, in the said Supreme Court "of Newfoundland, at or before a day therein to be speci- "fied; and the same goods, chattels, credits, and effects, "and all other the goods, chattles, credits, and effects of "the deceased, at the time of his death, or which at any "time afterwards, shall come to the hands or possession of "such administrator, or to the hands or possession of any "other person or persons for him, shall well and truly ad-

" minister according to law; and further to make, or cause " to be made, a true and just account of his said adminis- " tration at or before a time therein to be specified, and " afterwards, from time to time, as he, she, or they shall " be lawfully required. And all the rest and residue of " the said goods, chattels, credits, and effects which shall " be found, from time to time, remaining upon the said " administration accounts, the same being first examined " and allowed of by the said Supreme Court of Newfound- " land, shall and do pay and dispose of in a due course of " administration, or in such manner as the said Court shall " direct, then this obligation to be void and of none effect, " or else to be and remain in full force and virtue." And in case it shall be necessary to put the said bond in suit for the sake of obtaining the effect thereof, for the benefit of such person or persons as shall appear to the said Court to be interested therein, such person or persons from time to time giving satisfactory security for paying all such costs as shall arise from the said suit or any part thereof, such person or persons shall, by order of the said Supreme Court, be allowed to sue the same in the name of the Attorney-General for the time being, of the said colony, and the said bond shall not be sued in any other manner. And we do hereby authorize and empower the said Supreme Court to order that the said bond shall be put in suit in the name of the said Attorney-General. And we do further will, order, and require, that the said Supreme Court shall fix certain periods when all persons, to whom probates of wills and letters of administration shall be granted by the said Supreme Court, shall from time to time until the effects of the deceased shall be fully administered, pass their accounts relating thereto before the said Court; and in case the effects of the deceased shall not be fully administered within the time for that purpose to be fixed by the said Court, then, or at any earlier time, if the said Supreme Court shall see fit so to direct, the person or persons to whom such probate or administration shall be granted, shall deposit and dispose of the balance of money belonging to the estate of the deceased, then in his, her, or their hands, and all money which shall afterwards come into his, her, or their hands, and also all precious stones, jewels, bonds, bills, and secu-

rities, belonging to the estate of the deceased, in such manner, and unto such persons, as the said Supreme Court shall direct, for safe custody. And we require that the said Supreme Court shall from time to time make such order as shall be just for the due administration of such assets, and for the payment or remittance thereof as occasion shall require, to or for the use of any person or persons whether resident or not resident in the said colony and its dependencies, who may be entitled thereto or any part thereof as creditors, legatees, or next of kin, or by any other right or title whatsoever. And we do hereby, in exercise and in pursuance of the power in us by the said Act of Parliament in that behalf vested, authorize and empower the said Supreme Court of Newfoundland, under such limitations as hereinafter mentioned, to make and prescribe such rules and orders as may be expedient touching and concerning the forms and manner of proceeding in the said Supreme Court and Circuit Courts respectively, and the practice and pleadings upon all indictments, informations, actions, suits, and other matters to be therein brought, and touching and concerning the appointment of commissioners to take bail and examine witnesses; the taking examinations of witnesses, *de bene esse*, and allowing the same as evidence; the granting of probates of wills and letters of administration; the proceedings of the sheriff and his deputies, and other ministerial officers; the summoning of assessors for the trial of crimes and misdemeanours in the said Circuit Courts; the process of the said Courts and the mode of executing the same; the empannelling of juries; the admission of barristers, ottorneys, and solicitors; the fees, poundage, or perquisites, to be lawfully demanded by any officer, attorney, or solicitor, in the said Courts respectively; and all other matters and things whatsoever, touching the practice of the said Courts, as may be necessary for the proper conduct of business therein; and such rules and orders from time to time to alter, amend, or revoke, as may be requisite. Provided always that no such rules or orders be in anywise repugnant to the said Act of Parliament or this our Charter. Provided further, that all such rules and orders be promulgated in the most public and authentic manner in our said colony for three calendar months, at least, before the

same shall operate and take effect, and that the same be, by the first convenient opportunity, transmitted through the Governor or Acting Governor of our said colony, to us, our heirs and successors, for the signification of our or their pleasure, respecting the allowance or disallowance thereof. And we do hereby direct, ordain, and appoint, that any person or persons feeling aggrieved by any judgment, decree, order, or sentence of the said Supreme Court, may appeal to us, our heirs and successors, in our or their privy council, in such manner and within such time, and under and subject to such rules, regulations, and limitations as are hereinafter mentioned; that is to say, in case any such judgment, decree, order, or sentence of the said Supreme Court shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of five hundred pounds sterling, or in case such judgment, decree, order, or sentence shall involve directly or indirectly any claim, demand, or question of or respecting property, or any civil right amounting to or of the value of five hundred pounds sterling, the person or persons feeling aggrieved by any such judgment, decree, order, or sentence of the said Supreme Court, may within fourteen days next after the same shall have been pronounced, made, or given, apply to the said Supreme Court by petition for leave to appeal therefrom to us, our heirs and successors, in our or their privy council; and in case such leave to appeal shall be prayed by the party or parties, who is or are directed to pay any sum of money or perform any duty, the said Supreme Court shall and is hereby empowered either to direct that the judgment, decree, order, or sentence appealed from shall be carried into execution, or that the execution thereof shall be suspended, pending the said appeal, as to the said Court may appear to be most consistent with real and substantial justice. And in case the said Supreme Court shall direct such judgment, decree, order, or sentence to be carried into execution, the person or persons in whose favour the same shall be given shall, before the execution thereof, enter into good and sufficient security to be approved by the said Supreme Court, for the due performance of such judgment or order as we, our heirs or successors shall think fit to make thereupon; or in case

the said Supreme Court, shall direct the execution of any such judgment, decree, order, or sentence to be suspended, pending the appeal, the person or persons against whom the same shall have been given, shall in like manner and before any order for the suspension of any such execution is made, enter into good and sufficient security to the said Supreme Court, for the due performance of such judgment or order as we, our heirs and successors, shall think fit to make thereupon. And in all cases we will and require, that security shall also be given by the party or parties appellant, to the satisfaction of the said Supreme Court, for the prosecution of the appeal, and for the payment of all such costs as may be awarded by us, our heirs and successors, to the parties or party respondent; and if such last-mentioned security shall be entered into within three months, from the date of such petition, for leave to appeal, then and not otherwise, the said Supreme Court shall allow the appeal, and the party or parties appellant shall be at liberty to prefer and prosecute his, her, or their appeal to us, our heirs and successors, in our or their privy council, in such manner and form, and under such rules, as are observed in appeals made to us from our plantations or colonies. And we do hereby reserve to ourself, our heirs and successors, in our or their privy council, full power and authority, upon the humble petition at any time of any person or persons feeling aggrieved by judgment, decree, order, or sentence, of the said Supreme Court, to refuse or admit his, her, or their appeal therefrom, upon such terms and upon such limitations, restrictions, and regulations as we or they shall think fit, and to reform, correct, or vary such judgment, decree, order, or sentence; as to us or them shall seem meet. And it is our further will and pleasure, that in all cases of appeal allowed by the said Supreme Court, or by us, our heirs and successors, the said Supreme Court shall certify and transmit to us, our heirs or successors, in our or their privy council, a true and exact copy of all evidence, proceedings, judgments, decrees, sentences, and orders, had or made in such cases appealed, so far as the same have relation to the matter of appeal, such copies being under the seal of the said Court. And we do further direct and ordain, that the said Supreme Court of New-

foundland shall, in all cases of appeal to us, our heirs and successors, conform to and execute, or cause to be executed, such judgments and orders as we, our heirs and successors, shall think fit to make in the premises, in such manner as any original judgment, sentence, decree, or decretal order, or other order or rule of the said Supreme Court of Newfoundland, could or might have been executed. And we do hereby strictly charge and command all governors, commanders, magistrates, ministers, civil and military, and all our liege subjects within and belonging to the said colony, that in the execution of the several powers, jurisdictions, and authorities hereby granted, made, given, or created, they be aiding or assisting, and obedient in all things, as they will answer the contrary at their peril. Provided always, that nothing in these presents contained, or any act which shall be done under the authority hereof, shall extend, or be construed to extend, to prevent us, our heirs and successors, as far as we lawfully may, from repealing these presents, or any part thereof, or from making such further or other provision, by letters patent, for the administration of justice, civil and criminal, within the said colony, and the places now, or at any time hereafter, to be annexed thereto, as to us, our heirs and successors, shall seem fit, in as full and ample manner as if these presents had not been made, these presents or anything herein contained to the contrary, notwithstanding. In witness whereof we have caused these our letters to be made patent.

Witness ourself at Westminster, the 19th day of September, in the sixth year of our reign.

By writ of privy seal.

GENERAL

RULES AND ORDERS

OF THE

Supreme Court

OF

NEWFOUNDLAND.

IN virtue of the authority given to them by His Majesty's Charter, bearing date at Westminster, the 19th day of September, 1825, the Judges of the Supreme Court of Newfoundland have framed the following Rules and Orders, which are now published in pursuance of the directions contained in the said Royal Charter:—

I.

Where the debt, or other cause of action, shall not exceed the sum of Ten Pounds Sterling, the plaintiff may commence his suit by a summons, which, without making any distinction as to the form of action, will command the defendant generally to pay to the plaintiff the sum demanded by him, or otherwise to appear in Court, on a given day, to show cause why he will not do it. The proceedings in all cases which shall be commenced in this manner will be altogether summary; and the Court will endeavour to regulate its judgment by those principles of natural equity which will afford the most substantial justice to the parties litigant.

II.

If the cause of action shall exceed ten pounds sterling, the plaintiff may sue out an original writ, in the nature of a Præcipe, which will contain such a statement of the cause of action as will be sufficient to enable the defendant to file a short plea corresponding thereto. And where the plaintiff seeks to recover a debt, chattel, or liquidated damages, he may also obtain an attachment against the goods, credits, and effects, of the defendant, and likewise against his person, if property to a sufficient amount cannot be found, upon making an affidavit that the debt, chattel, or liquidated damages, exceed in amount, or value, the sum of ten pounds sterling.

III.

For the purpose of giving effect to the preceding rule, the Court has framed writs in several different forms of action; and selected from the pleas which a defendant is at liberty to plead to any of them in England, such as seem to be best adapted to the present condition and circumstances of this country.

IV.

Aware of the absolute impossibility of introducing much of the *form of pleading* into the practice of the Court, under existing circumstances, the judges have endeavoured to frame original writs in such a manner that they may supply the place of a declaration: and defendants will only be required to state, by way of plea, the *substantial grounds* of their defence.

V.

Indictments and Informations will, from time to time, during the several terms, be prepared by the Attorney General, and submitted by him to the Grand Jury; which will, at the opening of every term, be summoned to attend the Court; and the Judges will anxiously endeavour to assimilate the proceedings in all criminal matters as nearly as possible to the course of practice observed in England.

VI.

Commissions for the examination of witnesses will be granted by the Court whenever a satisfactory ground shall

be laid for such an indulgence; and the party applying for it will always be required to submit to such terms and conditions as to the Court shall seem just and reasonable.

VII.

The course of proceeding heretofore pursued relative to the granting of Probates of Wills and Letters of Administration will, for the present, be continued in the New Probate Court; but the Judges will lose no time in attempting to introduce such improvements therein as they may consider it susceptible of.—The following Table exhibits a list of the fees which will henceforth be received by the clerk of the Probate Court.

FEES TO BE TAKEN IN THE PROBATE COURT.

	£	£	s.	d.		£	£	s.	d.
Under	10	0	5	0	Under	500	2	12	6
..	20	0	7	6	..	750	3	10	0
..	40	0	10	0	..	1000	5	0	0
..	100	1	0	0	..	1500	10	0	0
..	200	1	12	6	..	2000	15	0	0
..	350	2	2	0	..	3000	30	0	0

VIII.

In addition to the regulations prescribed by the Charter, touching the office and duties of the Sheriff, the Judges only feel it necessary to declare, that he will not be required to execute the Process of the Court, either by himself or his deputies, beyond Twillingate in the Northern, and Cape La Hune in the Southern, district of this Island. For the execution of Process within these limits, the following fees will be demanded and received by him; except in those particular instances where, in consideration of the poverty of the party, or other peculiar circumstances, the Court shall see fit to direct that no fee shall be exacted by him for the service of Original Process.

ORIGINAL PROCESS.

£	By Sum. £ s. d.	By At. £ s. d.	£	By Sum. £ s. d.	By At. £ s. d.
Under 10	0 7 6	0 9 0	Under 300	3 2 6	3 15 0
.. 15	0 12 6	0 15 0	.. 400	3 12 6	4 7 0
.. 20	0 17 6	1 1 0	.. 500	4 2 6	4 19 0
.. 30	1 0 0	1 4 0	.. 750	5 2 6	6 3 0
.. 40	1 2 6	1 7 0	.. 1000	6 2 6	7 7 0
.. 50	1 5 0	1 10 0	.. 1500	7 12 6	9 3 0
.. 100	1 15 0	2 2 0	.. 2000	10 0 0	12 0 0
.. 150	2 5 0	2 14 0			
.. 200	2 12 6	3 3 0			

Capias £1 1 0
Bail Bond 0 10 6

FINAL PROCESS.

Commission on Goods taken in execution, where the value does not exceed £200, 5 per cent.

When above £200, 5 per cent. for the first £200, and 2½ per cent. for all beyond that sum.

JURY FEES.

For returning and Summoning a Special Jury, £1 2 6
Common Jury, 0 5 0

SUMMONING WITNESSES.

In ordinary cases, for each Witness £0 1 0

In extraordinary cases, an extra allowance, according to the discretion of the Court.

IX.

The Sheriff will also receive such fees upon all proceedings had on the Equity-side of the Court as shall, from time to time, be authorized by the Judges, upon a fair consideration of the circumstances of each case.

X.

Original Writs have been framed in the following forms of action :—

Assumpsit, Debt, Covenant, Trover, Case, Trespass, and Ejectment.

XI.

Some of those writs are, in fact, nothing more than mere summonses, detailing the nature of the plaintiff's com-

plaint; but in those forms of action which admit of ATTACHMENT, original writs, adapted to that course of proceeding, have likewise been prepared.

XII.

To the foregoing writs the defendant will be entitled to plead: In ASSUMPSIT—1st, That the defendant did not undertake and promise in manner and form, &c.; 2d, A set off; 3d, Tender; 4th, The Statute of Limitations. In DEBT—1st, That the defendant does not owe the sum demanded; 2d, That he only owes a certain sum, which he is willing to pay; 3d, A set off; 4th, Tender; 5th The Statute of Limitations. In COVENANT—1st, That it is not his Agreement; 2d, That he has kept his Agreement; 3d, That he has been discharged from the performance of his Agreement. In TROVER—1st, Not Guilty of the Conversion; 2d, The Statute of Limitations. In CASE and TRESPASS—1st, Not Guilty; 2d, The Statute of Limitations. In EJECTMENT—Not Guilty.

XIII.

Writs may be sued out in Vacation, as well as during Term; and when the defendant shall reside within ten miles of the Supreme Court, there shall be four days, at least, allowed between the teste and the return of the writ. In other cases the return will be regulated by circumstances, in such a way as to allow a reasonable time to the defendant to appear and plead.

XIV.

The plaintiff, on the day before the return of the writ, must file with the Clerk of the Court a bill with the particulars of his demand; and in actions of trespass and assumpsit such bill shall also be annexed to the copy of the original writ, which is in ALL cases required to be left with the defendant.

XV.

The defendant must file his plea with the Clerk of the Court before the opening thereof, on the day upon which the writ is returnable. In pleading a set-off he must annex a bill of particulars to his plea; and where he shall be desirous of entering several pleas, application for leave to

do so must be previously made to one of the Judges of the Court.

The Clerk of the Court shall keep a book, in which an entry shall be made of all writs and pleas; and this book shall be submitted to the Judges at the time of trial, for the purpose of apprizing them of the matter in dispute between the parties.

XVI.

All actions shall be considered as liable to be tried on the day after the return of the writ: and where the plaintiff shall not be ready for trial at that time, the defendant may move the Court for an immediate hearing of the case.

XVII.

Judgment will be given two days after the trial, unless some cause shall be shown in arrest thereof within that period.

XVIII.

No judgment by default will be given against a party, unless upon the most clear and satisfactory evidence of the due service of the writ upon him, or his accredited agent. If the cause of action be a debt, a specific chattel, or liquidated damages, the plaintiff will be required, upon obtaining judgment by default, to make oath to the amount or value thereof, and this will entitle him to an absolute judgment for the amount sworn to, unless the defendant shall move, within six days, to have the judgment by default set aside. But where the amount of the damages shall be uncertain, the defendant shall be served with a fresh notice to attend the Court for the purpose of having those damages ascertained by a jury: and on his neglect to obey this summons, judgment will be entered against him for the sum claimed by the plaintiff in his origiual writ.

XIX.

The only writs of execution which the Court will, for the present, make use of, are, a *fieri facias*—*a capias ad satisfaciendum*—and a writ of possession.

XX.

The sheriff will keep a list of persons qualified to serve

as grand jurors; in which will be entered, in alphabetical order, the names of all the principal merchants and gentlemen of the town; and four days before the commencement of each term, a written summons shall be sent to twenty-three of the persons mentioned in this list (beginning with the letter A, and proceeding regularly through the whole alphabet,) commanding them to attend the Court at the opening thereof. The persons so summoned will form the grand jury for the whole term; and will be liable to attend the Court during the continuance thereof, at such times as the judges shall direct.

XXI.

A fine, of from 50*s.* to £5 will be imposed upon every grand juror who shall neglect to attend the Court after having been regularly summoned to do so; unless his absence shall be excused by a certificate of sickness, under the hand of a respectable medical practitioner, which must be delivered to the clerk of the Court before the opening thereof. And if the non-attendance of the juror shall appear to have been occasioned by any neglect of the summoning officer, the Court will inflict the same fine upon him which the juror would have been liable to, had the summons been regular.

XXII.

Special jurors will be taken from the list of grand jurors in the following manner:—Beginning with the gentleman whose name shall stand next on the list to the last of the grand jury, the sheriff will summon eighteen persons to attend the Court on the day appointed for trial: and whenever another special jury shall be ordered, the sheriff will, in like manner, summon eighteen more of the gentlemen on the grand jury list; taking care to begin, in this instance, with the name of the person who shall stand next on the list to the last of the gentlemen on the former special jury: and repeating the same operation upon every other application for a special jury until he shall have gone through the whole list thereof.—The names of the eighteen persons summoned to attend as special jurors, shall be put into a box; and the first twelve that shall be drawn from thence shall form the jury for the trial of the cause, unless

a legal objection shall be made to any of them; in which case the place of the party so objected to shall be supplied by another name to be drawn from the box. And if in consequence of challenge, or of the neglect to attend on the part of the jurors summoned, twelve fit and proper persons cannot be found, the Court will, at the prayer of either party, direct the sheriff to summon *instanter* a further number of persons from the list, sufficient to supply the deficiency.

XXIII.

Each of the twelve special jurors will be allowed one guinea, which will be paid to him at the time the verdict is delivered.

XXIV.

All persons possessing real property, to any amount, or occupying any house or tenement of the annual rent or value of twelve pounds, within three miles of the court-house, and the sons of all such persons, during their residence with their fathers, will be liable to serve as petty jurors, with the following exception:—

All persons under 21 and above 60 years of age.

Magistrates.

Officers belonging to, and persons practising in, the Courts.

Clergymen, the ministers of the gospel in all religious congregations, and schoolmasters.

Doctors of medicine and practising surgeons.

Persons whose names are enrolled on the lists of grand and special jurors.

XXV.

The sheriff will keep a list of all persons liable to serve as petty jurors, in which their names shall be inserted in alphabetical order.

XXVI.

Four days before the commencement of each term, the sheriff shall cause 18 of the persons whose names appear first on the jury list (commencing with the letter A) to be summoned to attend the Supreme Court on the first day of its sitting; and shall, in like manner, on each succeeding

day, summon 18 more, according to the order in which they stand on the list, to attend the Court on the fourth day from the date of the summons.

XXVII.

When the sheriff shall have gone through the whole list of jurors he will, of course, repeat the same operation; beginning from the top, and taking care that there shall always be 18 persons summoned, in the mode already prescribed, to attend the Court every day during term.

XXVIII.

The summons shall be printed, or written, and delivered personally to the juror, or to some member of his family, at his house, or usual place of residence.

XXIX.

The persons summoned shall be liable to attend the Court the whole day for which they are summoned.

XXX.

Before the trial of the first cause, the names of the 18 jurors, written upon separate slips of paper, shall be put into a box by the clerk of the Court, and the first twelve names drawn by him from thence shall, if there be no ground of challenge to any of them, form a jury for the trial of all causes which may be heard on that day: the jury being, however, in EACH case, sworn to well and truly try the issue joined between the parties, and a true verdict to give, according to the evidence.

XXXI.

If any of the 12 persons whose names shall first be drawn from the box shall be set aside on account of challenge, their places shall be supplied by some of the remaining six, whose names shall afterwards, in like manner, be drawn from the box; and if by these means the number of twelve competent jurors cannot be completed from the persons summoned, the Court will direct the sheriff to make up the jury from the persons then present in Court.

XXXII.

To render the attendance as easy as possible to the jurors, the Court will, as soon as a jury of twelve persons

shall have been formed, permit the rest of the persons who were summoned to return to their homes: and if upon a subsequent trial, any members of the original jury should be objected to on the ground of interest towards either of the contending parties, their places shall be supplied by a *tales de circumstantibus*.

XXXIII.

On the other hand, the Court will most rigidly enforce the attendance of jurors by imposing a fine of 30s. in every instance where the absence of the juror shall not be excused by illness, to be certified to the Court, before the hour when the party was bound to attend, under the hand of some respectable medical practitioner. The fine to be immediately levied by distress: and where sufficient goods cannot be found to satisfy the distress, the party against whom it issued shall be imprisoned, under an order of Court, for the space of 48 hours.

XXXIV.

If the non-attendance of the juror shall have been occasioned by any culpable neglect on the part of the summoning officer, the latter shall be subject to precisely the same fine and penalties as the former would have been liable to had he been duly summoned.

XXXV.

A charge of one guinea for the jury will be allowed in the bill of costs, in every case where the party shall not be excused, on the score of poverty, from paying fees to any officer of the Court.

XXXVI.

Barristers at law, or advocates, of Great Britain and Ireland, or admitted writers, attornies, or solicitors in any of the Courts at Westminster, Dublin, or Edinburgh, or admitted as proctors in any Ecclesiastical Court in England, will at all times be permitted to practise in their respective characters, upon producing certificates of their admission by the Courts to which they respectively belong.

XXXVII.

Persons who shall have served an apprenticeship of five

years to any barrister, advocate, proctor, attorney, or solicitor, of the Supreme Court, and who shall be found, upon examination by the judges, to be duly qualified to practise in any of those characters, will be permitted to do so.

XXXVIII.

The judges will attend in their chambers, on Monday the third of April next, for the purpose of examining such gentlemen as may be desirous of obtaining permission to practise in the Court; and certificates will be granted to those who shall appear to be competently qualified. The privilege of practising will, of course, be confined to the persons to whom these certificates shall be granted.

XXXIX.

The judges only feel it necessary, at present, to limit the fees to be taken for those duties of the attorney, which necessarily arise out of their regulations concerning the practice of the Court; and they therefore purpose to adopt the following scale:—

For suing out a writ, when the plaintiff proceeds by summons only.....	£0	5	0
For suing out a writ, and preparing an affidavit of debt.....	0	10	0
For filing a plea.....	0	5	0
For the conduct of a cause, either for the plaintiff or defendant, to final judgment and execution.....	1	1	0

XL.

The above stated fees are adapted to the conduct of a common cause under usual and ordinary circumstances—in other cases additional fees, commensurate to the service actually performed, will be allowed by the Court.

XLI.

The registrar of deeds will be authorized to charge the following fees:—

For the verification, indorsement, and registry of a deed, or will, under £100,—10*s*. And when the value exceeds £100, a per centage at the rate of one per cent, for the first £100, and 5*s*. in the £100 for all above that amount,

If the value of the property to be registered shall not appear with sufficient certainty upon the face of the instrument, it must be ascertained by the oath of the party tendering it for registration.

For the registry of every grant of land, under 100 acres	£0	5	0
And for grants, exceeding 100 acres	0	10	0
For every certificate, from the record	0	5	0
For an inspection of the record	0	1	0

XLII.

The expenses of prosecutors and witnesses in criminal cases will be allowed, agreeably to the provisions of the statute of 25th Geo. II: c. 36, 27th Geo. II. c. 3, and 18th Geo. III. c. 19, under an order of the Court; and an allowance will also be made in some cases, not within these statutes, where it shall be made to appear that a failure of justice would ensue if the costs of prosecution were to fall upon individuals wholly unable to defray the same.

XLIII.

Fuel, candles, stationary, and all other necessaries for the Court, will be provided by the Sheriff, from time to time, under the order of any of the judges thereof, and charged for by him in his public account.

XLIV.

Copies of the forms of writs and other parts of process are appended to these regulations.

XLV.

Rules respecting the conduct of business, and course of proceeding, in the Circuit Courts, will be framed and published in this Court in the course of the present month.

XLVI.

Supplemental regulations will also be added from time to time, as circumstances may require.

XLVII.

Among the persons who are to be exempted from serving on Juries, the Judges deem it necessary to include—The Officers of His Majesty's Customs, and all other

persons actually and *bonâ fide* employed in the Public Service.

XLVIII.

Where property is held in co-parcenary, joint-tenancy, or in common, any of the parties who wish for a partition thereof may sue out a writ, in the following form, against all those persons who have a joint-possession with them of such property, and refuse to make a fair partition of it:

George the Fourth by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, &c. &c.

To the Sheriff of Newfoundland, and his Deputy and Deputies, Greeting:

Command E F to appear in our Supreme Court of Newfoundland, on the day of to show wherefore he denieth partition to be made between him and A B and C D of [*here state the nature of the property, with such a description of it as would be necessary in a conveyance*] which he holds together with the said A B and C D, as they say. And you are commanded to make return of what you shall do upon this writ, at the time and place above-mentioned.

Witness, the Honourable St. John's, Newfoundland, the day of in the year of our Reign.

By Order of the Court,
Clerk Supreme Court.

XLIX.

This writ, like all others, may be sued out in vacation as well as in term; but there shall always be fifteen days, at least, between the teste and return of it; and if the tenant shall not then appear, the Court will require that proof shall be given of the due and regular service of the writ, by an affidavit to the following effect:

Between { A B and C D Demandants, and E F Tenant.

W X of and Y Z of Officers to the Sheriff of Newfoundland, severally make oath and say, that they the said Deponents did, on the day of

in the year of our Lord serve the above-named Tenant,* with the writ of partition in this cause, by delivering to and leaving with the said E F a copy of the said writ, and acquainting him with the contents thereof; and these deponents did on the said day of in the said year of our Lord deliver to and leave with R S and T V the OCCUPIERS of the Messuages, Lands, and Tenements in the said Writ mentioned, a true copy of the same Writ.

Sworn before me at this day of &c.

L.

If, upon this proof of the service of the Writ, the Court shall be satisfied that a reasonable and sufficient time has been allowed the Tenant to obey the command conveyed by it, the demandants will, on the tenant's then neglecting to appear, be permitted to enter an appearance for him; and the Court will proceed to examine the demandants' title, and the quantity or proportion of the property to which they are entitled: and accordingly as they shall find the demandants' right and proportion to be, they will for so much give judgment by DEFAULT, and award a Writ to make partition whereby such part and proportion may be set out severally; which Writ shall be expressed in these terms:

George the Fourth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, &c. &c.

To the Sheriff of Newfoundland, and his Deputy and Deputies, Greeting:

Whereas E F, late of was commanded to be in our Supreme Court of Newfoundland, to answer A B and C D of a plea whereupon the said A B and C D and the said E F held together and undivided [*state the property in the same manner as in the original writ*], and the said E F denied partition thereof to be made between them, and permitted not the same to be done, as they said; and the said E F not appearing in our said Court according to the command of our said writ, our said Court did proceed to

* *Note.* If the service was upon an agent, the affidavit must conform to that fact.

examine the title of the said A B and C D, whereupon it was considered in our said Court that partition should be made between them of the messuages, lands, and tenements aforesaid, with the appurtenances: therefore we command you that, taking with you 12 free and lawful men of the neighbourhood of aforesaid, by whom the truth of these matters may be better known, in your proper person you go to the messuages, lands, and tenements aforesaid, with the appurtenances, and there in the presence of the parties aforesaid, by you to be forewarned, if they shall be willing to be present, the same messuages, lands, and tenements aforesaid, with the appurtenances, by the oath of the said 12 free and lawful men, respect being had to the true value of the messuages, lands, and tenements aforesaid, with the appurtenances, you cause to be divided into equal parts, and part of these parts to be delivered and assigned to the said A B and C D, and the other part thereof to the said E F, to be holden to them and their heirs in severalty, so that neither the said A B and C D, and the said E F, may have more of the messuages, lands, and tenements aforesaid, with the appurtenances, than it belongs to them to have; and that the said A B and C D of their part to them belonging, and the said E F of his part thereof to him belonging, may severally apportion themselves, and that that partition by you so distinctly and openly made, you have here on under your seal, and the seals of those by whose oath you shall have made that partition; and have you then the names of those by whose oath you shall have made the same partition, and this writ.

Witness, the Honourable St. John's, Newfoundland, the day of in the year of our Reign.

By order of the Court,

Clerk Supreme Court.

LI.

When this writ shall have been executed, after eight days' notice given to the occupier or tenant or tenants of the premises, and returned, final judgment will be entered; and the same shall be good and conclude all persons what-

soever, after notice as aforesaid, whatever right or title they have, or may at any time claim to have, in any of the property mentioned in the said judgment and writ of partition; unless such tenant, or person concerned, or either of them, against whom, or their right and title, such judgment by default is given, shall, within the space of one year, or in case of infancy, coverture *non sanæ memoriæ*, or absence out of this island, within one year after his, her, or their return, or the determination of such inability, apply themselves to the Court by motion, and show a good and probable matter in bar of such partition; in which case the Court will set aside such judgment, and the cause shall proceed as if no such judgment had been given. But if the Court, upon hearing thereof, shall adjudge for the first demandant, then the said first judgment shall stand CONFIRMED, and shall be good against all persons whatsoever, except such other persons as shall be absent or disabled as aforesaid, and the person or persons so appealing shall be awarded thereupon to pay costs.

LII.

Should any of the persons described in the last article, and within the time or times as there stated, come into Court and, admitting the demandants' title, show an INEQUALITY in the partition, the Court will award a new partition to be made in presence of all parties concerned (if they will appear), notwithstanding the return and filing upon record of the former; and such second partition shall be good and firm for ever, against all persons not labouring under any of the inabilities herein previously mentioned.

LIII.

The preceding rules are applicable to the case of a judgment given by DEFAULT upon the neglect of the tenant to appear at the return of the writ. In the event of his appearing he may either CONFESS the action, or plead that the DEMANDANTS DO NOT HOLD TOGETHER WITH HIM. In the first case a writ of partition, like that described in rule 50, with such slight alterations as may be necessary to adapt it to the present purpose, will issue to the sheriff immediately; but the truth of the tenant's plea must be

tried, within a convenient time, by a jury; and if their verdict shall be against him upon that point, the demandant will then be entitled to a writ of partition.

LIV.

If the value of the property, of which the partition is desired, does not exceed £100 sterling, the price of the original writ will be 10s.: and where the value exceeds £100 the original writ must be paid for at the rate of 10s. for the first hundred, and 5s. for every other hundred pounds of the true value thereof. Thus, supposing the value of the property to be £1000, the price of the original writ will be £2 15s. 0d.

LV.

Each of the jurors by whom the partition shall be made will be entitled to half a guinea; and the fee of the Sheriff upon the execution of the writ of partition, will be the same as the price of the original writ.

LVI.

The whole of the costs will be borne by the tenant, if it shall appear to the Court that the suit necessarily grew out of his refusal to make partition upon equitable terms.

R. A. TUCKER.
J. W. MOLLOY.
A. W. DES BARRES.

GENERAL

RULES AND ORDERS

OF THE

Circuit Courts

OF

NEWFOUNDLAND.

I.

WHERE the debt, or other cause of action, shall not exceed the sum of ten pounds sterling, the plaintiff may commence his suit by a summons, which will command the defendant generally to pay to the plaintiff the sum demanded by him, or otherwise to appear in Court, on a given day, to show cause why he will not do it. The proceedings in all cases where the sum in dispute shall not exceed ten pounds will be altogether SUMMARY; and the Court will endeavour to regulate its judgments by those principles of natural equity which will afford the most substantial justice to the parties litigant.

II.

If the cause of action shall exceed ten pounds sterling, the plaintiff may, in like manner, commence his suit by a summons; and where he seeks to recover a debt, chattel, or liquidated damages, he may also obtain an attachment

against the goods, credits and effects of the defendant, and likewise against his person, if property to a sufficient amount cannot be found, upon making an affidavit that the debt, chattel, or liquidated damages, exceed in amount, or value, the sum of ten pounds sterling.

III.

The judges feel that it will be impossible, upon the first establishment of these Courts, to introduce into them any of the forms of pleading; and they, therefore, propose to adopt, for the present, the course of practice observed in the Supreme Court under its former constitution.

IV.

In the Central Circuit Courts, all criminal proceedings will be conducted by the Attorney General; and in each of the other Circuit Courts the presiding Judge will, from time to time, select the most competent person he can find to prosecute in the name of his Majesty.

V.

Commissions for the examination of witnesses will be granted by the Court, whenever a satisfactory ground shall be laid for such an indulgence; and the party applying for it will always be required to submit to such terms and conditions as to the Court shall seem just and reasonable.

VI.

The Sheriff will be entitled to the Fees specified in rules 8 and 9 of the General Rules and Orders of the Supreme Court.

VII.

Writs may at all times be sued out, returnable on any day during the sitting of the Court; and the parties will be expected to come prepared to pursue and defend the cause on the day of the return of the writ. If, however, either of the parties shall then be able to assign a reasonable ground for the postponement of the trial, he may obtain a rule to that effect, upon his submitting to such equitable terms and conditions as the Court may think it necessary to impose upon him.

VIII.

Judgment will be entered as soon as the trial is over; and, where the sum is not appealable, writs of execution may also be immediately sued out.

IX.

The same writs of execution will issue from the Circuit Courts as from the Supreme Court.

X.

No judgment by default will be given against a party, unless upon the most clear and satisfactory evidence of the due service of the writ upon him or his accredited agent. If the cause of action be a debt, a specific chattel, or liquidated damages, the plaintiff will be required, upon obtaining judgment by default, to make oath to the amount, or value, thereof; and this will entitle him to an absolute judgment for the amount sworn to, unless the defendant shall move within two days to have the judgment by default set aside. But where the amount of the damages shall be uncertain, the defendant shall be served with a fresh notice to attend the Court, for the purpose of having those damages ascertained by a jury; and on his neglect to obey this summons, judgment will be entered against him for the sum claimed by the plaintiff in his original writ.

XI.

The Sheriff will keep a list of persons qualified to serve as Grand Jurors, in which will be entered, in alphabetical order, the names of all the principal merchants and gentlemen residing within seven miles of each place where the Court shall sit; and two days before the sitting of the Court a written summons shall be sent to twenty-three of the persons mentioned in this list (beginning with the letter A, and proceeding regularly through the whole alphabet), commanding them to attend the Court at the opening thereof. The persons so summoned will form the Grand Jury for the whole sitting; and will be liable to attend the Court during the continuance thereof, at such times as the Judge shall direct.

XII.

A fine of from 30s. to 50s. will be imposed upon every

Grand Juror who shall neglect to attend the Court after having been regularly summoned to do so; unless his absence shall be excused by a certificate of sickness, under the hand of a respectable medical practitioner, which must be delivered to the clerk of the Court before the opening thereof; and if the non-attendance of the juror shall appear to have been occasioned by any neglect of the summoning officer, the Court will inflict the same fine upon him which the juror would have been liable to had the summons been regular.

XIII.

Special Jurors will be taken from the lists of Grand Jurors in the following manner:—Beginning with the gentleman whose name shall stand next on the list to the last of the Grand Jury, the sheriff will summon 18 persons to attend the Court on the day appointed for trial; and whenever another Special Jury shall be ordered, the sheriff will, in like manner, summon eighteen more of the gentlemen on the Grand Jury list; taking care to begin with, in this instance, the name of the person who shall stand next on the list to the last of the gentlemen on the former Special Jury; and repeating the same operation upon every other application for a Special Jury until he shall have gone through the whole list thereof. The names of the 18 persons so summoned to attend as Special Jurors, shall be put into a box, and the first 12 that shall be drawn from thence shall form the jury for the trial of the cause, unless a legal objection shall be made to any of them; in which case the place of the party so objected to shall be supplied by another name to be drawn from the box. And if, in consequence of challenge, or of neglect to attend on the part of the jurors summoned, 12 fit and proper persons cannot be found, the Court will, at the prayer of either party, direct the sheriff to summon, *instanter*, a further number of persons from the list, sufficient to supply the deficiency.

XIV.

Each of the 12 Special Jurors will be allowed one guinea, which will be paid to him at the time the verdict is delivered, by the party at whose instance such jury was ordered.

XV.

All persons possessing real property, to any amount, or occupying any house, or tenement, of the annual value of £4, within seven miles of the Court-house, and the sons of all such persons, during their residence with their fathers, will be liable to serve as Petty Jurors, with the following exceptions :—

All persons under 21 and above 60 years of age.

Magistrates.

Officers belonging to, and persons practising in, the Courts.

Clergymen, the Ministers of the Gospel in all religious congregations, and Schoolmasters.

Doctors of Medicine and Practising Surgeons.

Persons whose names are enrolled on the lists of Grand and Special Jurors.

Officers of His Majesty's Customs, and other persons holding employment under His Majesty.

XVI.

The sheriff, or his deputy, will keep lists, arranged in alphabetical order, of all persons liable, under the preceding regulations, to serve as Petty Jurors, and residing within seven miles of any place in which a Circuit Court may be holden.

XVII.

Two days before the opening of the Court at each place in the Circuit where it shall be liable to sit, the sheriff shall cause eighteen of the persons whose names appear first on the jury list (commencing with the letter A), to be summoned to attend the Court on the first day of its sitting; and shall, in like manner, on each succeeding day, summon eighteen more, according to the order in which they stand on the list, to attend the Court on the second day from the date of the summons.

XVIII.

When the sheriff shall have gone through the whole list of Jurors he will, of course, repeat the same operation; beginning from the top, and taking care that there shall always be 18 persons summoned, in the mode already prescribed, to attend the Court every day during its sitting.

XIX.

The summons shall be printed, or written, and delivered personally to the juror, or to some member of his family, at his house or usual place of residence.

XX.

The persons summoned shall be liable to attend the Court the whole day for which they are summoned.

XXI.

Before the trial of the first cause, the names of the 18 jurors, written upon separate slips of paper, shall be put into a box by the clerk of the Court, and the first twelve names drawn by him from thence shall, if there be no ground of challenge to any of them, form a jury for the trial of all causes which may be heard on that day; the jury being, however, in each case sworn to well and truly try the issue joined between the parties, and a true verdict to give, according to the evidence.

XXII.

If any of the 12 persons, whose names shall first be drawn from the box, shall be set aside on account of challenge, their places shall be supplied by some of the remaining six, whose names shall afterwards, in like manner, be drawn from the box; and if by these means the number of twelve competent jurors cannot be completed from the persons summoned, the Court will direct the sheriff to make up the jury from the persons then present in Court.

XXIII.

To render the attendance as easy as possible to the jurors, the Court will, as soon as a jury of twelve persons shall have been formed, permit the rest of the persons who were summoned to return to their homes; and if, upon a subsequent trial, any members of the original jury should be objected to on the ground of interest towards either of the contending parties, their places shall be supplied by a *tales de circumstantibus.*

XXIV.

On the other hand, the Court will most rigidly enforce the attendance of jurors, by imposing a fine of 15s. in every

instance where the absence of the juror shall not be excused by illness, to be certified to the Court, before the hour when the party was bound to attend, under the hand of some respectable medical practitioner. The fine to be immediately levied by distress; and where sufficient goods cannot be found to satisfy the distress, the party against whom it issued shall be imprisoned, under an order of Court, for the space of 48 hours.

XXV.

If the non-attendance of the juror shall have been occasioned by any culpable neglect on the part of the summoning officer, the latter shall be subject to precisely the same fine and penalties as the former would have been liable to had he been duly summoned.

XXVI.

A charge of one guinea for the jury will be allowed in the bill of costs, in every case where the party shall not be excused, on the score of poverty, from paying fees to any officer of the court.

XXVII.

In those places where a competent number of persons cannot be procured to form petty juries, the circuit judge will fix and appoint some certain day, or days, for the dispatch of criminal business; and TWO days before the day so fixed and appointed by him, the sheriff, or his proper officer, shall summon, by a written notice, FIVE magistrates, residing within SEVEN miles of the place where the Court shall be holden, to attend the Court on the day appointed, to act as assessors.

XXVIII.

A fine of from 50s. to £5 will be imposed upon every magistrate who shall neglect to appear after having been duly summoned; unless his non-attendance shall be excused by illness, or other sufficient cause, to be certified to the Court in such manner as it shall require.

XXIX.

The names of the magistrates in attendance shall be put into a box, written on separate slips of paper, and the

first three names drawn from thence shall form the assessors for the trial of the first cause, unless there shall be legal ground of objection to any of them; in which case the place of the person so objected to shall be supplied by another name to be drawn from the box.

XXX.

The magistrates, whose names were not drawn from the box at the trial of the first cause, shall form part of the assessors for the trial of the second cause; and one or two more, as the case may require, shall be added to them, taken by lot, from those magistrates who were engaged on the former trial.

XXXI.

If, in consequence of challenges, or the absence of magistrates, three disinterested persons cannot be procured in the place where the Court is then holden, the prisoner shall be conveyed to the next place in the circuit where the Court will sit, and shall be tried there.

XXXII.

For his attendance at Court, each magistrate who has been summoned will be entitled to 10s. 6d.; and he will also receive the same sum for each cause in which he may act as an assessor.

XXXIII.

Under a persuasion that no professional assistance can be obtained by the suitors in many parts of the island where the Circuit Courts will be holden, the Judges have endeavoured to construct the process and practice of these Courts in such a manner *that every person may be equal to the management of his own cause.* The practitioners in the Supreme Court will, however, at all times, be at liberty to practice in the Circuit Courts; and the parties who employ them may, upon application, have their bills taxed by the Court.

XXXIV.

The registrar of deeds will be authorized to charge the following fees:—

For the verification, endorsement, and registry of a deed or will under £100, 10s.

And when the value exceeds £100, a per centage at the rate of one per cent. for the first £100, and 5s. in the £100 for all above that amount.

If the value of the property to be registered shall not appear with sufficient certainty upon the face of the instrument, it must be ascertained by the oath of the party tendering it for registration.

For the registry of every grant of land, under 100 acres	£0 5 0
And for grants exceeding 100 acres	0 10 0
For every certificate from the record	0 5 0
For an inspection of the record	0 1 0

XXXV.

In FELONIES the reasonable expenses of prosecutors and witnesses, as settled by the Court, and the allowance to juries or assessors, will be paid by the sheriff, and charged in the account of the district in which the trial may be had; but in MISDEMEANOURS those charges will be borne by the prosecutor, unless the court shall deem it necesary to relieve him from the payment of costs: in which case they shall be paid by the sheriff, under the fiat of the presiding judge.

XXXVI.

Fuel, candles, stationary, and all other necessaries for the court, will be provided by the sheriff, from time to time, under the order of any of the Judges thereof, and charged by him in his public account.

XXXVII.

Until the Judges shall have acquired, by experience, a more perfect knowledge than they now possess of the actual state and condition of the other parts of the island, they will feel themselves prevented from attempting to introduce into the practice and pleadings of the circuit courts any of those refinements which require the aid of professional talent; convinced that no rules, or regulations, however specious or beautiful they may appear on paper, can ever prove salutary in practice, unless they are properly adapted to the circumstances of the society in which they are to be enforced. At the same time the Judges are

deeply impressed with a sense of the importance of method and order in all judicial proceedings; and it will, accordingly, be their constant and most earnest endeavour to engraft upon these rules every regulation tending to the advancement of method and order which the condition of the country will, in their opinion, admit of.

XXXVIII.

All the regulations prescribed by the general rules and orders of the SUPREME COURT OF NEWFOUNDLAND, respecting the qualifications of jurors, the mode of summoning thereof, and the fines and penalties to which they will become liable upon their neglect to attend, will be observed and enforced in the CIRCUIT COURT of the Central District when the sittings of that Court are holden in the town of Saint John; but, if its sittings shall at any time be holden in other parts of the district, the same course of proceedings upon those points which has been enjoined in regard to the other Circuit Courts, as better adapted to the circumstances and condition of the smaller towns and settlements of this island, will be strictly followed in it.

XXXIX.

The original writ which has been framed in the Supreme Court of Newfoundland for co-partners, joint-tenants, or tenants in common, to compel a partition of the property in which they may be interested in any of those characters, will also be used in the Circuit Courts: and ALL the rules which have been formed, touching the manner of proceeding in a suit for partition, in the former Court, will likewise be adhered to in these Courts; with this only difference—that where the whole value of the property, of which the division is desired by some of the part-owners thereof, shall not exceed the sum of one hundred pounds sterling, and the fact of the joint-possession of the demandant and tenant shall be clearly established, either by a plea of confession, or by a finding in favour of the demandant, upon the plea that they do not hold together, the Court will direct a partition of the property to be immediately made by the sheriff, or his proper officer, in such manner as may seem to be most suitable to the particular circumstances of the case, and best calculated to afford real jus-

tice to all the parties concerned. And a partition made in this particular manner, unless appealed from, shall be final, and effectually binding upon all sorts of persons.

XL.

In the case above described the parties will, probably, be generally relieved from the charge of six guineas for a jury, to divide the property; but the price of the original writ, and all the costs of the proceedings in a suit for partition, will be precisely the same in the Circuit Courts as in the Supreme Court of Newfoundland.

R. A. TUCKER.
J. W. MOLLOY.
A. W. DES BARRES.

N. B. The *first* and *thirty-sixth* rules of the Circuit Courts have not been confirmed by His Majesty.

Officers belonging to the Supreme and Circuit Courts.

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CHARLES DICKSON ARCHIBALD, Esq. (Barrister of Nova Scotia), *Chief Clerk of the Supreme Court.*
JOHN BROOM, Sen. Esq. *Clerk of the Arraigns.*
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