Vol. I.] [No. 4.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEW BRUNSWICK,

WITH A TABLE OF THE NAMES OF THE CASES.

BY JOHN C. ALLEN, ESQUIRE,
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CONTAINING THE CASES OF HILARY TERM IN THE TWELFTH YEAR OF

QUEEN VICTORIA, 1849.

SAINT JOHN, N. B.

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1849.

TABLE OF CASES CONTAINED IN THIS NUMBER.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEW BRUNSWICK,

IN

HILARY TERM,

IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

THE QUEEN *against* OULTON and OTHERS.

Wednesday, 7th February.

A party appearing to support a conviction, cannot object to the cause being proceeded with, because the Justice's return to the *certiorari* is not under seal.

THIS was a conviction for disorderly riding, under the act 6 *Wm.* 4, *c.* 25. The proceedings having been removed into this Court by *certiorari*, *A. L. Palmer*, in *Michaelmas* term last, obtained a rule *nisi* to quash the conviction on several grounds, which need not now be stated.

G. Botsford now shewed cause, and objected that the case could not be heard because the Justice's return to the *certiorari* was not under seal; and cited *Paley on Convic.* 296.

[CARTER, J. It is not in your mouth to make that objection.

PARKER, J. The conviction is clearly insufficient.]

*Per Curiam.** Rule absolute.

* CHIPMAN, C. J. was absent during the argument of this and the following case.

Ex parte LEONARD.

Where the presiding Justices of the Common Pleas, who were also Justices of the Peace, refused to try a cause, because from their position and knowledge as Justices of the Peace, they believed that the defendants, who were a committee of the Justices, had contracted with the plaintiff in their public capacity for the performance of public work, the Court granted a mandamus to the Justices of the Common Pleas generally, to try the cause.

IN *Michaelmas* term last, *Allen* obtained a rule *nisi* for a mandamus to the Justices of the Inferior Court of Common Pleas for the county of *Northumberland*, to compel them to

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try a cause pending and at issue in that Court in a suit of *Michael Leonard*, plaintiff, and *John T. Williston* and *William Letson*, defendants. The cause stood for trial at the Court in *July* last, but the Justices refused to try it or allow the jury to be sworn, because they said it was generally reported that the defendants were a committee of the Sessions, and the plaintiff had contracted with them as such; though the plaintiff's counsel stated to the Court that the action was not brought against the defendants in their public capacity, but upon their personal liability.

J. A. Street, Q. C., now shewed cause, and produced an affidavit of *Williston* and *Letson*, stating that they had been appointed a committee of the Sessions to provide relief for distressed emigrants, and as such committee and not in their individual characters contracted with *Leonard*; also an affidavit of the three Justices who had refused to try the cause, stating that they were also Justices of the Peace, and attended the meetings of the Sessions, and took part in the proceedings when the committee was appointed—that they had also attended a special Session at which the accounts of the committee were examined and allowed, and being so mixed up with the transaction as Justices of the Peace, felt that they could not conscienciously try the cause. The counsel contended that the Justices did right in refusing to try the cause, as they were interested, and it would be difficult to say to whom a mandamus should be directed. [CARTER, J. It will go to the Justices of the Common Pleas generally; I dare say they will get through with the trial some way or other. The Justices who refused to try the cause are not the only Justices of the Common Pleas for the county. STREET, J. It was the business of the Justices present in Court to see that this man had justice, and if they were so situated that they could not try his cause, it was their duty to see one of the Justices who could; and if there were none such, they should have applied to the Government to appoint one.]

Allen, in support of the rule, was not heard.

Per Curiam. Rule absolute.

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DOE on the demise of HUBBARD *against* POWER.

Friday, 9th February.

In ejectment against a mortgagor, by a purchaser of the equity of redemption under a warranty deed, the defendant is estopped from shewing that he had no title when he gave the deed; nor can he set up the title of the mortgagee in bar of the action

The registry of a mortgage is not notice of an incumbrance to subsequent purchasers.

EJECTMENT, tried before *Parker*, J., at the *Northumberland* circuit in *September* last. The following facts appeared: The defendant mortgaged the property in dispute to one *Fraser*, in fee, on the 30th *May*, 1818, the money to be paid on the 30th *December* following: in *June* 1824, the defendant conveyed the same land to *M'Laughlin* by deed, containing a covenant that he was seized of a good estate of inheritance in fee free from incumbrance, and that he had good right &c. to convey. *M'Laughlin's* interest was sold at sheriff's sale, and conveyed to *J. Cunard* in *November* 1828. On the 17th *May* 1832, *Cunard* agreed to sell the land to the defendant for £120, payable in four years: the defendant went into possession, but never paid any part of the purchase money, and on the 30th *April* 1846, *Cunard* conveyed to the lessor of the plaintiff and put him in possession of the land, which was then vacant, and had been so for several years previous; soon after this the defendant took possession, and said that he was holding under *Fraser*, who had authorized him to go there. It did not appear that the mortgage money had been fully paid, though the defendant had told *Cunard* that he did not owe *Fraser* anything. The mortgage had never been discharged on the records, and it was proved that recently and three or four years before the trial, *Fraser* had told the defendant to keep possession of the property. The learned Judge reserved the question whether or no the defendant was estopped from setting up an outstanding title in *Fraser*, and a verdict was taken for the defendant by consent, with leave to move to enter a verdict for the plaintiff, in case the opinion of the Court was in favor of the estoppel; accordingly in *Michaelmas* term last,

Allen obtained a rule *nisi* on the following grounds: 1st That the defendant was estopped by his warranty to *M'Laughlin*, from setting up title in *Fraser*. 3 *Sugd. Vend.* (Am. ed.) 430, *Somers* v. *Skinner* (*a*), *Fairbanks* v. *Williamson* (*b*)

(*a*) 3 *Pick.* 60. (*b*) 7 *Greenl.* 96.

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2d. That the defendant was estopped by his agreement with *Cunard* from disputing his title. 3d. That the defendant by his admission to *Cunard* was estopped from saying that *Fraser's* mortgage was not paid. *Pickard* v. *Sears (a)*. 4th. That *Fraser's* title was barred by the act 21 *Jac.* 1, *c.* 16, or by 6 *Wm.* 4, *c.* 43, and was not a subsisting title when the lessor of the plaintiff purchased. *Bull. N. P.* 110, 1 *Pow. Mort.* (Am. ed.) 401, 2 *Stark. Ev.* 427, *Jackson* v. *Hudson (b)*, *Collins* v. *Torrey (c)*. 5th. That though *Fraser's* title might not be barred, the defendant not claiming by any writing, was not such an assignee under the act 2 *Wm.* 4, *c.* 23, *s.* 4 *(d)*, as could set up *Fraser's* title.

J. A. Street, Q. C., now shewed cause. The defendant had *Fraser's* permission to keep possession before the lessor of the plaintiff purchased. *Fraser* had the legal title, and none of the subsequent conveyances are inconsistent with it. [STREET, J. The defendant professed to convey the property to *M'Laughlin* free from incumbrances: that is inconsistent with the mortgage.] It only operated as a conveyance of the equity of redemption; and the mortgage being recorded, the purchaser took the property with notice of it. In the *United States* the recording of a mortgage is held to be notice to subsequent purchasers. *Tilling. Adams' Eject.* 48, note. [PARKER, J. In *Bagshaw* v. *Fraser*, in Chancery, it was held that the registry was not of itself notice.] As the defendant could not set up a title adverse to the mortgagee, neither can any one claiming under him. The defendant proved that he came in under and held by *Fraser's* title. [*Allen*, for the plaintiff, referred to *Doe* v. *Vickers (e)*.] He does not attempt to repudiate his own deed, but says that he is in by permission of *Fraser*, and as his tenant. [PARKER, J. He cannot become tenant to

(*a*) 6 *A. & E.* 469. (*b*) 3 *Johns.* 375. (*c*) 7 *Johns.* 278.

(*d*) Be it enacted, that hereafter in any action of ejectment brought by a mortgagor or mortgagors, his, her or their heirs, executors, administrators or assigns, to recover possession of any lands, tenements or hereditaments, under mortgage, no defendant other than the mortgagee or mortgagees, his, her or their heirs, executors, administrators or assigns, shall be permitted to set up the mortgage to bar the right of recovery, or to defeat the title of such mortgagor or mortgagors, his, her or their heirs, executors, administrators or assigns.

(*e*) 1 *A. & E.* 782.

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Fraser after his deed to *M'Laughlin:* if *Fraser* had defended as landlord the case might have been different.]

CHIPMAN, C. J. The case is too clear for argument. The defendant is estopped by his own act.

PARKER, J. In *Lindsey* v. *Lindsey (a)* it is said, that "in ejectment brought by a second mortgagee against the "mortgagor, he shall not give in evidence the title of the "first mortgagee in bar of the second, because he is barred "to aver contrary to his own act that he had nothing in "the land when he took upon him to convey by the second "mortgage."

CARTER, J. The authority from *Buller's Nisi Prius* is quite decisive. If the law were otherwise it would lead to an immense deal of fraud; and if the defendant was allowed to set up the mortgage, it would defeat the rule of estoppel altogether.

STREET, J. I am of the same opinion. This is a fraudulent attempt of the defendant to defeat his own act.

Rule absolute.

(a) Bull. N. P. 110.

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A mandamus lies to enforce a contract entered into by a person with public officers for the performance of public work, on which he has the legal right to the money, but no legal remedy by action; though a third party was secretly interested with him in the performance of the work, and claims the money under an arbitration to which they had submitted their disputes.

IN *Trinity* term last, *G. Botsford* obtained a rule *nisi* for a mandamus to be directed to the Justices of the Peace for the county of *York*, requiring them to pay to *Andrew Blair*, as the contractor with a committee of the Justices, for building a gaol in the county of *York*, any sum of money that might be in their hands for that purpose, or to make an assessment upon the county to collect such sum as was necessary to pay off the balance due; according to the power given by the Acts of Assembly 5 *Vict. c.* 5, and 10 *Vict. c.* 17. It appeared that on the 14th *March*, 1840, a contract for building a gaol had been entered into between *Blair* of the one part, and *J. Robinson* and five others, a committee appointed for that purpose by the General Sessions of the county, under the Act of Assembly 7 *Wm.* 4, *c.* 28, of the other part *(a)*.

(a) See the contract &c. in *Blair* v. *Robinson*, 3 Kerr 487.

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By a report of a committee of the Justices made in *January* 1847, it appeared that a balance of £1370 was due the contractor in *July* 1842, that this sum was reduced by payments to about £500 on the 1st *January*, 1847, to meet which the county treasurer had in hand at the disposal of the Justices £281. *Blair's* affidavit stated that a balance of upwards of £900 was due him on the contract, and that early in the year 1844 some difficulty having arisen about the payment of the balance then due, he notified the committee not to pay any part of it to any person without his orders.

D. S. Kerr shewed cause in *Michaelmas* term last, and produced affidavits setting forth that at the time *Blair* entered into the contract he was in insolvent circumstances, and unable, without assistance, to carry on the work; that it was agreed that *James Taylor* (one of the committee) and *John F. Taylor* (his partner) should assist *Blair*, and that the profits should be divided between them, and that in consequence of this agreement, *John F. Taylor* together with *Thomas Stewart* became bound as sureties to the Justices, in a bond with *Blair*, for the performance of the contract. That the *Taylors* furnished the principal part of the means for carrying on the work, and on making up the accounts after the completion of it, found that they had paid *Blair* upwards of £90 more than his share, but he having disputed the accounts, the matters in difference were referred to arbitration. That the arbitrator awarded that *Taylors* should receive from the county the balance due for erecting the gaol, and should pay *Blair* a certain sum of money, and take up a note for £95 on which he was liable; that they had paid the note, and were ready to perform the other parts of the award, but *Blair* had refused to abide by it. It further appeared that in *January* 1844, *Blair* had given an authority to *John F. Taylor* to receive from the committee the balance due on the contract; and the reason why the Justices had not paid the balance, was the countermand of that authority and the subsequent dispute between *Blair* and the *Taylors* in the settlement of their accounts.

A mandamus will not be granted when the party applying has

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has another legal remedy. *Bac. Ab.* "*Mandamus*" (C) 2. *Blair* might have had a legal remedy if he had made his contract properly—he might have made such a contract under the act as he could have sued the Justices upon, for the act says they are "to consent and agree." Now *Blair* was clearly bound by that contract, and could have been sued upon it; and the rule is, that unless a contract binds both parties, it binds neither. [PARKER, J. The act authorises the Justices to make a contract, but not to make themselves personally liable. They have made such a contract as the act contemplates, and what legal remedy has *Blair* against them? In Government contracts one party has a legal remedy, and the other has not.] If a mandamus lies here, it may be obtained in every case where a party fails in making out his contract. Secondly. *Blair* has no legal right to the money, because the *Taylors* are the parties really interested. [CARTER, J. Suppose the application is refused, how can *Taylor* compel the Justices to pay him? PARKER, J. The Justices have made all the difficulty by mixing themselves up with *Taylor*.] *Blair* is estopped by the award and by *Taylor's* paying the £95 note, from obtaining the balance: their condition was thereby altered, and *Blair* cannot open the accounts again. If he is entitled to anything he has a sufficient remedy on the award, and therefore no remedy by mandamus. It is not a writ of right, but the application is to the discretion of the Court. *Bac. Ab.* "*Mandamus*."

The *Attorney General* in support of the rule. It does not appear that the Justices resist this application: on the contrary, they admit that they have the money to pay to whoever has the right to it. It is also admitted that *Blair* is the only contracting party with the county; he therefore is entitled to the money—he has the legal right to it, and the only question is, whether this is the proper course to get it. The Court has already determined that he has no legal remedy on the contract, *Blair* v. *Robinson* (*a*): this then seems to be the very case where the writ ought to be granted. In *Bac. Ab.* "*Mandamus*" (*b*), it is said that "It was introduced "to prevent disorder from a failure of justice; and there-

(*a*) 3 *Kerr* 487. (*b*) 5 *Bac.* 256.

"fore

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" fore it ought to be used on all occasions where the law has " established no specific remedy, and where in justice and " good government there ought to be one." The award, even if good, which it is not, has nothing to do with this application; for the Court will not step aside to investigate the disputed accounts between *Blair* and the *Taylors*. The facts admitted by the report of the Sessions are, that there is a balance in the hands of the Justices due the contractor, and that *Blair* is the contractor: nothing more is necessary.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. We think that the claim of *Blair*, the applicant in this case, must be limited to the amount of £89 14*s.* 7*d.*, the balance due on the contract between him and the Justices, besides interest, and that a mandamus should go accordingly. The two contracting parties are *Blair* and the Justices. The work being done under the contract, *Blair* is clearly entitled to receive the stipulated payment. The *Taylors* have not made themselves liable as co-contractors to the Justices. The liability assumed by *John F. Taylor* jointly with *Thomas Stewart* as *Blair's* security, is a different thing, and cannot be insisted on—no damages having been incurred thereby. That surety bond treats *Blair* as the sole contractor for the building. *Blair* then and *Blair* alone has the legal right to receive the money remaining due on the contract, but he is unable to recover it in an action on the contract against the Justices, because it appears that they contracted only in their public capacity and cannot be made liable in their public capacity; but it furthermore appears that they contracted for the benefit of the county, under a law which enabled and required them to levy by assessment on the county the money stipulated to be paid for the work done under the provisions of such law, and also that they have actually made such assessment and levied such money, which they now hold in their power. Here is money then which *Blair* is *prima facie* entitled to have, but has no legal remedy to obtain except by a mandamus from this Court. It is just such a case as, by all the authorities, calls for the interposition of this Court by mandamus, unless the Justices can shew some good

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ground for not paying it. It is not denied that if the action could have been maintained against the Justices, *Blair* alone was the person to bring it, and *Blair* could have recovered in it notwithstanding any objection made by the *Taylors*. The Justices have not made themselves liable in any way to pay the *Taylors*, and it is perfectly optional in them to set up or not, any objection to the payment to *Blair*. Now, independently altogether of the situation in which Mr. *James Taylor* stands, as one of the Justices who contract with *Blair*, namely, one of the parties of the second part, and contracting in the discharge of a public duty as a Justice, which exempts him from private liability; it seems to us that the transaction between *Blair* and the *Taylors* should be left as a matter for themselves to settle, with which the Justices ought not to interfere. But the strong objection to any interference is upon principle. *James Taylor* after taking upon himself the duty of one of the committee of Justices to make the contract on behalf of the public, which required him to look after the public interests, solely as one of the parties of the second part, ought not to have entered into an agreement with *Blair*, whereby he was to become virtually interested on the other side of the contract. Such an arrangement ought not to have been allowed by the Justices, nor ought it to receive the sanction of this Court, which it would do if that is made the ground for refusing to *Blair* what he is otherwise clearly entitled to. We therefore do not think it proper to go at all into the merits of the arbitration, or the transaction between *Blair* and the *Taylors*, further than actual payments are concerned. Any payments actually made by the Justices to the *Taylors* may be considered as made to them as *Blair's* agents; and this is not disputed. It may be all true that the county has derived benefit from the circumstance of the *Taylors* aiding *Blair* in the performance of the contract, and that *Blair* may be in insolvent circumstances; but these facts cannot affect the legal rights, which we are dealing with here. We stated in the outset our intention to grant a mandamus for the sum of £89 14*s*. 7*d*. besides interest. On the point of interest we have to remark, that such interest should be paid to *Blair* as

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has been levied on the county, or received by the Justices from the bank where the money is deposited. If any part of the interest assessed and remaining unpaid, is due upon monies paid to the *Taylors* but not paid in due time, they may be entitled to that. The calculation of interest will probably be a difficult one, and we rather hope that after this expression of our opinion as to the legal rights of the parties, they may be induced to come to some arrangement between themselves. The rule for a mandamus may be drawn up according to the tenor of this judgment.

THE RECTOR, CHURCH WARDENS and VESTRY of SAINT PAUL'S CHURCH, in the Parish of Hampton, *against* TITUS and OTHERS.

A grant of land to the Rector, church wardens and vestry of a parish "for a glebe," sufficiently signifies that it is to be for the use and benefit of the rector under the Act of Assembly 56 *Geo.* 3. c. 11.

Under the particular provisions of that act, the rector has a legal estate of freehold during his incumbency, in glebe lands granted to the church corporation, and may make leases thereof, binding upon himself, without the assent of the corporation: per *Chipman*, C. J., *Carter*, J. and *Parker*, J., (*Street*, J. *dissentiente.*)

Quære—whether a lease by the Rector and church corporation for a term not exceeding twenty one years, would be binding on a succeeding rector? Held, per *Street*, J., that it would. *Semble*, per *Carter*, J., that the lease should be confirmed by the ordinary.

The property in trees growing on a glebe is in the church corporation as the owners of the inheritance, and they may maintain trover for them if wrongfully severed, against a tenant of the rector or any person acting under the tenant's authority.

If a tenant cuts down trees for the purpose of clearing wilderness land, they belong to him, and the cutting is not waste; but the *onus* lies on him to shew that they were cut for that purpose: and, per *Chipman*, C. J., *Carter*, J. and *Parker*, J., they should be cut with a present intention of clearing the land. But, per *Street*, J., if the tenant intended to clear the land at any time during the term, it was not waste.

Acts which would have been waste if done by the tenant, cannot be justified by any person acting under his authority.

THIS was an action on the case, for an injury to the plaintiffs' reversion. The first count of the declaration stated, that whereas the plaintiffs before and at the time of committing the grievances hereinafter mentioned, to wit, on the 1st *November*, 1844, were and still are seized in their demesne as of fee, of and in two several tracts of land situated in the parish of *Hampton* in *King's* county, bounded as follows. [The lands were then described.] Which said several tracts or parcels of land with the appurtenances, during all the time aforesaid have been and still are in the tenure and occupation of divers tenants of the rector of *Saint*

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Paul's church in the parish of *Hampton*, at a certain yearly rent, payable by the said tenants respectively to the said rector or his successors, the reversion of the said premises then and still belonging to the plaintiffs. Yet the defendants well knowing the premises, but contriving &c. to injure and prejudice the plaintiffs in their reversionary estate and interest in the premises, whilst the plaintiffs were so seized thereof, and while the same were so in the tenure and occupation of the said tenants, to wit, on &c. wrongfully and unjustly, without the license and against the will of the plaintiffs, cut down, prostrated and destroyed divers trees, to wit, five hundred spruce trees &c. of great value &c., then growing upon the said several tenements and premises; by reason whereof the said tenements became and were very much injured and damnified, and the reversionary estate and interest of the plaintiffs therein very much lessened and diminished in value, to wit, at the parish aforesaid &c. There were three other counts varying from the first, only in naming the tenants in possession; and there was also a count in trover. Plea, not guilty.

At the trial before *Street*, J., at the *Kingston* circuit in *July* 1846, it appeared that the land described in the declaration had been granted by the Crown in 1834, in the following words, "to the Rector, church wardens and vestry of *Saint Paul's* "church in the parish of *Hampton*, and their successors for "ever, for a glebe;" habendum, "to the said rector, church "wardens and vestry, and their successors for ever." The land at that time was all wilderness, and shortly after, it was laid out in lots of one hundred acres each, but by whose directions did not appear. In *April* 1844, the Reverend *William Walker*, the rector of the parish of *Hampton*, granted leases in his own name as rector, of two of these one hundred acre lots, to two persons named *James Kinney* and *Thomas Benson*, for the term of twenty one years each, from the 1st *May*, 1843, at an annual rent of one farthing for the first term of seven years, one pound for the second term of seven years, and two pounds for the third term of seven years; and that the tenant should deliver up the premises to the Rev. *William Walker* or his successors, with all the improvements. The lots

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lots were at this time in wilderness, and there were no provisions in the leases shewing what improvements should be made, or limiting the tenants in the nature and quantity of wood or timber they were to cut; but there was an understanding at the time the leases were given, that the tenants were to have all the wood and timber cut off any part of the land that they cleared up for cultivation during the term. It did not appear that the leases were given by the authority of the plaintiffs, or that they had any knowledge of them at the time, except that Mr. *Smith*, one of the church wardens, was with the rector when he went to put one of the tenants in possession; but in what capacity Mr. *Smith* attended was not shewn. The defendants were the owners of a saw mill in the neighbourhood of the lots, and in 1845 purchased from the tenants a quantity of trees standing on the lots, for saw logs, which they cut down and carried to their mills. The defendants were not limited to cut in any particular parts of the lots, and therefore cut promiscuously over the whole, wherever the trees were best adapted to their purpose; their operations being described by the witnesses as apparently for "logging purposes," no preparations having been made to clear the land over which they had cut; and it was the opinion of the witnesses that land so chopped and not cleared up immediately, was not only depreciated in value by the loss of the timber, but rendered more difficult to clear at a future period. The tenants at this time had only cleared up about two or three acres of their respective lots. The learned Judge directed the jury, that in case of a lease of wilderness land, the tenant, under the implied intention of the parties, would have a right to cut down the trees to clear the land, and the property in the timber and logs arising from the trees so cut would be in the tenant. That it was an important question to determine at what time during the term, the tenants were to clear up the land from which they might cut the wood. If the trees were taken off as a preliminary step to clearing the land—and that was a question of intention for them to determine, as the lease made no provision as to the time of doing it, and under the verbal agreement it might therefore be done at any time before the end of the

the term—their verdict should be for the defendants. But if the timber was taken off merely to make a profit by it, and without any intention of clearing the land and bringing it into a state fit for cultivation, and with the intention of leaving it in an unimproved state at the end of the lease, and if they considered the cutting was going beyond any right that a fair and reasonable construction of the lease would give, and there was no probable ground for supposing the tenants intended to clear up the land, then that would be an injury to the reversion, for which an action would lie, and they should find for the plaintiffs, leaving the Court to determine whether the action was maintainable against the defendants who acted under the authority of the tenants. The jury found a verdict for the defendants. *Wright*, in *Michaelmas* term 1846, obtained a rule *nisi* for a new trial on the ground of misdirection, in telling the jury—1st. That the tenants had a right to sell the trees, provided that they intended to clear the land at any time during the term; 2d. That trover would not lie; and also, that the verdict was against the weight of evidence. *Bac. Abr.* "*Waste*" (F), *Hob.* 293, *Liford's* case *(a)*, *Jesser* v. *Gifford (b)*, *Shadwell* v. *Hutchinson (c)*, were cited. In *Trinity* term 1847,

G. D. Street shewed cause, and *Wright* was heard in support of the rule, before *Chipman*, C. J., *Carter*, J., and *Street*, J.; and in *Michaelmas* term following,

The Court directed a second argument on the following points: 1st. What is the nature of the estate vested in the church corporation by the terms of their grant, and whether by the lease in question given by the rector alone, the corporation were divested of their immediate estate under the grant—that is, whether such a lease given by the rector in his own name is binding on the corporation. 2d. If the grant be construed to enure to the benefit of the rector, so as to give him the right of granting leases in his own name, then whether the corporation has any such reversionary interest as to enable that body to maintain an action on the case for an injury to the reversion in the nature of waste. 3d. Whether the injury complained of, was in fact such an injury to

(a) 11 *Co.* 48. *(b)* 4 *Burr.* 2141. *(c)* *M.* & *M.* 350.

the

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the reversion of land in a wilderness state let on the lease in question, as to support an action on the case by the reversioner. 4th. Can an action upon the case in the nature of waste, be maintainable against a stranger to the tenancy where there is a tenant for years in possession, in any case? 5th. If such an action can be maintained against a stranger who is a trespasser on the tenant, can it also be maintained where the stranger enters and cuts the trees by permission of the tenant, under an agreement with the tenant for the purchase of the standing trees, as in this case? 6th. Where there is no specific grant or reservation of the trees in a lease of wilderness land, may they be cut and carried away by the tenant to any and what extent, and with what intent, without committing waste?

The case was again argued in *Trinity* term last, before *Chipman*, C. J., *Parker*, J., and *Street*, J., by

Wright for the plaintiffs. In considering the first question proposed, it will be necessary to advert to the nature and tenure of glebe lands in *England*. It appears clear from the language of Lord *Coke (a)*, that the glebe is held by the rector or parson as a species of freehold—he is seized in *jure ecclesiæ*, in order that in his person the church may sue for and defend her rights. He might even maintain an action of waste, not in his own right, but upon his reputed inheritance; or as it is said in *Co. Lit.* 341 a, "*ex hæredationem ecclesiæ*." It was long a disputed point whether the fee simple was in abeyance, or in the patron and ordinary, and Lord *Coke* assigns reasons why "of necessity the fee simple "is in abeyance." The same is said in 2 *Burn's Eccl. Law* (9th ed.) 298, though after induction, he says, the freehold of the glebe is in the parson. Then how is the law of *England* on this subject affected by the several Acts of Assembly in this Province? The 56 *Geo.* 3, *c.* 11, *s.* 3, declares that all lands granted to the rectors, church wardens and vestries for the use and benefit of the rectors or ministers, "shall be "held subject to the sole management and direction of such "rectors or ministers, and shall be used, occupied and en- "joyed by them severally and respectively, for the best

(*a*) *Co. Lit.* 300 b, 341 a.

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" benefit and advantage of themselves and their successors, " in like manner as glebe lands belonging to any rectory or " parsonage in *England*, and there usually held, occupied and " enjoyed." The word " occupy" has been held to confer a freehold. *Rex* v. *Inhabitants of Eatington* (*a*). The act of 9 *Vict. c.* 18, admits by implication the right of a rector to cut timber on his glebe, because it prohibits clergymen who have only letters of institution, from cutting timber on lands constituting the glebe of the church of which they have only spiritual charge ; and taken in connexion with the act of 56 *Geo.* 3 *c.* 11, explains what the Legislature meant by the terms " management and direction" used in that act. As rectors in *England* may grant leases for twenty one years, so it must be held that these acts give power to rectors in this Province to grant leases of their glebes without the intervention of the corporation holding the fee, at least for a term not exceeding twenty one years ; otherwise the reference to the usage in *England* would be nugatory, and it would be difficult to assign any definite meaning to the words " manage- " ment and direction." There is nothing constrained in this view of the law, for even without the aid of legislative enactments, a *cestui que trust* can bind his trustee, at least in equity ; and it is said in *Parker* v. *Wyndham*, cited in *Sand. on Uses* 222, that every disposition of a *cestui que trust* is binding on his trustee, in equity and even at law. In *Vallance* v. *Savage* (*b*), it was held that a lease made by a *cestui que trust*, if known and not repudiated by the trustee, must be considered the act of the trustee. The correct view probably is, that by virtue of the grant, the rector, church wardens and vestry have the fee simple with the powers and privileges incident to such estates, while by force of the statutes the rector has—not the freehold or any distinct interest in the glebe, for nothing less than an estate for life will constitute a freehold, and here the act limits the use of the glebe to the rector for the time being—but a naked right to use and manage it for the benefit of himself and his successors, and that his acts in the exercise of such right must by force of the statute be held binding upon the corporation ;

(*a*) 4 *T. R.* 177. (*b*) 7 *Bing.* 595.

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in other words, that his acts done in accordance with the provisions of the statute must be held to be the acts of the corporation. Then if the rector is clothed by law with power to manage and direct the glebe lands, is there any thing inconsistent with such power, that he should grant leases for terms not exceeding those which rectors in *England* may grant? Could he otherwise manage and direct them advantageously? Or if he could, has not the Legislature left it to his discretion how to manage and direct them? The act imposes no restriction in this respect; it does not say that the corporation shall be consulted in the matter. Perhaps in point of form it would be more correct that the leases should be granted by the corporation, but that after all is but a question of form—for how could the corporation dispute leases made by the rector? Having accepted the land subject to the trust, they could not repudiate it; and the very fact of bringing this action is a confirmation of the leases. As between the corporation and the tenant, the leases would clearly be binding. The law having clothed the rector with power to manage and direct the glebe lands, has virtually conceded to him the right to grant leases, though the freehold remains in the corporation; and if so, until the expiration of the term, the corporation were by his acts and by operation of law divested of their immediate estate, retaining only the reversionary interest. There is nothing in the grant under which the plaintiffs claim to take this case out of the general rule: it cannot be contended that it does not convey the fee simple, for that may be done without any habendum at all; and where an instrument in the granting part contains words of limitation, it is unnecessary to repeat them in the habendum. 3 *Prest. Abs.* 39. 43. The words "for a glebe" are sufficient to create the trust, for no particular form or expression is necessary for that purpose. 3 *Prest. Abs.* 222. Secondly It seems to follow as a necessary consequence that if the corporation were divested only of the immediate estate, they would with their reversionary interest retain whatever is incident to a reversion. The act 29 *Geo.* 3, *c.* 1, incorporating the rectors, church wardens and vestries in the several parishes in this Province,

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Province, gives them power to sue, and clothes them with the usual powers of corporations. If they cannot maintain an action for an injury to the reversion, who can? Assuming that the injury here was of a permanent nature, affecting not merely the present interest of the rector, what remedy does the law afford, but an action on the case? In *Comyn's Land. and Ten.* (2d ed.) 575, it is said that such is the proper form of action by a landlord against a stranger for an injury to the reversion. It is true there is a dictum of Lord *Coke*, that for waste committed by a stranger, the reversioner has no remedy but against the tenant: but he must have meant a remedy by action of waste, because there are numerous authorities where actions on the case have been maintained against strangers. *Bedingfield* v. *Onslow* (*a*), *Pomfret* v. *Ricroft* (*b*). So in *Com. Dig.* "*Action on the case for Nuisance*" (B), it is said that "an action on the case lies "for a nuisance to the freehold, though the plaintiff might "have an assize, or *quod permittat*." *Vowles* v. *Miller* (*c*) is also in point: that was an action against a stranger, the declaration alleging the premises to be in possession of the plaintiff's tenant. *Doddington* v. *Hudson* (*d*), was also an action by a reversioner against a stranger for an injury done to the inheritance while in possession of a tenant. The third question is one rather of fact than of law. I admit that it was a necessary part of the plaintiffs' case to shew that the injury was of a permanent nature, and it cannot be denied that the plaintiffs made out a very strong *prima facie* case of permanent injury, which was not answered. The injury was of a nature which could not be remedied before the end of the term, even if it could afterwards; but it is no answer to an action of this nature that the injury might be remedied before the end of the term, for the reversioner has a present interest to sue, and is not bound to wait until the end of the term. *Jesser* v. *Gifford* (*e*). *Shadwell* v. *Hutchinson* (*f*). The reason given in the latter case, by Lord *Tenterden*, is very satisfactory: that if the reversioner was prevented from bringing an action during the existence of the lease, the

(*a*) 3 *Lev.* 209.
(*b*) 1 *Saund.* 322 b.
(*c*) 3 *Taunt.* 137.
(*d*) 1 *Bing.* 257.
(*e*) 4 *Burr.* 2141.
(*f*) *M. & M.* 350.

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evidence to the facts might be lost. If the evidence here had shewn an intention to clear the land—as if the tenant had cut down the trees and burned them—it is admitted that the action could not be maintained; but the whole evidence shewed that the trees were cut for milling purposes, and not with any intention of following it up by clearing the land. The onus of proving it to be a clearing operation and not a logging operation, lay on the defendants. Fourthly. The cases referred to on the second point, clearly establish that an action on the case in the nature of waste is maintainable by the reversioner against a stranger, while there is a tenant in possession. In addition to which it is said in 1 *Chit. Pl.* (4th ed.) 132, that "case lies by a reversioner "against his tenant, or a stranger, for waste by cutting down "trees not excepted in the lease, or for any other act injurious to the reversion." Fifthly. There cannot be a distinction between cases where the injury is committed by a stranger by way of trespass on the tenant, and cases where it is done by permission of the tenant. None of the cases of actions against strangers support such a distinction, nor do they put the right of action on the ground of the trespass done to the tenant, but solely on the ground of the injury to the reversioner. If the right of action depended on the trespass done to the tenant, then the permission or license of the tenant might be a bar to the action; but even then it should be specially pleaded. But the permission of the tenant was no answer to the action, for in *Lord Egremont* v. *Pulman* (*a*), *Tindal*, C. J., said "The reversioner is sueing for a permanent injury to his estate, and I think he cannot be met "with the answer that the injury arose out of the wrongful "act of the tenant." In *Bedingfield* v. *Onslow* (*b*), the defendant pleaded to an action by the reversioner, that the tenant had accepted twenty shillings in satisfaction of the trespass; but the Court held it was no plea, for the reversioner and the tenant had each a right of action. It would be absurd to say that the tenant could do by another, what he could not legally do himself, and that though he could acquire no title to the trees, he could convey a title to a third party.

(*a*) *M. & M.* 404.

(*b*) 3 *Lev.* 209.

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party. His act of selling the standing trees was a fraud upon the plaintiffs; then how could such an act be a protection to the buyer, who was a *particeps criminis?* Sixthly. The general rule is, that in the absence of any express agreement or reservation of trees in a lease, the tenant has no right to cut them except for the ordinary and necessary purposes of the farm, or as it is expressed in the old books, for house-bote, fire-bote, &c.; for if the lessee cuts trees and sells them, though with the money he repairs the house, yet it is waste, *Bac. Ab.* "*Waste*" (F); because the subsequent repairing does not purge the waste committed by the sale (*a*). *Bac. Ab.* "*Waste*" (C), 2 *Hob.* 296. The tenant is bound to treat the property in such a manner that no injury is done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee. *Comyn's Land. and Ten.* 188. The principle upon which the tenant may cut timber for repairing houses on the land demised, is that the reversioner is benefited by such repairs. The same rule may be applied with equal reason to leases of wilderness land, because a portion of the trees must necessarily be cut down and destroyed in order to clear the land; and so far as the tenant proceeds to clear up the land over which he cuts, he benefits the landlord: but if he cuts down trees, not for agricultural purposes, but to make gain to himself by the sale of them, he thereby injures the landlord in the proportion that he himself profits by the sale; and it never could have been the intention of the parties that the tenant should make profit out of the land by selling the timber. It is not disputed, that according to the law of *England* this would have been waste, nor on the other hand is it denied, that the circumstances of this country introduce an exception into the general rule as to the right of tenants to cut timber; but it was the duty of the defendants to bring themselves within that exception. Whether the cutting was

(*a*) Where the tenant hired a person to repair the fences and to furnish the materials, in payment for which he permitted the person to cut down trees for fuel to the value, it was held waste. *Elliott* v. *Smith*, 2 N. Hamp. 430. But in *Loomis* v. *Wilbur*, 5 Mason 13, it was held that if the cutting trees was originally for repairs, and the timber was afterwards sold or exchanged for more suitable materials, and the proceeds *bona fide* applied to that purpose, it was not waste. See contra *Simmons* v. *Norton*, 7 Bing. 640, per *Tindal*, C. J.—REPORTER.

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bona fide in a due course of husbandry, or with the intention of making a profit out of the trees, was a question for the jury. *Doe* v. *Wilson* (*a*). The general interest in trees growing upon land demised, remains in the lessor as parcel of the inheritance, and he may sell them to a third person. *Liford's* case (*b*), and if they are cut down by the lessee, or any other person, or by any other means severed from the soil, the lessor shall have them by reason of his general ownership. *Boules'* case (*c*). The property in these trees was therefore clearly in the plaintiffs, and they had a right to recover on the count in trover, even if the other points should be decided against them.

G. D. Street for the defendants. It does not exactly appear how the fee simple in glebe lands in *England* has been originally conveyed; but it is clear that the fee simple is in abeyance, and that the rector has, during his life, the freehold in the glebe. Here the case is different: for the fee simple, by the grant, is vested in the church corporation. The words of this grant are not sufficient to vest the land in the coporation for a glebe for the use of the rector: it conveys no right to the rector, and is not made in the terms contemplated by the Act of Assembly 56 *Geo.* 3, *c.* 11. The words of this act are "for the use and benefit of the several "rectors for the time being of the several and respective "churches." There are no such words in this grant—it does not even state that it is for a glebe in the parish of *Hampton*; and there is nothing in it to create any trust for the benefit of the rector, or to prevent the church corporation from taking the profits of the land for the benefit of the church, instead of the rector. It is necessary for the plaintiffs to shew clearly that this land was granted for a glebe. But whether the words of the grant are sufficient to vest this land in the corporation for a glebe or not, is perhaps not very material. The grant conveys the legal estate and the fee simple to the corporation; they are vested by law with the powers of bodies corporate, and they are the only parties who can grant leases: for if the rector alone could grant leases, there would be nothing to shew the con-

(*a*) 11 *East*. 56. (*b*) 11 *Co*. 48. (*c*) 11 *Co*. 81.

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sent of the owner of the fee, which is as necessary in this country, as the assent of the patron and ordinary to leases made by rectors in *England*, under the statutes of *Eliz.* Before these statutes, a rector had no right to lease at all, without the consent of the patron and ordinary, 3 *Steph. Com.* 141; and since the statutes, he cannot bind his successor without obtaining such consent. But why is it that rectors in *England* have the power to lease? Because they have the freehold in the glebe—they have a qualified fee simple in *jure ecclesiæ*, 3 *Steph. Com.* 70. 506; and no other person has the legal estate: but it is not so here; for both the fee simple and the legal estate are in the grantees, who are the only parties capable of making any disposition of the land, unless such a right is given to the rector by the third section of the 56 *Geo.* 3, *c.* 11. Now there is nothing in this section which can divest the church corporation of their legal estate, nor are there any express words vesting a legal estate in the rector: to give the act such a construction, would destroy the provisions of the second section, which declares that lands granted for the use and benefit of the rectors, shall be held by the several rectors, church wardens and vestries, for the uses and trusts expressed in the grants. They cannot both have the legal estate at the same time; in whom then is it vested? Surely in the grantees. The rector, under the third section, would probably have a right to claim the rents and profits of the land under any lease made by the corporation; but he would not have a right to grant leases of it himself: or he might probably have the right to take possession of the glebe and live upon it, and in that case it would be under his "sole "management and direction" as to the mode of cultivation &c., subject to the same restrictions that rectors are under in *England* in the management of the glebes. Such a construction of the act would give effect to all its provisions, but the construction contended for by the plaintiffs would render the second section inoperative. Then, assuming it to be correct that the rector has no power to make a lease, it follows that the leases in this case are not binding on the corporation, and therefore they have no such reversionary interest

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interest as will enable them to maintain this action. But admitting, for argument, that the rector had the right to lease, and that this cutting is a permanent injury to the inheritance; the rector is the only person injured, and he is the proper party to bring the action. I contend however the cutting of the trees was no injury to the reversion; it was not in itself waste, and the question whether it was so or not depends upon circumstances; and it was peculiarly for the consideration of the jury what extent of wood might be cut without exposing the party to an action for waste; whether the intention of the cutting was for the purpose of clearing up the land, or wilfully for the purpose of making gain by a sale of the timber. *Jackson* v. *Brownson* (*a*). It is clear that the law of *England* respecting the rights of tenants to cut trees, cannot apply here: it must be modified to suit the circumstances of this country; and it would be very unreasonable to hold that the tenant, immediately upon cutting down the trees, must proceed to clear up the land, where he is not so limited by the lease, as he might have been. There being no provision of this sort in the lease, the tenant has the whole term to clear up the land, and surely he may at any time during the term go over any part of the land, and cut down such trees as he thinks proper; for if he has a right to cut one tree, he has a right to cut a thousand; and if he has a right to cut, he surely has a right to sell, for that cannot injure the landlord any more than burning the trees on the land: there is, therefore, nothing inconsistent with the intention of clearing the land, in selling the trees for saw logs. It ought not to be presumed that the tenant did not intend to clear the land, particularly when only two years of the term had expired. If the term had been near expiring, there might have been a strong presumption in favor of the right of action. As to the count in trover, if the tenant had a right to cut the trees, that question is merged in the other. It is admitted that he had a right to cut the trees if he had burned them on the land, as that would have indicated his intention to clear; but why is he bound to destroy them? I contend that he has the right to

(*a*) 7 *Johns.* 227.

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them; and upon this question probably depends the other, whether he could authorise the defendants to cut the trees. If, as I contend, there was not sufficient evidence against the tenant of intention not to clear the land, much less is it sufficient against the defendants, who could not know that the tenant had such intention, and therefore they ought not to be liable for doing an act, which abstractedly he had a right to do.

The case stood over for consideration until this term, when the learned Judges, not being agreed in their opinions, delivered judgment *seriatim*.

STREET, J. This case was tried before me, at the *Kingston* circuit in *July* 1846, and a verdict found for the defendants. The case was opened at the trial on the part of the plaintiffs as an action of case in the nature of waste; and the whole evidence given in the cause on the part of the plaintiffs, went to endeavor to support such an action.

The declaration contains four special counts. The first count states, that the plaintiffs were before and on the 1st *November*, 1844, and have been since, seized in their demesne in fee, of two certain tracts of land as therein described, which said two tracts of land during the time aforesaid had been and were in the tenure and occupation of divers tenants of the rector of the said church, under certain yearly rents, payable to the said rector or his successor, the reversion of the said lands still belonging to the said plaintiffs. It then alleges, that the defendants well knowing the premises, maliciously intending &c. to injure and prejudice the plaintiffs in their reversionary estate and interest therein, wrongfully &c. cut down and destroyed a quantity of trees growing upon the land, whereby the plaintiffs' reversionary interest became very much impaired in value. The second count merely states that a certain other lot of land was in the possession and occupation of one *James Kinney*, as tenant thereof to the said rector of the said church (the reversion thereof then and still belonging to the plaintiffs); and then alleges the damage done by the defendants the same as in the first count. The third and fourth counts are the same as the second, only alleging the lots therein

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therein respectively mentioned to have been in the occupation of other tenants to the rector. In neither of these three last counts is it stated that the plaintiffs were seized in fee, or how or in what manner, or what way, they would become entitled to the reversion, while it is alleged the tenants were holding under the rector only, and not under the plaintiffs; and in the first count, though it alleges the plaintiffs were seized in fee, yet does not shew in such case how the rector alone could have any right to let the premises to yearly tenants. The fifth count is a common count in trover for a quantity of logs. The defendants pleaded only the general issue.

The plaintiffs to prove their estate in the property, put in a grant from the Crown, dated 20th *November*, 1834, whereby it appears the land in question was granted in the following words, "unto the rector, church wardens and vestry of "*Saint Paul's* church in the parish of *Hampton* in *King's* "county, and their successors for ever, for a glebe;" habendum, "to hold unto the said rector, church wardens and "vestry, and their successors for ever." The words declaring the tracts to be *in trust for the use of the rector for the time being*, usually contained in grants of glebe lands in this Province, are left out of this grant; and as one of the questions raised in this case is, that for the want of these words this grant does not come within the provisions of the Act of Assembly of the 56 *Geo.* 3, *c.* 11; in order to dispose of that question at once, I quite agree with the opinion I am aware my learned Brethren have come to thereon, that is, that the term "glebe" mentioned in the grant as the use for which this land was granted, must be taken in the ordinary and usual acceptation of that word, that is, "for the use and "benefit of the rector or minister for the time being, and his "successors," and must be held equally subject to the provisions of the said act, with the other grants for the same purpose, which do contain that declaration of trust.

It appeared in evidence also, that the land contained in the grant was all wilderness when the grant came out, and it seems to have been laid out in lots of one hundred acres each, for letting: by whose authority this was done did not appear; but it seems that somewhere about the year 1840, the

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the Reverend *William Walker*, who was and is the rector of the parish of *Hampton*, commenced leasing these lots separately to different individuals, in his own name, as the rector of *Saint Paul's* church in the said parish, and among others granted two leases, one to a man named *James Kinney*, and the other to a man named *Thomas Benson*, one lot of one hundred acres to each. These leases are both dated in *April* 1844, for the term of twenty one years, from the 1st *May*, 1843, at an annual rent of one farthing for the first seven years of the term, one pound for the next seven years, and two pounds for the remainder of the term. There are no provisions or restrictions in either of these leases, shewing what improvements should be made on the land, respectively by these tenants, what wood or trees they should be allowed to cut and take off, or what should be reserved or left standing at the expiration of the term, or what buildings should be erected and left on the several lots by the lessees. The only conditions on the part of the tenants are, that they should respectively pay the rents reserved, and at the expiration of the term deliver up the premises to the said *William Walker* or his successors, with all the improvements thereon; and it was admitted that the lots at the time these leases were made were all in a wilderness unimproved state. There was no evidence to shew that these leases were given by the authority or assent of the plaintiffs (the grantees), or that they were in any way parties or privy thereto at the time they were made, except that one of the witnesses spoke of Mr. *Smith*, one of the church wardens, having been with Mr. *Walker* when he went to put one of the tenants into possession of his lot: but in what capacity he so attended it did not appear. It also came out in evidence that it was understood when the leases were granted, that the tenants were to have all the wood and timber they took off any part of their respective lots that they cleared up for cultivation during the term. These tenants took possession of their respective lots so leased to them, and commenced clearing and improving, and while so in possession, each of them in 1845, sold to the defendants (who were then occupying a saw mill in the neighbourhood), a quantity of

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trees standing upon the lots, for saw logs for their mill, and gave them permission to go upon the lots to cut and carry away the same; which the defendants accordingly did. It did not appear that in this bargain the tenants limited the defendants to any particular parts of the lots respectively where they should cut the trees; therefore they went where they found them most plentiful or convenient to suit their purpose: this it will be seen was within the first two years of the term leased, and the tenants at the time had only two or three acres of their respective lots cleared up, and the evidence shewed that the defendants had cut the logs rather promiscuously through the wood growing on the lots: and for this cutting the action is brought—the plaintiffs contending that this is waste, committed upon these lands by the defendants, whereby the plaintiffs' reversionary interest has been permanently injured. There is however nothing in the evidence to shew that the plaintiffs ever recognized or treated the lessees as their tenants, nor do they in the declaration in this cause describe or state them to be such: on the contrary, they aver in all the special counts that they are the tenants of the rector only. Upon this state of facts several very important questions have arisen:

1st. What is the nature of the estate vested in the church corporation by the terms of the grant, and whether by the leases in question the corporation are divested of any immediate estate and right of entry; that is, whether the rectors of the parish churches in this Province take a legal freehold estate in, and have the same right to grant leases of their church glebes, as rectors in *England* have, without any assent or privity of the church corporation, who are the grantees, so as to make such leases binding on those corporations pending the incumbency of the rectors.

2d. If the rectors have this right; then whether the corporation has any such reversionary interest pending the incumbency of the rector, as to enable that body to maintain an action on the case in the nature of waste for an injury to the reversion.

3d. If they have—whether the injury complained of in this case, has been proved to be an injury to the reversion.

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4th. Can an action upon the case for waste be maintained in any case against a stranger to the tenancy, when there is a tenant for years in possession.

5th. If it can; then can it be sustained where the stranger enters and cuts trees by the permission of the tenant in possession, for a valuable consideration.

6th. Under the terms of the leases in this case, of wilderness land, coupled with the facts proved in evidence, to what extent may the wood be taken off by the tenant, without being subject to an action for waste pending his term?

Now on the first point, I regret exceedingly to find that the conclusion I have come to differs so materially as it does from the opinions I am aware my learned Brethren are about to deliver thereon, which has led me to give greater consideration to it, and to search the more minutely for authorities that could bear upon the point, in the hope of being able to bring my mind to the same conclusion as theirs, but without effect; I therefore think it necessary to go the more at large into the reasons upon which I have founded an opinion on so important a point, differing from those for whose judgment in all cases I entertain the greatest respect and deference. I will first advert to the law as it stood in respect to church property in the colonies, prior to any local enactments thereon. We all know that in the first settlement of a new colony by *British* subjects, they bring with them from the mother country all such laws as are applicable to their new state, and more particularly the common law, and that the church of *England* as by law established, was first planted in the *British American* colonies under the immediate authority of the Crown, through the royal instructions to the Governors; and as the title to the lands in such first settled colonies was in the Crown, when they became organised, and townships or parishes established, the Crown in making grants generally reserved and in some cases granted in each of such townships or parishes, a lot or tract of land as a glebe for the church of *England* there as by law established; and this was often done before any church was built, or rector or minister in existence, as it was intended for an endowment of such a church when established, for without

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without an endowment the church, as the established church of *England*, could not be consecrated or recognised as such in law; and in some cases these grants were made by the Crown without any grantee being named, but simply in the words "for a glebe for the church of *England* as by law "established." By such a grant the fee passed from the Crown, and as soon as a church was erected and established as the church of *England* for that parish, the property in the land became vested in that church, although there might be no person in *esse* to hold the fee, which would therefore be considered in abeyance; but in such case as soon as a minister of the gospel was inducted as rector of such parish church, he, by the common law of *England*, became vested with a legal estate in all the real property with which the church was endowed, and also in the church itself, so long as he continued such incumbent, to hold the same in a freehold right for the benefit of himself and his successors, and for that purpose he thereby became by necessity a corporation sole, as there was no one else in *esse* that could hold the church and land; and it has been held by high authority that in such case the fee should be considered a *quodam modo* vested in the parson. *Co. Lit.* 341 a, *Com. Dig.* "*Ecclesiastical Persons*" (C 9); and Mr. Justice *Story* cites from the year book *(a)*, which he says has been held good law by *Fitzherbert* and *Brook (b)*, that if a grant be made to any church in a parish [*in those words*], it shall be a fee in the parson and his successors, because in such cases the law looks to the substance of the gift; and in favor of religion, vests it in the party capable of taking it, and has the effect of a grant to the parson of the church and his successors: the fee therefore in such a case passes out of the donor, without a grantee, by way of public appropriation or dedication to pious uses; which shews that such cases form an exception to the general rule, that to make a grant valid, there must be a person in *esse* capable of taking it. This is the rule laid down by Mr. Justice *Story* as the law of the state of *New Hampshire* while it was a *British* province,

(*a*) 11 *H.* 4, 84 b.
(*b*) *Fitz. Feoff.* pl. 42; *Bro. Estate*, pl. 19; *Vin Ab.* L, pl. 4.

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founded upon numerous *English* authorities, cited by him in his able decision in the case of *The Town of Pawlet* v. *Clark (a)*, and derived from the law of *England*, or brought into the colonies at their first settlement; and would still continue to be the law here if local enactments had not made other provisions in lieu thereof. Now the legal estates in the parish churches, yards and glebes, in *England*, become vested in the respective rectors during their incumbencies, because there is no one else in *esse* in whom the estate can vest—there are no grantees of those lands for the churches nor ever have been, but they are lands that have been originally conveyed, or dedicated and appropriated, not to any grantees, but simply *for the use and benefit of the parish churches* respectively, as endowments thereof; which endowments were made in some cases by the Crown, in others by the great landholders or lords of manors, and in others by religious institutions, and were the means in fact by which parish churches were originally established in *England*, 1 *Burn's Eccl. Law*, 66; and as Mr. Justice *Story* observes, the law vests the legal estate in such endowments in the parson or rector for the time being, as the *only person* capable of taking it, who in the intendment of the law is the representative of the parish church, and as such entitled to take and hold the church and glebe belonging thereto, as the property of that church; and if our churches in this Province were respectively endowed in the same way, of course the same rule would hold here in respect to the rectors' right in the land, and by operation of the law they would in such case each be a corporation sole, to hold for themselves and their successors, the same as in *England*. But our legislative enactments have, I conceive, completely superseded this rule of the common law, and the rectors here cannot now take the same estate in the churches and glebes that the rectors in *England* hold, for the very substantial reason that the Legislature of the Province has chosen to create a church corporation other than the rector, in each parish, for the express purpose of taking and holding the legal estate in all lands granted for the endowment of their

(a) 9 *Cranch* 292; 3 *Cond. Rep.* 408

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churches, including the glebes, which are part of the endowments; and this brings me to the consideration of our Acts of Assembly on the subject: the first of which was the act of 26 *Geo.* 3, *c.* 4, passed in the first session of the General Assembly held in the Province; but there is nothing in this relating in any way to church property—it was passed (as the title declares) for the purpose of preserving the church of *England* as by law established in this Province, and for securing liberty of conscience to other denominations. This act recognizes the existence of the established church in this Province, and parsonages and benefices thereof, and prohibits any person from being admitted thereto, except such as shall be ordained according to the form by law established in the church of *England*. This act left the common law rights of such rectors, in any endowments of their churches, untouched; but I cannot find that any endowment of land has ever been made to any church in this Province, but by grants or conveyance to trustees for the use thereof, so that a case has never occurred here for a parson to exercise the right given by the common law to a corporation sole, to hold the lands of the church for himself and his successors, as in *England*, for the want of any other person in *esse* to hold the same. Thus the law stood until the passing the act of 29 *Geo.* 3, *c.* 1, prior to which, I believe, there was only one grant passed from the Crown, of land in this Province, for the use of any church or glebe; which was a grant dated, I think, in 1786 or 1788, to the Justices of the county of *Charlotte*, in trust for the use and benefit of the rector or minister of the church by law established in the parish of *Saint Andrew's*, for a glebe. In *Saint John*, it seems, land was purchased for the use of a church which was built thereon, prior to the passing of the act of 29 *Geo.* 3: how or in what way the title to these lands was taken, is not material to inquire; but it would seem the Legislature of that day deemed it advisable to make some general regulation for the whole Province in respect to the church property in different parishes, not only in respect to what then belonged to any parish church, but also as to any that might thereafter

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after be granted, in preference to leaving it to the rule of the common law, which would not be applicable to a new country like this, where if lands was granted by the Crown or by individuals for the use of a church in some parishes, without vesting the legal estate in any person in *esse*, they might be for years before any church was erected or a parson inducted, without any one having a legal estate therein, to protect them from depredations; and therefore the act of 29 *Geo.* 3, *c.* 1, was passed, which incorporates the rectors, church wardens and vestries of every church in the Province, and vests in those corporations respectively by express words an absolute estate in fee simple in their respective churches, with all the furniture, ornaments, bells &c., and in all the lands belonging thereto, in trust for the use of the parish churches respectively, and it gives them power to sell or let the pews and lands for the use and benefit of the church, and they are to pay all salaries and allowances to the rector and other officers of the church, and to defray expenses. They are thus made trustees of all the property for the church parishioners, and the church itself, within their respective parishes; and thus the common law right in the rector to hold an estate of freehold in the church and lands is in express terms taken away, and the whole legal estate therein is vested in these corporations aggregate so created. By the seventh section of this act the same estate is vested in the church wardens and vestry, where there is no rector; and the provision in the act, that the corporations were to pay the rector's salary, shews that the intention of the Legislature was that the corporations were to receive all the profits of the lands &c. in trust, to pay the rector thereout, and for other purposes of the church, leaving him no real estate therein. But it was afterwards doubted, and well might it be, whether this act did not give power to these corporations to sell and dispose absolutely of the lands of the churches; and it seems to have been also doubted, whether it gave power to them to receive and hold such estates in lands in trust for the use of the rector; which gave rise to the subsequent act of 56 *Geo.* 3, *c.* 11: and when we look at the language of the recital in the second section of

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of that act, we may reasonably imagine that as the law then stood the Legislature were apprehensive that questions like the present might arise, by the rectors for the time being claiming such titles to the glebes, pending their incumbencies, for I do not see any other question that could have arisen upon the point. The former act having given the church corporation full power to receive and hold lands for the use of the church, any grant the Crown chose to make to them in trust for a glebe for the use of the rector of that church, was land in fact granted for the use of the church, as the rector in the eye of the law by his induction becomes a part of the church; and therefore it would seem one great object of the act of 56 *Geo.* 3, *c.* 11, was to put an end to any doubts on that point, by expressly enacting that the said respective corporations should hold the title to the lands in trust for the respective rectors for the time being, for the words of the recital to the second section are as follows: "And whereas doubts have arisen whether the said rectors, "church wardens and vestries of the several and respective "churches are capable of taking, receiving and holding "*lands in trust for the use of the said several rectors of the* "*said churches for the time being*." Here the very point now in question is mentioned, that is, *their right to hold the land in trust for the rector for the time being*, and to put an end to such doubts the act then goes on as follows, "For the "removal whereof be it further declared and enacted, that "the rectors, church wardens and vestries of the several "and respective churches erected or to be erected in the "several parishes &c., shall be deemed in all Courts of law "and equity, capable of receiving, taking and holding any "lands, tenements or hereditaments, for the use and benefit "of the several rectors for the time being of the several and "respective churches, any thing in the said hereinbefore "recited act *or elsewhere*, to the contrary thereof notwith-"standing: and that all lands, tenements or hereditaments "heretofore granted or conveyed to the said several and "respective rectors, church wardens and vestries upon trust "for the use and benefit of such rectors, or of the ministers "of the said several and respective churches for the time "being,

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" being, shall be held by and be deemed and taken in all " Courts of law and equity to be holden by the said several " and respective rectors, church wardens and vestries, for " the uses and trusts in the said several grants or convey- " ances of said lands respectively expressed, and for no other " use whatever, any thing to the contrary thereof notwith- " standing." This section therefore, whatever doubt might have before existed, does, in language as plain and strong as can be used for the purpose, declare that the church corporation shall be deemed in all Courts, as holding the glebe lands upon the trusts declared in the grants; thus making them by law stand as trustees for the *rector for the time being*. Now they could not hold these lands as such trustees, if the rectors for the time being took a legal freehold estate in the respective glebes immediately on their induction, because that would divest the corporation of the legal estate granted to them pending the incumbency, and instead of holding the lands in trust for the rector for the time being, according to the grants, they would hold them only pending a vacancy in the parsonage, in trust for a rector in expectancy, in direct opposition to the express words of the second section of the act; and yet it is contended that the construction to be given to the third section of this act is to have that effect, and thus make the two sections in the same act contradictory to each other, as also to defeat the declaration of trust declared in the grant itself. Now the language of the third section of the act is, " that all lands &c., *already granted* or hereafter " to be granted to the said rectors, church wardens, &c., as " hereinbefore mentioned (thus having a direct reference to " the preceding section), for the use and benefit of the rec- " tor &c. for the time being, shall be held subject to the " sole management and direction of such rectors &c., and " shall be *used, occupied and enjoyed* by them severally, " for the benefit and advantage of themselves and their suc- " cessors, in *like manner as the glebe lands* belonging to any " rectory or parsonage in *England*, are there usually held, " occupied and enjoyed." Now if this was the only section in the act, it would certainly bear the construction, that the Legislature intended thereby to give the rector a legal estate

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of freehold in the glebe land, of the same nature as rectors in *England* hold, although it is not so expressed; but in construing an act we must take the whole together to get at the intention of the Legislature, and there is nothing in the language of the third section which in any express terms divests the corporation of the immediate title which is granted to them by the Crown, and which the second section declares they shall hold during the incumbency; and it would seem extraordinary indeed that the Legislature should intend to give a legal freehold estate to the rector, when it in express terms declares in the same act that the corporation shall hold the legal estate in trust for him. I read this part of the act as merely providing that the corporation shall so hold the same (that is, in manner as directed in the second section), subject to the rector's management and direction, and the rectors may if they please take the glebes into their own hands, and live upon them, and farm them themselves for their own use and benefit; but this does not necessarily divest the rector of his character of *cestui que trust*, but can only intend to give him as such *cestui que trust* the privilege of managing, using, and occupying the trust estate himself if he so chooses; and if he does, then I read the latter part of the third section as restrictive upon the rector, because the language is in the imperative—that is, that he shall use, occupy and enjoy it in the same manner that glebes in *England* are used, and only so—and of course subject to the same restrictions as to committing waste or doing any act that would injure the property for his successor; this being a condition upon which he is allowed by law so to occupy, and if he breaks it by committing waste, the corporation, who hold the title as trustees not only for him but for his successors, would be in duty bound to interfere: and though it is imperative upon the rector if he do take it into his own possession, to use it in the manner the act directs, yet I think it can hardly be held that the act makes it imperative upon him to take it into his possession or to meddle with it in any way. I consider that the rector, under the law as it now stands, has a right to say to the corporation—manage the glebe yourselves, I will have nothing to do with it in my capacity as rector.

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In such case (if the legal freehold was in him), the corporation could do nothing with it pending that estate, as they would not even have a right of entry on it, and could not let it, or give any other person a right of entry; and for the same reason they could have no right of action for trespass on the land, or trover for any thing taken off pending the incumbency; but all such actions would have to be brought in the name of the rector only, as the party holding the legal title and right of property for the time being: besides, before a statute can be construed as taking away or altering a legal title given by grants or conveyed by the donor, or to alter the trusts upon which such title is given, there should be express words in the statute to do that, and particularly if it is to create an intermediate estate not provided for in the grant. There is not a word in this act that speaks of any *legal estate* to vest in the rector—it is confined to his beneficial interest, and it gives him no doubt an equitable freehold therein, with the privilege of occupying the land himself if he pleases. It is also to be observed that the second section of the act has made, in itself, a provision against any construction of the third section contrary thereto by these concluding words "*any thing to the contrary thereof* "*notwithstanding;*" and I cannot think the case of *Rex* v. *The Inhabitants of Eatington (a)* governs this in any respect, for the question in that case turned upon the effect of the conveyance itself, in which the donor in the deed of gift in fee, reserved to himself by express words a life estate in the premises; and the question was, whether there was under such a provision, any immediate estate in possession vested in the donor by the conveyance; and the Court decided that the conveyance only gave an estate in remainder, and no present interest to the donor. But supposing a grant to the church corporation for a glebe, in trust for the rector for the time being and his successors, comes out at a time when there is a rector in possession of the church (which I believe has been the case in some parishes), would it not be a very extraordinary anomaly to hold that although the grant itself gives the whole legal estate to the church corporation, and

(a) 4 *T. R.* 177.

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the law authorises them to receive such a grant, yet they shall take no immediate estate by it, but the legal estate shall immediately vest in another, in direct defiance of the grant, and that the grantees shall only have an uncertain contingent temporary estate in remainder? And yet such must be the effect of the law as will be laid down by the rest of the Court on this point. In this view of the case, I of course must hold that the plaintiffs cannot maintain this action upon any of the special counts in the declaration, as the leases, I consider, are not binding upon the church corporation unless it be shewn that they were granted by their assent and privity; but in that case they would be bound to treat the tenants as their tenants, and should have averred them to be such in the declaration, as was done in the case of *Vallance* v. *Savage (a)*; where it was held that in a letting by a *cestui que trust* in his own name with the consent of the trustee, the latter might treat the tenant as his lessee, and bring an action in his own name for an injury to the reversion, as the *cestui que trust* had no legal interest in the land. But as the case before the Court stands, in my view of it, of course the property in the trees growing on the land was in the plaintiffs, and though the cutting them was a trespass for which the action should have been trespass, yet trover will lie for taking them away and converting them to the defendants' use—and on that ground I think there should be a new trial on the count for trover, as I ought to have left the case to the jury on that count; but if the rector had the legal freehold estate in the land, I cannot well see how these plaintiffs could maintain even trover, for it appears to me in such case the action should have been brought in the name of the rector, as would be the case in *England*, as having the legal estate in the land and the property in the trees after they were severed from the freehold; and therefore, although I agree with my learned Brethren that there should be a new trial on the count for trover, yet it is upon a different ground.

The conclusion I have thus come to on the first point makes it unnecessary for me to say any thing on the second

(a) 7 *Bing.* 595.

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and third, as to the power of the church corporations to grant leases, and for what term, of the glebe lands. I will merely observe that my present impression is, that although the corporation cannot grant leases for any term without the assent and privity of the rector for the time being, and who in fact becomes a party to such leases as the head of the corporation aggregate, yet with his assent, as they are both by the law and the grant constituted trustees of these lands for the rectors and their successors for ever, they may grant leases for twenty one years, which would be binding upon the successors of the then incumbent; and this may be done under their hands without any assent of the patron or ordinary; for the Crown as the patron has intrusted to the corporation the guardianship of these lands upon the trusts stated, and therefore as long as they act *bona fide* to carry out the trusts reposed in them, they are acting legally: but I consider the restraining act of 13 *Eliz. c.* 10, extends to these lands, and if so, the corporation could not lease for a longer period than twenty one years.

The Court having all agreed to grant a new trial in this case only upon the ground that the action can here be sustained upon the count for trover, it might not be necessary that any thing should be said upon the remaining points: but as they were stated to the bar for the new argument, it is but right that some further notice should be taken of them by the Court. But as the fourth point (that is, whether an action of case in the nature of waste will lie against a stranger to the tenancy, committed while the tenant for years is in possession), is one not necessary now to be decided for the disposal of this case, and as I find my learned Brethren do not intend to express any opinion thereon, I shall adopt the same course, and shall therefore pass that over, and also the fifth point, which is dependent thereon; which brings me to the sixth and only remaining question. And as to this, all I think it necessary at present to say, is that I believe it is admitted that we cannot extend the rule of the law which governs in *England*, to leases of wilderness land in this country, as the land can be of no use to the tenant without taking the wood off; and when once that rule

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is broken through, it is very difficult to draw the line which is to govern the tenant as to what trees he shall cut, and to what extent, unless the lessor provides for it in his lease; for if he does not, there is no rule of law, that I know of, to limit the tenant's right, but the law of *England*. Now the common law of *England* before the statutes of *Marlebridge* and *Gloucester*, made no limits in such cases, except such as the lessor provided in his lease, and it is admitted that the statute law goes too far to extend the whole here; and if so, who is to say how much of those statutes shall be extended, and how much not, the parties themselves not having made any conditions or stipulations in the leases to shew what were their intentions as to the quantity of wood that might be cut and taken off by tenants, and what proportions of the land should be cleared up and improved. I therefore incline to the opinion, that if under the terms of these leases the tenants are under any restraint as to the wood, it can only be by the verbal understanding proved to have taken place between the parties when the lands were leased: that is, that the tenants were to clear up all the land fit for cultivation from which they took the wood. Though I am not in favor of making a precedent for letting in such parol understandings as a general rule, yet in this case, without adverting to it, I do not see what rule the tenants had to guide them in that respect. The leases not containing any stipulations on the subject, and it being admitted the *English* rule would not apply, it would seem the tenants have a discretionary power to clear up and improve as much or as little of the land as they please during the term, and as they have twenty one years to do it in, they may in such case clear up the whole one hundred acres before the end of the term; and what rule in law is to prevent them doing so? And if they do, they must take the whole wood off. I therefore think, in a new wilderness country like this, in leasing wilderness land, the old common law rule should prevail, that is, that the lessor must take care to provide by conditions in his lease, what trees or wood shall be left standing on the land, and to what extent the tenant shall be permitted to clear up and take the wood off—which was always necessary in *England* before

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before the statutes of *Marlebridge* and *Gloucester*. I also consider the question, whether the tenants intend, before the end of the term, to clear up all the land that the trees in question were cut from, is one entirely for the consideration of a jury under the evidence given; for if the tenants should at any time before the end of the term perform that condition of the verbal agreement, it appears to me no action would lie: and it is very difficult to know how that is to be ascertained until near the end of the term, if the tenants continue working and occupying the place. I do not see how such a question could be put correctly to a jury differently from the way in which I left it. This also involves the question, whether the cutting these trees is a permanent injury to the reversion or not; for if the tenants clear up and improve the land before the end of their term, it may, and probably would be, more valuable than in a wilderness state, with the trees standing thereon.

PARKER, J. I have considered the principal questions which arise in this case, carefully and repeatedly, and not now for the first time, and with every respect for my learned brother who has just delivered his matured and elaborate judgment, I am unable to concur with him except on one point.

As the better way of understanding the principles which must govern the case, I shall consider the nature of the rector's estate in the glebe lands in this Province, and the incidents to such estate, which will naturally include an investigation of the relative rights of the rector and the church corporation, and thus lead us by a proper train of argument to a solution of the question, whether the present action is maintainable by the rector, church wardens and vestry; and if maintainable, on what grounds. Upon some questions which have been started, but which may be now deemed irrelevant, I abstain from expressing an opinion: on such as do properly arise, I shall proceed to state my views, at a length which I think the importance of the case will justify. I am most happy to find these views agree with those of His Honor the Chief Justice and Mr. Justice *Carter*.

The grant from the Crown, dated 20th *November*, 1834, is expressed to be "unto the rector, church wardens and "vestry

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" vestry of *Saint Paul's* church in the parish of *Hampton*, " and their successors for ever, for a glebe;" habendum, to the said rector, church wardens and vestry, and their successors for ever; and this would vest undoubtedly by the common law, the whole legal estate in the land in the church corporation, although the insertion of the words *for a glebe* might, in equity, entitle the rector to the benefit of it as a sort of a *cestui que trust*.

If however it is admitted (which I incline on consideration to think is the true construction of the grant, from the well known and peculiar application of the term "glebe" to the land of the rector or parson) that the words "for a glebe" sufficiently manifest the intent of the Crown that the grant is to be for the use and benefit of the rector of the parish, within the act; we have to consider what is the effect of the Act of Assembly 56 *Geo.* 3, *c.* 11, *s.* 3, on such a grant, whether it vests any legal estate in the rector: that section is as follows. " And be it further enacted, that all lands, " tenements and hereditaments, already granted or hereafter " to be granted to the several and respective rectors, " church wardens and vestries, for the use and benefit of the " rectors or ministers of the said several and respective " churches for the time being, shall be held subject to the " sole management and direction of such rectors or ministers; and shall be used, occupied and enjoyed by them " severally and respectively for the best benefit and advantage of themselves and their successors, in like manner as " the glebe lands belonging to any rectory or parsonage in " that part of *Great Britain* called *England*, are there " usually held, occupied and enjoyed." It appears to me under the terms of this act, the rector must be deemed to have a freehold in the glebe, or in other words, an estate for life, determinable on his vacating the rectory, either by surrender or deprivation; that upon the death or vacating of the rector, the whole legal estate is revested in the church corporation until the appointment of a successor, when a like freehold estate becomes vested in the new rector, and so *toties quoties*.

If the Act of Assembly had stopped with the two first sections,

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sections, I should agree with my Brother *Street* on that point; but the third section goes much further, and the effect of it appears to me to be (similar though not to the same extent as the statute of uses, which gives the legal estate to the *cestui que use*) to vest in the rector a *legal right of occupation* of the land granted to the church corporation for a glebe. Not merely an equitable estate as *cestui que trust*, not a mere license to occupy, not a mere beneficial interest in the rents and profits, not a holding under or by permission of the church corporation—none of which would enable the rector to retain the possession at law against the church corporation—but a legal right to the possession, which would entitle him to hold it against the church corporation or their grantee, as well as against strangers, and enable him to maintain trespass for an injury to that possession. Then if there be a legal right to occupy, what is the extent and duration of that right? The act declares it. The rector is not merely to have *the sole management and direction*, which might consist with my learned Brother's views; but the use, occupation and enjoyment of the land is given to the rector for the best benefit and advantage of himself and his successors, *in like manner* as the glebe lands belonging to any rectory in *England* are there usually held, occupied and enjoyed. A right by law to occupy land in like manner as the glebe in *England*, constitutes in my mind, a freehold. A *cestui que trust*, like the *cestui que use*, at common law, has neither *jus in re* or *jus ad rem* (*a*). In the ordinary form of trust conveyances, the right of occupation is not given to the *cestui que trust*, though the trutees may be directed to pay to him the rents and profits. If the rector was a mere *cestui que trust*, he might be deemed at law a trespasser if he entered on the glebe contrary to the will of the church corporation. If the law is to be construed as giving him an option to occupy or not at his pleasure, surely if he exercises the option and enters, he is lawfully entitled to the possession.

The case of *The King* v. *Inhabitants of Eatington* (*b*) is not inapplicable: there it was decided that in a conveyance

(*a*) 8 *Bac. Abr.* 172. (*b*) 4 *T. R.* 177.

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of the fee by deeds of lease and release, a reservation to the grantor of the right to occupy for life gave him a freehold; and Lord *Kenyon* there says, "An estate for life to one is "not totally repugnant to, but consistent with an estate in "remainder to another." I perceive no greater difficulty in considering such an estate as vesting in the rector, because the fee is in the church corporation, than when the fee is in abeyance: in either case the fee is *out of the rector.* The church corporation cannot interfere with the possession of the rector, who is to have the sole management and direction, use, occupation and enjoyment of the glebe. The circumstance of the fee being in the church corporation, and it's thus having a vested estate operating *in possession* between the death and removal of one rector and the appointment of his successor, does certainly present a difficulty under the rules of the common law in holding a devolution of the estate and rights of one rector upon another as his successor and privy in his estate; but the rule laid down by Lord *Hardwicke*, in *Basset* v. *Basset (a)* is appropriate: "Where "a new Act of Parliament is made to alter the law, and the "Judges are formal in adhering to rules of law, and will not "construe according to the words and intention of the act, "there this Court (Chancery) will take it up and give remedy "here, though it is the business of Judges to mould their "practice so as to make it conformable to the Legislature." The reasoning in *Basset* v. *Basset*, which related to the rights of a child *en ventre sa mere* at the death of his father, under the statute 10 & 11 *Wm.* 3, *c.* 16, is not inapplicable to the rights which may come in question under the Act of Assembly 56 *G.* 3, *c.* 11. The Chancellor there says "According to the "doctrine of the *Prince's* case *(b)*, an estate may cease and "revive again. So here, this may divest on the death of the "father, and vest on the birth of the son." By like reasoning, an estate or reservation depending on an estate might divest on the death of a rector, and vest again on the appointment of his successor. The church corporation might be entitled to receive the *mesne* profits during a vacancy of the rectory, as in the case of descent or devise to an infant in

(a) 3 *Atk.* 206.

(b) 8 *Coke* 14.

ventre

ventre sa mere, where the land is held to descend to the existing heir at law until the birth of the child; and the heir so seized receives the profits and any rent then accruing. The right of the church corporation in such case might be subject to the legal rights of the executor of the deceased rector to a growing crop, and also to an account in equity to the successor for what was received by them; but it is unnecessary to go into these points.

I differ also with my Brother *Street* on another point. It appears to me the rector in this Province is a corporation sole, and although the estate in the church and church yard be not vested in him as such, but in the church corporation, a grant might still be made to the rector of a parish and his successor. Such was I think the effect of the act 26 *Geo.* 3, *c.* 4, in furtherance of the common law, which is not done away by the subsequent act 29 *Geo.* 3, *c.* 1, although the latter act may alter the mode of holding the church and church lands. The parson was a corporation by the common law. The term "parsonage" is used in the act 26 *Geo.* 3, *c.* 4. In the old colony of *Virginia* a grant to a church was held to vest the land in the parson, the established church of *England* being also established in that colony. *Angell & Ames on Corp.* 19.

Conceding then a freehold right to the rector, we have to consider—

1. What leases he may give of the glebe?
2. What right he has to the trees on the glebe?
3. What action he may bring respecting the glebe?

The Act of Assembly expresses nothing particularly on either of these points. We can only infer the intention of the Legislature from the term *sole management* and *direction*, and *use, occupation* and *enjoyment* by the rector, for the best benefit and advantage of *himself* and *his successors, in like manner* as glebe lands in *England* are *usually held, occupied* and *enjoyed.*

I think a power to lease for his life or tenure of the rectory, which is all a rector could do by the common law, must be considered as belonging to the rector; but certainly not beyond that, without the concurrence of the church corporation, the owner of the fee, or the confirmation of the patron and

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and ordinary, and perhaps both. In *England* a lease by a parson is not binding on his successor without the confirmation of the patron and ordinary, under the statute 13 *Eliz.*, *c.* 10; and then it must be made in conformity to the eight rules or qualities therein mentioned. It might be argued with some plausibility, that the King being the patron of the rectories in this Province, and making a grant in fee simple to the church corporation for the use of the rector, thereby enabled the rector with the concurrence of the church corporation to grant a lease for three lives or twenty one years, as the rector may do with the confirmation of the patron and ordinary in *England;* especially as tenant for life with the concurrence of the owner in fee may ordinarily make leases extending beyond the life of the tenant; but it may be answered, that the now patron of the living is not the King who made the grant, but the Queen who now reigns, acting it may be by her representative in this Province. If then a lease of glebe in *England* to bind the successor must be confirmed by the patron and ordinary, why should it not be so here? The successor to the rectory would be limited in the use of his freehold in a manner not contemplated by the Act of Assembly, unless there were a conformity to the *English* usage in granting leases. I incline therefore to think that the leases given by Mr. *Walker*, though good against himself, and not void *(a)* though made for the term of twenty one years, and liable to enure, if he so long live, to the end of the term, yet are not binding on his successor, as not having the confirmation of the patron and ordinary; neither are these leases so binding on the church corporation, their concurrence not appearing, as to bar an entry on the tenants after the death of Mr. *Walker* by the church corporation. If the church corporation concurred in the leases or confirmed them, it would bind their right, but still leaving open the question as to the right of the successor to the rectory.

2dly. What is the rector's right over the trees growing on the glebe?

In *England* the rector has the benefit of the trees as part

(a) 2 *C. M. & R.* 731, Doe v. Seaton.

of

of the land and also appurtenant to the land for the necessary uses of a residence thereon, but he cannot cut the trees down and dispose of them for his private benefit. If he cut them down except for repairs or fuel, it is waste, and he may be prohibited, and is liable to an action by his successor for delapidation, or an injunction may issue. 2 *Burn's Ecc. Law*, tit. "*Delapidation and Glebe Lands*," *Bac. Abr.* tit. "*Waste*" (G), *Tomlin's Law Dict.* tit. "*Prohibition.*" *Prohibitio de vasto.* "A prohibition shall be granted to any "one who commits waste, or cuts down trees on the glebe." *Moor* 917. *Liford's* case *(a)*. "If the parson of a church "will waste the inheritance of his church to his private use in "felling trees, the patron may have a prohibition against him; "for the parson is seized as in the right of his church, and his "glebe is the dower of his church, for of it he was endowed." On this point may also be cited *Bird* v. *Relph (b)*. As a general rule then the rector is not entitled to cut down trees. This rule in a new wilderness country is of course liable to limitation—there must be an implied right to cut in the course of clearing the land for the purpose of cultivation. And with regard to other cutting, as in *England*, the rector has the power (though not the right) to cut unless restrained by the patron, who is seized of the advowson; and as cases must constantly occur in which it is expedient to cut timber trees, we may presume the rector with the assent of the patron does cut trees in *England*. And so in this Province as it may often be proper and expedient to cut trees (other than for fuel, repairs, or for clearing the land), e. g. saw logs, and timber and fuel, for sale—I should think the rector with the assent of the church corporation, the owner of the fee, might cut or license the cutting of trees; and I should think also the church corporation would be entitled to a writ of prohibition to restrain the rector from any improper cutting, they being the owner of the fee of the land, though not the patron of the living—but seized of the fee for the benefit of the church. The property in trees cut on the glebe, properly or improperly, would in *England* necessarily vest in the rector; he not only having the freehold, but

(a) 11 *Co.* 19 a. *(b)* 4 *B. & Ad.* 826.

reputed

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reputed to have the inheritance *quodam modo*, for the benefit of his church or successor. *Com. Dig.* "*Eccles. Persons*," (C 9), *Co. Litt.* 341. But the reason of this reputed inheritance is evidently because the fee is in abeyance, and there is no one else but the rector having any right in the land itself or the trees thereon. Here the rule would be different in regard to trees, in which the rector has only an interest as growing on the land, and is not entitled to cut, the property in them when cut must necessarily vest in the church corporation as seized of the fee; though the Court of Chancery would control the application of the proceeds, as in *Bewick* v. *Whitfield* (*a*).

3dly. What action may the rector bring in regard to the glebe?

He or his tenant, as the case may be, may certainly bring personal actions for injury to the possession: and so to recover the value of any trees rightfully cut by him, and improperly taken by others, or for other property belonging to him, and so I think ejectment would lie, on the demise of the rector or his tenant; but to recover the value of trees cut and taken away by a stranger, or improperly cut and taken away by the rector or his tenant, or by persons cutting by license of the tenant, as in the present case, I think the proper remedy is an action of trover at the suit of the church corporation, as owner of the fee, and as such, owner of the trees when cut. In *England*, no doubt the rector might bring the action. *Com. Dig.* "*Ecclesiastical Persons*" (C 9): "The parson is seized in right of his church, and "the freehold of the church, church yard and glebe belong "to him, and therefore he may sue and be sued for the "right of his church." So for the benefit of his church and successor, he shall be reputed to have the inheritance *quodam modo*, and therefore "he may have waste, and "declare *ad exhæreditationem ecclesiæ*." *Co. Litt.* 341 b. "A tenant for life cannot have this action (for waste), but "a parson may have an action of waste, and the writ shall "say *ad exhæreditationem ecclesiæ*, for it is the dowry of the "church. * * Neither shall a bishop, master of an

(*a*) 3 *P. Wms.* 267.

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" hospital, parson &c., have an action of waste done in the " time of their predecessors." *Bac. Abr.* tit. " *Waste*" (G). Our Act of Assembly making no provision as to the bringing of actions injurious to the inheritance of the church, and not providing that the fee shall be in abeyance as in *England*, but leaving it in the church corporation, leaves it, I conceive, with all such incidents as are not inconsistent with the *use* of it by the rector and his successor. On the maxim *cessante ratione cessat etiam lex*—and also as obviating the difficulty which in *England* exists by reason of the parson not being entitled to sue for waste by a stranger, done in the time of his predecessor—I see no reason why the church corporation should not have the right to sue for waste or other injury to the reversion, as well as others who are seized in fee subject to estates for life or years. It may be said, that if the church corporation were entitled to recover damages for waste done by the rector, it would interfere with the action by his successor for delapidations, which may be maintained against the executor of the deceased rector; but the case of waste by the rector himself may be an exception, or if it were not I see no great inconvenience: for it is not easy to see why the rector, who is not entitled to cut down and sell the trees himself, may yet recover the value of them if cut down by his predecessor. If the church corporation is made the proper guardian of the inheritance, which would appear to be one reason for vesting the fee in the church corporation and their successors, and not in the rector and his successor, it would be more proper that they should recover for injury to the inheritance, though of course such recovery must be for the benefit of the church—the benefit of the parsonage, and benefit of the church, are equivalent terms as used in the *English* books. Of the right in general of the owner of the fee to recover the value of trees when severed from the soil, there is little doubt. *Blaker* v. *Anscombe (a)*. " The timber, while standing, is " part of the inheritance, but whenever it is severed, either " by the act of God as by tempest, or by a trespasser, and by " wrong, it belongs to him who has the first estate of inheri-

(a) 1 *N. R.* 25, referring to 3 *P. Wms.* 268.

" tance,

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"tance, whether in fee or in tail, who may bring trover for it." *And see* 2 *Selw. N. P.* 1329. If the rector let for a shorter period than his life, he may perhaps have an action for the injury to his contingent reversion for life; but that would only be for the injury he might sustain by being deprived of the use of the growing trees, and would not interfere with the recovery of the value of them when cut, by the owner of the fee. In order to enable the rector to recover for waste in *England*, he is held *quodam modo* seized of the inheritance for the benefit of the church: not only is there no reason for such a holding here, but we are I conceive precluded from holding him *in ullo modo* seized of the inheritance, when we find that another is actually seized of that inheritance.

For these reasons, and on the best consideration I am enabled to give this case, I think the plaintiffs were entitled to recover on the trover count. I am by no means sure they might not recover on the first count (with some amendments), which states the plaintiffs to be seized in fee of the land, "which is in the tenure and occupation of divers "tenants of the rector, *the reversion of the said premises then* "*and still belonging to the said plaintiffs*," though there is perhaps a defect in not setting out the grant as made for a glebe for the use of the rector. It is true also, the plaintiffs were not reversioners in the usual sense of the term, which is that perhaps stated in the declaration, which defines a reversion to be the residue of an estate left in the grantor; but they come under the first signification given of the term in *Tomlin's Law Dict.*: "an estate left, which continues during a particular estate in being." It does not certainly follow, that the plaintiffs are entitled to the possession after the determination of the particular estate of the rector's tenants, and it might be difficult to frame a special count to meet the case, nor would there be a necessity for it if trover is maintainable. I quite agree, that if the rectors be only *cestui que trust* (all the legal estate remaining in the church corporation), the plaintiffs must fail on the special counts which allege the land to be in the possession of tenants of the rector, and the reversion to be

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in the plaintiffs, for the rector not having title to lease, the interest of the plaintiffs could not properly be stated as a reversion expectant on the lease of the rector; but even in that case it would appear that the plaintiffs might have treated the rector's tenants as their tenants, and alleged that the land was in possession of their tenants, and the injury done to their reversion, *Vallance* v. *Savage* (*a*); and so recover in trover for the value of the trees, the property thereof being in them as owners of the inheritance, when they were cut and carried away by the defendants, who can set up no right under the rector's tenants beyond what the tenants themselves could have exercised. *Berry* v. *Heard* (*b*), *Palmer* 327, *Lewis Bowles'* case (*c*), 1 *New R.* 25. The rector, Mr. *Walker*, in his leases, neither professes to give any right to cut the trees, nor does he except them out of the demised premises. The right to cut for the purpose of clearing and cultivating the land must, no doubt, be implied to exist in the tenant as well as the rector; but the right is, in my opinion, far more limited than was laid down at the trial, and the evidence was quite insufficient to warrant the jury in the conclusion they arrived at under the learned Judge's charge. I think such a cutting down of trees as would be justified, must either be for the necessary use of the farm or in the course of clearing up the land for cultivation. When the latter purpose is relied on, the intent should be indicated by the acts; and, as is said by the *American* writers, "regard must be had to the condition of the land, and to "the object of felling the trees, and generally whether "the tenant has in the act complained of, conformed to "the regular practice and usage of the country in similar "cases: and to what extent wood and timber may be "felled without waste, is a question of fact for the jury to "decide on under the direction of the Court." Now here not only was there no custom of the country to warrant the acts, or intent to clear and cultivate apparent, but the acts were done *alio intuitu*, with another object altogether, namely, to make money by the sale of the trees; and it is not the custom to clear up all the land at once, or permit others to

(*a*) 7 *Bing.* 595. (*b*) *Cro. Car.* 242. (*c*) 11 *Rep.* 81 b.

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cut generally on the whole land in the course of clearing up a part. It is vain to say that the tenant might possibly intend to clear up the whole before the expiration of the term: there was nothing to manifest such an intent, or to bind him to the fulfilment of it. The future remedy for breach of covenants against waste, in leases, does not preclude the present remedy, for the recompense might and often would be lost if the right of recovery remained suspended until the end of the term.

For all these reasons, I think the verdict cannot be sustained, but that the rule for a new trial must be made absolute.

CARTER, J. Not having been present at the second argument of this case, I should probably have taken no part in its decision but for the difference of opinion which exists among my learned Brethren. That however being the case, I have thought it better to add the slight weight of my opinion, in accordance as it is with that of His Honor the Chief Justice and Mr. Justice *Parker*. After the very full and able judgment of Mr. Justice *Parker*, I shall not think it necessary to go at any length into the case; but shall state my conclusions on the main points of the case in a very few words.

I think there can be no doubt the expression in the grant "give and grant to the rector, church wardens and vestry, "*for a glebe*," brings this grant within the provisions of the 56 *G.* 3, *c.* 11, *s.* 3, as a grant of land for the benefit of the rector for the time being—the latter part of that section identifying such land as glebe, by putting it on the same footing as glebe land in *England*. It appears to me that after the passing of that act, the third section must be considered as incorporated in every grant of glebe land made to any church corporation; and the fair way of testing the main question in this case is to consider the grant as if the provisions of that section formed a part of it. The habendum of the grant would then read thus, "To have and to hold the said two "tracts of land unto the said rector, church wardens and "vestry, and their successors, for ever, subject to the sole "management and direction of the rector for the time being; "and subject to the use, occupation and enjoyment by such "rector

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" rector, for the best benefit and advantage of himself and his " successors, in like manner as glebe lands belonging to any " rectory or parsonage in *England* are there usually held, " occupied and enjoyed." What estate would a grant so worded give to a rector?

The words " use, occupation and enjoyment," would give the rector a right to the sole possession of the land so long as he continued rector; and the words " management and " direction" would enable him to put other parties in possession, so long as he continued rector—thereby enabling him to do the same acts and derive the same benefit from the land as could a person having a limited freehold, such as an estate for life. Then taking the concluding words, "in like " manner as glebe lands in *England* are usually held" &c., does not this define the legal interest which the rector is to have as a freehold during his incumbency? which is the estate of a rector in *England* as to glebe lands. After much hesitation, I therefore must admit that the conclusion of my mind on this point is, that the rector has a legal estate of freehold in glebe lands during his incumbency, the fee remaining in the church corporation; and on the appointment of a new rector, the freehold vesting in him. The church corporation seems to me to stand somewhat in the position of trustees to support contingent remainders.

2. It is evident that the lease now under consideration—made by the rector alone—though purporting to be for twenty one years, could not, if he ceased to be rector before the expiration of that term, be binding on the church corporation or on a succeeding rector; but will be good as long as he remains rector. It is perhaps hardly necessary to determine in the present case what lease would be binding on a succeeding rector, but I should incline to think that a lease for a term not exceeding twenty one years, made by the rector and church corporation, and confirmed by the ordinary, would be binding. The rector and corporation together have the limited freehold and the fee, thereby representing the estate which a rector in *England* has; and as the glebe land is held as in *England*, where the rector and patron can give such leases binding the succeeding rector, I should conceive the

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the same would hold good here in leases made by the rector and church corporation, and confirmed by the ordinary.

3. The rector's right to cut trees must, I think, be limited to cutting in the *bona fide* actual clearing of the land, and the same right would apply to his tenants; and such trees so cut would, I think, be fairly the property of the tenant or rector—whoever was in the occupation of the land. Trees cut not in the course of clearing, or perhaps for necessary repairs, and firewood to be consumed on the land, would become the property of the church corporation, who might sustain trover for the value. I think it is incumbent on the defendants to shew themselves, or the tenants by whose permission the trees were cut, clearly within the exception to the strict rule of the *English* law, for which probably the evidence given on the trial could hardly be said to be sufficient. The special counts cannot I think be available, and the case should go to a new trial on the trover count, subject to a narrower direction as to the right of cutting trees, than was given by the learned Judge who tried the cause before.

CHIPMAN, C. J. It now devolves upon me to give my opinion in this important case; and in doing so, I beg to premise that I entertain a great respect for the opinion of my learned Brother with whom I differ; but after repeated deliberation, I cannot concur in his view of the case.

Perhaps the most important question discussed in this case, is the nature and extent of the estate of a rector in land held by a church corporation for his use and benefit, under the Act of Assembly 56 *Geo.* 3, *c.* 11, *ss.* 2, 3.

I will first inquire what was the state of the law on this subject anterior to the Act of Assembly above mentioned. By the act 26 *Geo.* 3, *c.* 4, "An act for the preserving the "church of *England*, as by law established in this Pro-"vince," it is enacted, "That no person whatsoever shall "be capable to be admitted to any *parsonage or other eccle-"siastical benefice*, or promotion whatsoever, within this "Province of *New Brunswick*, before such time as he shall "be ordained, according to the form and manner by law "established in the said church of *England*." This act thus completely recognizes the church of *England* as established

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blished in this Province, and expressly deals with parsonages and other ecclesiastical benefices; and the effect is to give to rectors or parsons the rights in the church and church lands which by the common law they have in *England*, and to preserve them in such rights until altered by legislative enactment. Now, by the common law, a rector is seized of the freehold of church lands as a sole corporation, capable of transmitting the inheritance to his successors. The fee would be in abeyance, or according to other opinions, should be considered as *quodam modo* vested in the parson or rector for the benefit of his church and of his successors.

That this was the law in the old *American* colonies, appears by two learned judgments of Mr. Justice *Story* in the Supreme Court of the *United States*, one in the case of *The Town of Pawlet* v. *Clark and others* (*a*), the other, *Terrett and others* v. *Taylor and others* (*b*). Thus the law remained until the Act of Assembly 29 *Geo.* 3, *c.* 1, which erected corporations aggregate of the rector, church wardens and vestry of the several churches in the Province, for the purpose of taking and holding lands for the use and benefit of the said respective churches, and to improve and use the same for the use, benefit and advantage of the said respective churches, and to this end vested in the said corporations aggregate the full estate in fee simple in such lands, and also in their respective churches, with full powers of managing and disposing of the same for the use and benefit of their respective churches. There can be no doubt that the effect of this last mentioned act was to displace the rectors, as sole corporations, from the freehold estate which they had at common law in lands held for the use and benefit of the church at large. But I see nothing in this act to prevent the rectors from continuing to take and hold lands as glebes, or for the use and benefit of themselves and their successors, in contradistinction to lands held for the general benefit of the church, between which two classes of lands the subsequent Act of Assembly, to which I shall presently advert, makes a clear and marked distinction. The next act

(*a*) 9 *Cranch's Rep.* 292; 3 *Cond. Rep.* 408
(*b*) 9 *Cranch's Rep.* 43; 3 *Cond. Rep.* 254

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is the 56 *Geo.* 3, *c.* 11, which in section two recites doubts to have arisen whether the rectors, church wardens and vestries of the several and respective churches are capable of taking and holding lands in trust *for the use of the several rectors* of the said churches for the time being: for the removal of which doubts it is *declared* and enacted, that the said rectors, church wardens and vestries of the several and respective churches erected or to be erected in the several and respective parishes in this Province, shall be deemed capable of taking and holding lands for the use and benefit of the several rectors for the time being. The third section of this act, is the one under which the present question arises, and provides "that all lands, tenements and here-"ditaments, already granted or hereafter to be granted to "the several and respective rectors, church wardens and "vestries as hereinbefore mentioned, for the use and benefit "of the rectors or ministers of the said several and respec-"tive churches for the time being, shall be held subject to "the sole management and direction of such rectors or "ministers, and shall be *used, occupied and enjoyed by them* "severally and respectively, for the best benefit and advan-"tage of themselves and their successors, in like manner as "the glebe lands belonging to any rectory or parsonage in "that part of *Great Britain* called *England*, are there "usually *held, occupied and enjoyed.*" Now if such lands are to be used, occupied and enjoyed by the rectors in this Province in like manner as glebe lands in *England* are usually held, occupied and enjoyed, this must confer upon such rectors the same rights as rectors have in glebe lands in *England*, and that is a legal estate of freehold. It appears to me therefore, upon full consideration, that the terms of this enactment can be satisfied only by giving to the rector a legal estate of freehold for life, or during his tenure of the rectory. The words "*used, occupied and enjoyed,*" are too strong to put up with a mere equitable interest. The word "*occupy,*" in the case of *Rex* v. *Inhabitants of Eatington* (*a*) applied to a holding for life, has been deemed to confer a legal freehold.

(*a*) 4 *T. R.* 177.

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I see no inconsistency in the church corporation holding the fee simple or inheritance in connexion with the lesser estate of freehold for life in the rector. On the contrary, this is a wise arrangement for the protection of the lands during any vacancy in the rectory, and obviates the necessity of the inheritance being deemed to be in abeyance or held *quodam modo* by the rector for the benefit of his successors, as is the case in *England*. I quite concur in the opinion that the words of the grant, upon which the title of the plaintiffs rests "for a glebe," are quite sufficient to bring the grant within the scope of the Act of Assembly 56 *Geo.* 3, *c.* 11, *ss.* 2, 3—glebe lands, and lands held for the use and benefit of the rector, being in a measure convertible terms. With regard to the power of leasing such lands, there can be no doubt that a lease by a rector will be binding upon him during his incumbency. At common law, such a lease would not be binding on his successor without the consent of the patron and ordinary. It may be that in this Province, the intervention of the church corporation as the owner of the inheritance may be necessary. But upon this point I desire to be understood as giving no opinion. If the state of the law upon this point should be deemed to be uncertain or imperfect, it may be advisable that there should be some legislative enactment in the matter, as the existing Acts of Assembly are silent on the subject of leasing.

I do not think it necessary to go into any of the points connected with the special counts in this case. I quite concur in the opinion, that trover will lie at the suit of the church corporation, the present plaintiffs, for trees wrongfully cut down; such trees, when severed from the soil and made chattels, being the property of the owner of the inheritance.

I now come to the point upon which a new trial was moved for; namely, the misdirection of the learned Judge to the jury. The Judge, in charging the jury, after stating that in the case of wilderness land, the tenants in leases for years under the implied intention of the parties to the lease, would have a right to clear the land, and to cut down trees in so doing, and would have the property in the timber and logs arising from the trees so cut down in clearing the land, proceeded

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ceeded to say: "The question came up, at what time during "the lease, were the tenants to clear up the land; and whether "under the evidence, it was or was not *the intention of the* "*tenants to clear up the land* from which the timber was cut, "*before the expiration of the lease*, that is, whether it was "taken off as a *preliminary step* to clearing up the land; if "it was, then it was admitted the tenant had a right to do "so, and in that case their verdict should be for the defen- "dants: but if, on the other hand, they were satisfied that "the timber was taken off merely to make what they could "of it, without any intention of clearing up the land, and "bringing it into a state of improvement, but to leave it in "that state at the end of the lease, then it was an injury to "the reversion." And again, "If they considered the cut- "ting the logs was going beyond any right that a fair and "reasonable construction of the lease would give, and that "there was no probable ground for supposing the tenants in- "tended to clear up the land, then they should find for the "plaintiffs, leaving the Court to determine whether the action "was maintainable." Now I cannot but think that these directions of the learned Judge are too unlimited. By the principles of the common law, timber trees belong to the owner of the inheritance, and the felling of such trees is waste. In this country, in the case of wilderness lands, it must be admitted, and it accordingly was admitted on the part of the plaintiffs in this case, that it is not waste for the tenant to fell timber trees for the purpose of clearing land for cultivation, and that the property of the trees so cut in the process of clearing the land would be in the tenant, and that he would have a right to sell the same.

The law in the *United States*, a country under similar circumstances with our own in respect to wilderness land, is thus stated by Chancellor *Kent*, in the fourth volume of his *Commentaries* (1st ed.), p. 75, referring to the case cited at the Bar *(a)*, "If the land be wholly wild and uncultivated, "it has been held that the tenant may clear part of it for the "purpose of cultivation; but he must leave wood and timber "sufficient for the permanent use of the farm. And it is a

(a) Jackson v. Brownson, 7 *Johns. Rep.* 227.

"question

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"question of fact for a jury, what extent of wood may be "cut down in such cases without exposing the party to the "charge of waste." I am willing to admit this, as the rule of law in this Province. This relaxation of the common law being admitted in favor of the tenant, I think that the *onus* lies upon him, and those who derive right under him, seeking to have the benefit of it, to shew that the timber trees in question were *bona fide* felled in the process of clearing the land for cultivation, according to the custom of the country, and that it is not permissible to range over the whole piece of land, culling here and there what trees may be fit for logs or timber, even although this be done with an intention to clear up the land at a future period, which intention may never be carried out. Justice to the owner of the inheritance I think requires that for the felling of timber trees to escape the imputation of waste, they should be cut down in the prosecution of a *present* intention to clear the land for cultivation; such intention to be indicated by other acts than the mere felling of the timber trees. I therefore think that the directions of the learned Judge which I have quoted afford too great a latitude to the tenants.

It was made a question in this case, whether this action would lie against the present defendants, who in cutting down the trees, acted under the authority of the tenant. This I think depends upon the question, whether under the circumstances of the case, the felling of the trees would have been waste if done by the tenants themselves. If so, no authority of theirs could justify the defendants in doing this injury to the inheritance. The right to bring trover depends upon the same circumstances. If it was waste to cut down the trees, the present plaintiffs, as owners of the inheritance, were never divested of their property in them, and consequently when the trees were severed from the soil, could maintain trover for them.

For these reasons I am of opinion that with reference to the trover count alone, the rule for a new trial should be made absolute.

Rule absolute.

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All rivers above the flow of the tide, which may be used for the transportation of property, as for floating rafts and driving timber and logs—and not merely such as will bear boats for the accommodation of travellers—are highways by water, and subject to the public use; and in determining whether a river is public or private, its length and depth at ordinary times, and its capacity for floating rafts &c. are proper to be considered.

In an action for obstructing a river by erecting a mill dam, it is not a proper question for the jury, whether the benefit derived by the public from the mill, is sufficient to outweigh the inconvenience occasioned by the dam.

Evidence of special damage in not being able to fulfil a contract for the delivery of logs, is not admissible where the damage alleged in the declaration is that the plaintiff was prevented from getting the logs to market, and thereby lost the freight and sale thereof.

THIS was an action on the case for obstructing a navigable river, tried before *Street*, J. at the *Kingston* circuit, in *July* 1846. The declaration contained four counts. The first stated, that whereas the plaintiff before and at the time of committing the grievances hereinafter mentioned, was lawfully possessed of certain goods and chattels, to wit, 30,000 logs and pieces of lumber, and at the time of committing the grievances, was floating and driving his said goods and chattels along a certain *navigable* river or common public highway, called *Hammond* river, situate at *Hampton* in the county of *King's;* yet the defendants well knowing the premises, but contriving &c. to injure the plaintiff, and to prevent him from floating and driving his said goods and chattels along the said river, on the 19th *November*, 1845, at *Hampton* aforesaid, wrongfully and injuriously built and placed, or caused to be built and placed across the said river and the channel thereof, a certain dam and certain booms, and kept and continued the said dam and booms so built and placed across the said river, for a long space of time &c., and thereby during all the time aforesaid, obstructed the said navigable river and the channel thereof, and thereby prevented the plaintiff from floating and driving his said goods and chattels along the said river or common public highway. By reason of such premises, the plaintiff was not only obstructed and prevented from floating and driving his goods and chattels along the said river, but was put to great trouble and inconvenience about his said business, and had to expend large sums of money, to wit &c., about the said goods and chattels, and the said 30,000 pieces of lumber were absolutely lost to the plaintiff. The other counts stated, that whereas before and at the time &c., there was and still ought to be, a public river or *common public highway*, called *Hammond* river, for all the liege subjects of the Queen to pass and repass at their free will and pleasure, at all times of the year, and to float and stream drive down and along

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along the same, their timber, logs and lumber; and that the plaintiff was possessed of 30,000 other logs and pieces of timber (as in the first count): alleging as damage, that the plaintiff was prevented from getting the lumber to market, and thereby lost the freight of the same and the sale thereof Plea, not guilty.

It appeared that the defendants were the proprietors of land on both sides of *Hammond* river, and about ten years before the trial, had built a saw mill and dam extending across the river, which, at this place, was about two hundred feet wide. The lower side of the dam was about fifteen feet high, and nearly perpendicular, and it caused the water to flow back up the river about two miles. They had also placed a boom across the river a short distance above the dam, for the purpose of securing the logs brought down the river to be sawed at their mill. In *November* 1845, the plaintiff had between seven and eight thousand logs, part belonging to himself and the rest on freight, which during a freshet, he was driving down this river, for the purpose of taking them to *Saint John*. The defendants' boom being closed, a large quantity of the logs collected there, and when the boom was opened after some delay, the logs passed over the dam in a mass, and jammed on the lower side, and the water falling immediately after, the plaintiff was unable to get them down the river to the rafting place until it was too late to take them to market that season. The plaintiff had from fifteen to twenty men employed in different parts of the drive, and spent a good deal of time and labor in endeavoring to break the jam; and evidence was offered and rejected, of special damage sustained by him in consequence of not being able to perform a contract to drive logs for a Mr. *Kirk*. Before the dam was built, the river had been used for driving down logs and timber, and persons had occasionally passed up and down in canoes; but it was not generally used for boating, except by persons engaged in driving timber, and while so occupied. It was a rapid stream, easily affected by rains, rising and falling rapidly, and being somewhat obstructed by rocks and shoals, was rather a difficult stream to drive; but the general opinion of

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of the witnesses was, that if there had been no dam and boom, the logs would have gone down the river without any serious difficulty or delay. From the time the dam was built, until about two years before the trial, all the logs brought down the river had been sawed at the defendants' mills. Evidence was given on the part of the defendants, subject to the plaintiff's objection, that the mill was a benefit to the public, because it increased the value of property in the neighbourhood, and afforded a market for the timber growing on the land above; but it was not stated that the dam had improved the navigation of the river, except in that part where it caused the water to flow back. The defendants' witnesses also stated that they considered the public benefit derived from the mill, more than equivalent to any inconvenience arising from the interference with the navigation.

The learned Judge left the following questions to the jury: 1. Whether the river was used in such a way as to bring it within the definition of a public highway? 2. If it was so used, whether the obstruction was such as to injure generally the navigation of the river? 3. If it did injure the navigation in some degree, whether the public benefit derived from it, was not such as to counterbalance any occasional private inconvenience it might cause? 4. The extent of the injury sustained. His Honor told them, that it was not every stream upon which logs and timber could be driven at particular seasons of the year, that came within the definition of a public highway; that he considered a river to come within that definition, should be such as could be used for the passing and repassing of boats and canoes for the accommodation of travellers at ordinary seasons of the year, and that if they did not consider this river above the dam could be so used, the defendants were entitled to a verdict; that they must consider whether the dam and boom so obstructed the navigation as to amount to a public inconvenience or a nuisance; if not, their verdict should be for the defendants. But if they were a public inconvenience, then they should consider whether the public benefit derived from the mill did not counterbalance any inconvenience that might occasionally occur in the navigation; for if it was a public

public benefit, it could not be a public nuisance, and a mere private inconvenience should yield to the public good. If on all these points they should find against the defendants, they should give the plaintiff such damages as they considered he had sustained by the detention of his own timber, and not for any thing he might have lost in consequence of not being able to fulfil his contracts to bring down the timber of other people on freight. The jury found a verdict for the defendants, stating that the river was not a navigable river, and that the benefit derived by the public from the mill was greater than the injury arising from the obstruction to the navigation.

In *Michaelmas* term 1846, *Gray* obtained a rule *nisi* for a new trial, on the grounds of misdirection, improper rejection of evidence, and that the verdict was against law and evidence. *Esson* v. *M'Master (a)*, *Rex* v. *Russell (b)*, *Rex* v. *Lord Grosvenor (c)*, *Rex* v. *Ward (d)*, *Rosc. Crim. Evid.* 517. 739, were cited.

In *Trinity* term 1847, *G. D. Street* shewed cause, and *Gray* was heard in support of the rule, before *Chipman*, C. J. *Carter*, J. and *Street*, J. The Court not being agreed, the case was again argued in *Trinity* term last, before *Chipman*, C. J., *Parker* J. and *Street*, J., by

Gray for the plaintiff. The injury is stated to have arisen from the dam and boom together: if there had been a dam without a boom, or a boom without a dam, the injury would probably have been slight. This river is clearly a public highway. The principles of the law of *England*, in respect to rivers, cannot be applied to this country: there the rivers are not subject to such sudden freshets, nor are they used for the same purposes as in this country; the cases therefore on this subject in the *United States*, where the rivers are used for the same purposes as in this country, will be very important. There it is held that any stream that is "floatable" is a public highway. In *Wadsworth* v. *Smith (e)*, it is said that rivers "which are sufficiently large to bear boats or barges, or "to be of public use in the transportation of property, are high-"ways by water, over which the public have a common right,

(a) 1 *Kerr* 501. (b) 6 *B. & C.* 566.
(c) 2 *Stark.* 511. (d) 4 *A. & E.* 384. (e) 2 *Fairf.* 276.

"and

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" and the private property of the owner of the soil is to be im-
" proved in subserviency to the enjoyment of this public right;
" such rivers therefore cannot lawfully be so obstructed,
" even by the owners of the banks and bed, as to interfere
" with this public right. If therefore *Ten Mile* brook (the
" stream in question) was naturally of a sufficient size to
" float boats or mill logs, the public have a right to its free
" use for that purpose unincumbered with dams, sluices or
" tolls." The case of *Esson* v. *M'Master (a)* collects and reviews all the cases, and draws this deduction: that all rivers, though above the flowing of the tide, which afford a common passage not only for larger vessels, but for boats or barges, are by the principles of the common law, public and common highways, and are subject in the same manner as highways on the land, to the use of all the Queen's subjects, for passage and transportation of property thereon. The terms " boats and barges," are only given as an illustration of the principle, and not for the purpose of confining the rule to rivers on which boats and barges may be floated; for it must extend equally to rivers on which rafts and logs can be floated; and it is not necessary to constitute them public highways, that they should be navigable for boats and canoes, for in this country a stream may be a highway on which there never has been a boat, if at particular seasons, it may be used for stream driving logs and timber. The exigencies of the country require it. The very existence of the timber trade, the clearing of the forests, the opening up the resources of the country—all depend upon it; for how many streams must yet exist, in the unexplored wilderness, which may be made subservient to the wealth and intercourse of the inhabitants, but which would be comparatively useless if the grantee of to-morrow could stop the stream, because no *boat* had floated on it. Even the river *Saint John*, during the drought of summer, is not navigable for boats above *Woodstock*, but no one will contend that it is not a public highway, and that the proprietors of lands on each side have a right to stop it up. [STREET, J. The case of *Wadsworth* v. *Smith* speaks of the " natural state" of a stream. What do you call its natural state?] The state it is in without any

(a) 1 *Kerr* 501.

artificial

artificial means used by man, when the rise and fall of its waters result from natural causes. Though this stream should not come strictly within the definition of a navigable river, still there has been such a usage of it for driving logs and timber, that it has acquired the character of a public highway, and therefore ought not to be obstructed. *Berry* v. *Carle (a)*. The question of the public benefit counterbalancing the private inconvenience, should not have been submitted to the jury; because though the dam might have been a benefit to the navigation in particular parts, that will not divest the public of the easement they had in freely navigating the river as before the dam was built. *Rex* v. *Ward (b)*, overruling *Rex* v. *Russell (c)*. The evidence that the mill was a public benefit, was based on the fact that it increased the value of the property up the river, and enabled persons living above to sell their lumber at the mills and get supplies: they could not say that it benefited the navigation generally, which is the only principle upon which it could have been admissible; for the question is, not whether it was a benefit to private individuals, but whether it was a general improvement to the navigation of the river. *Rex* v. *Lord Grosvenor (d)*. The mill was established merely for the private benefit of the defendants, therefore the whole of this evidence should have been excluded. The act 9 *Vict. c.* 34, having been passed after this suit was commenced, cannot affect the case any further than to shew that before the act, the erection of dams across rivers was illegal. The evidence offered to prove that the plaintiff lost the freight of the logs in consequence of the dam, was improperly rejected: the averment of special damage was sufficient.

G. D. Street for the defendants. The only evidence of this being a navigable river, was that it was used in the spring to drive timber down; but if because streams may be so used at certain seasons of the year, they are to be considered navigable rivers, there is scarcely a brook in the country which will not be entitled to that designation in the spring of the year. There was no evidence that this stream was navigable, even for canoes, except occasionally for

(*a*) 3 *Greenl.* 269.
(*b*) 4 *A. & E.* 384.
(*c*) 6 *B. & C.* 566.
(*d*) 2 *Stark.* 511.

crossing;

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crossing; but in *Esson* v. *M'Master*, the river was proved to be navigable for boats and canoes. *Wadsworth* v. *Smith* is an authority for the defendants; for it says, that "such "little streams or rivers as are not floatable, that is, cannot "in their natural state be used for the carriage of boats, "rafts or other property, are wholly and absolutely private, "not subject to the servitude of the public interest, nor to "be regarded as public highways by water." Can it be said that a river, which is only "floatable" when it is swollen by rains or the melting snow in the spring, is in its "natural state?" The jury were justified in finding that it was not a public highway. If the declaration had described it as a stream navigable for stream driving at certain seasons of the year, the question of the public rights in such a stream would have come properly before the Court; but on the present declaration the plaintiff cannot recover, because he has not proved his averments. The question of public benefit was properly left to the jury, for the doctrine that if the public generally is benefited by the erection complained of, it is a justification, though individuals may be injured, is still law, for *Rex* v. *Ward* does not entirely overrule *Rex* v. *Russell*; nor is there any thing in *Rex* v. *Ward* which shews that the direction of the learned Judge to the jury on this point was wrong. In *Rex* v. *Russell* there was no evidence that the navigation of the river was improved by the erections: the ground upon which the case was questioned was, that the benefit was altogether collateral, that there was no benefit to the navigation of the river. In this case, it was proved that the river driving was benefited rather than injured by the dam. There is no averment in the declaration to authorize the admission of the evidence to prove special damage—the defendants could have had no intimation that such evidence would be offered.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. The principal question in this case is, whether *Hammond* river be a river of such a description as to be subject to public use as a highway. The principle of law on this subject is thus stated in the judgment of the Supreme Court of the "State

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State of *Maine*, in the case of *Wadsworth* v. *Smith* (*a*): "The general principle of the common law applicable to this "subject is, that above the flow of the tide, rivers become "private, either absolutely so or subject to the public right "of way, according as they are small or large streams. "Those which are sufficiently large to bear boats or barges, "or to be of public use in the transportation of property, "are highways by water, over which the public have a com- "mon right; and the private property of the owner of the "soil is to be improved, in subserviency to the enjoyment "of this public right."

This exposition of the law we think is fully borne out by the doctrine laid down in Lord *Hale's Treatise De Jure Maris*, cited in the case of *Esson* v. *M'Master* (*a*); and if this be the true statement of the law, it was not correct to confine the description of rivers, which are water highways, to those rivers which will bear boats and barges for the accommodation of travellers; but it should have been extended to all rivers which may be used for the transportation of property. Indeed Lord *Hale* considers *all rivers* to be *prima facie publici juris*, except "little streams," which do not afford a common passage for the use of the King's people. Now *Hammond* river is a river of very considerable extent, both in point of length and magnitude. It is stated by one of the witnesses to be two hundred feet in width at the place where the defendants' mills are situated. It was proved to have been used for many years before the erection of those mills, for the driving or floating of timber. In the judgment of the Court in the case of *Wadsworth* v. *Smith*, private rivers are thus described. "But such little "streams or rivers as are not floatable, that is, cannot in "their natural state be used for the carriage of boats, rafts "or other property, are wholly and absolutely private, not "subject to the servitude of the public interest, nor to be "regarded as public highways by water, because they are not "susceptible of use, as a common passage for the public." It was proved that there were from six to eight thousand logs lying at one time in this river for passage down it. It

(*a*) 2 *Fairf.* 280. (*a*) 1 *Kerr* 501.

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is therefore of great public use for the transportation of property; and if it be a private river, in which the public have no right of passage for timber or logs, the defendants may shut it up altogether, and prevent any logs or timber coming down (*a*).

It is very evident, that the mere capacity of a stream during the spring freshets, or after heavy rains, to float down single sticks of timber or logs, is of itself a very uncertain criterion of the public or private nature of the river, for there is no stream so small but which may at times

(*a*) The question, what is to be considered a navigable river, was discussed in the case of *Boissonnault* v. *Oliva*, Stuart's L. Canada Rep. 565. It was an action for damages alleged to have been occasioned by the appellant's stopping up the communication on a public navigable river, called the *Riviere du Sud*, by means of a boom and chain, whereby saw logs and timber belonging to the plaintiff, were stopped and prevented from arriving at his saw mill at *Saint Thomas*. *Reid*, C. J., in delivering the judgment of the Court said, "The appellant by his plea, admits the placing of the booms and chains on the *Riviere du Sud*, but denies that it is a navigable river: on the contrary, he alleges that it is not navigable, but the property of the adjoining seigniors, whose permission he has to erect and maintain the boom in question. Testimony has been adduced to a very considerable extent, to shew the waters of this *Riviere du Sud*, the difficulties and obstructions to the navigation, and the kind of communication of which it is capable. There may be some doubt whether this river can be considered *flottable*, as rivers of this description would appear to be ranked among navigable rivers, *portant bateaux et radeaux pour le transport du bois et autres merchandises*, and as such, were the property, and under the protection and jurisdiction of the Crown. The *Riviere du Sud* appears capable of floating only single logs, and not rafts or bateaux, from the frequent interruption of the navigation from the rocks, shallows and rapids to be found in it, and therefore is not to be considered as a navigable river; but, allowing it to be of the description of *seigneuriale et banale*, the use of it, even in that case, must be free and open to the public: for according to *Freminville*, vol. 4, c. 4, p. 434, the King preserves his right over all such rivers as may be used for the floating of timber, inasmuch as he is considered to be the protector of commerce and of the public interest. But if the King were not to retain this authority over a *riviere seigneuriale*; yet the *seigneur feodal* cannot claim the property of these rivers, as according to the *French* system, they belonged to the *seigneur haut justicier*, who was vested therewith, and exercised a jurisdiction over them; not so much for his own interest as for the public benefit, and was said to hold them in the same manner and for the same purpose as the King held and exercised jurisdiction over navigable rivers. In this country the King is the sole and only *seigneur haut justicier*; and as such, protects the rights of all his subjects in matters of this kind, which, under the *French* system, was intrusted to inferior officers. The waters of all rivers, whether navigable or not navigable, being matters of public benefit and public interest, are vested in the Crown, and no man, whether seignior or other, can hold or exercise a right over them without special grant from the Crown. No such grant has been ascertained to exist in the seigniors of *Saint Vallier* and *Saint Thomas*, nor could they convey to the appellant the right to stop up the communication on this river; but as the plaintiff has acquiesced in the act of which he has complained, and has agreed that the defendant shall keep up these booms as a thing beneficial to both parties; we think that the judgment of the Court below should be reversed."—REPORTER

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suffice and be used for driving down a log or piece of timber, and therefore the breadth of a stream, its length and depth, and volume of water at ordinary times, and its capacity for the conveyance of rafts, are matters proper to be taken into consideration. It is difficult to lay down any general rule which will be applicable to all cases; but our opinion is, that taking all the evidence together in regard to the river in question, it partook of the character of a river subject to the public right of way, rather than that of a mere private river.

We think also the direction to the jury, as to the balance of advantage or disadvantage to the public from the obstruction, was not correct; and it is difficult to say what effect that might have had on the minds of the jury in a case like this.

The evidence tendered to prove special damage was, we think, properly rejected. The particular damage of which proof was offered, namely, the loss sustained by the plaintiff by the nonfulfilment of a contract made with *Kirk* for the delivery of these logs, is not alleged in the declaration: on the contrary, the special damage alleged is, that the plaintiff was hindered from bringing the logs *to market*, which would mean bringing them for sale *to be made*—not bringing them to be delivered on a previous contract. It is a clear rule, that special damage must be stated with certainty. *Westwood* v. *Cowne* (*a*). On this ground therefore the rule cannot be supported.

On the other grounds, the rule for a new trial must be made absolute.

Rule absolute.

(*a*) 1 *Stark.* 172.

FOSHAY *against* BAXTER and OTHERS.

The plaintiff contracted to build a bridge

ASSUMPSIT for work and labor, tried before *Parker*, J. at the *Kingston* circuit in *July* last. It appeared that in 1846, for the defendants according to a specification, for a certain price, but varied from the contract in many particulars, of which the defendants were aware, but made payments to the plaintiff while the work was going on and very shortly before its completion; the bridge was carried away by the ice, the spring after it was built: Held, that the defendants' conduct was evidence of acquiescence in the deviations, and that if the bridge was of any value, the plaintiff was entitled to recover on the common counts.

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a public meeting of the inhabitants of several parishes in *King's* county, had been held to consider about raising money by subscription towards building a bridge over the *Kennebeccasis* river; that the defendants were appointed a committee for that purpose, and to select the site; and in *April* following entered into a contract with the plaintiff to build the bridge according to a specification and verbal instructions, for the sum of £248. The bridge was finished in *November* 1847, but was not built according to the contract: the defendants however were present at different times while the work was going on, and even made various payments to the plaintiff, with full knowledge of the deviation from the contract, and the last payment of £50 was made a few days before the work was finished. When the work was finished, the parties met, and the defendants refused to take the bridge off the plaintiff's hands, on the grounds of alleged defects and variance from the agreement; there was then a balance of £70 due the plaintiff, according to the contract price. The bridge was carried away by the ice in the spring of 1848, and there was conflicting evidence whether it was in consequence of defective work, or the selection of a bad site. It was proved that as good a bridge could be built for £150 or £160. Payments had been made to the plaintiff to the amount of about £175.

The learned Judge told the jury, that if the bridge was of no use, and had been carried away in consequence of bad work and deviations from the instructions, the plaintiff could not recover; and they ought to be well satisfied that such was not the case, before they could find for the plaintiff. It was evident the work had not been performed according to the contract, but a bridge had been built and used by the public, and if it was worth any thing, the plaintiff was entitled to receive it, though he had not performed his contract. They would therefore have to consider what the work was worth, and whether the payments made to the plaintiff were equal to the value of the work: if they were, he could not recover. The defendants had been guilty of a breach of duty, in making payments to the plaintiff from time to time, when they knew that he was deviating altogether from the contract;

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contract; but the fact of their having made him a payment after nearly all the work was completed, was a strong circumstance against their setting up that the bridge was worth nothing, or that the plaintiff was not entitled to recover any thing unless he proved a strict compliance with the contract. Verdict for the plaintiff, £23.

In *Michaelmas* term last, *Jack* moved to set aside the verdict and grant a new trial, on the grounds of misdirection, and that the verdict was contrary to evidence. The payment of the money would not amount to a dispensation from the performance of the contract. [STREET, J. It was evidence to go to the jury of acquiescence by the defendants in the deviation.] Unless the contract was performed, the plaintiff has no right to recover. *Ellis* v. *Hamlen* (*a*). In *Kewley* v. *Stokes* (*b*), where there had been a breach of contract on the part of the plaintiff, it was held that he could not recover on a *quantum meruit*, nor prove that his breach of contract arose from the defendant's default. The defendants wanted a bridge of a particular description, and they did not wish to accept a bridge different from that contracted for, and pay what it was worth; and it cannot be said that because they made payments from time to time, they accepted the bridge. [CARTER, J. Do you contend, that if you employ a man to build a house according to contract, and he varies from the contract, you can keep the house and pay nothing for it?] Surely if he builds the house entirely different from his contract, I am not bound to take it. [CARTER, J. No, you are not bound to take it; but if you do take it, you must pay what it is worth.] The use of the bridge by the public could not amount to an acceptance by the defendants—they could not control the public. So long as the contract is open, and the work unfinished, the plaintiff recovers on the contract. *Rees* v. *Lines* (*c*). [STREET, J. How long do you say the contract continued open?] In *Tuft* v. *Inhabitants of Montague* (*d*), where the plaintiff contracted for a certain price to erect a bridge in a particular manner, and executed it so unfaith-

(*a*) 3 *Taunt.* 52.
(*b*) 2 *C. & K.* 435.
(*c*) 8 *C. & P.* 126.
(*d*) 14 *Mass.* 282.

fully,

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fully, that although it served its intended use for a time, yet from the mode of building it, it was finally carried off by a flood; it was held that he could not recover on the special contract, because he had not fulfilled it, nor on a *quantum meruit*, because the defendants derived no benefit from his labour. The defendants are not liable on the *quantum meruit*, unless they have accepted the bridge, and the last evidence about it was, that they were disputing about the work, and refused to accept it. The acts of the defendants should be joint, to bind them as a committee; it is not like a partnership, where one may bind the others. [PARKER, J. I told the jury they must be satisfied, that all the defendants consented to or acquiesced in the deviations.] There is not sufficient evidence to support the verdict. [CHIPMAN, C. J. The Court think there was no misdirection; but there may be a question whether the verdict is not against the weight of evidence, and you may take a rule *nisi* on that ground.]

Rule *nisi*.

Scovil now shewed cause. The defendants saw the work going on, and assented to the deviations: the case was left fairly to the jury for the defendants, and where so large a reduction has been made by the jury, from the plaintiff's demand, the Court it is submitted, will not disturb the verdict.

Jack in support of the rule. The only evidence of the value of the bridge was, that it was worth about £160, and the plaintiff had been paid more than that sum; he was therefore not entitled to any thing more, and the verdict is against evidence.

Per Curiam. The value of the work was a question entirely for the jury, and as they have made a deduction from the contract price, we cannot say that the verdict is so much against the weight of evidence as to justify us in interfering, though we might not have come to the same conclusion.

Rule discharged.

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COVENANT. The first count of the declaration stated that whereas on the 1st *February*, 1830, at *Saint John*, by a certain indenture then and there made between the defendant of the one part, and one *Robert Forsyth* of the other part, under the hands and seals of the defendant and *Forsyth* respectively, the defendant for the consideration therein mentioned did demise and lease unto the said *Robert Forsyth*, his executors, administrators and assigns, all &c. (a description of the land followed.) To have and to hold the said lot and premises, with the appurtenances, unto the said *Robert Forsyth*, his executors &c. from the 1st *February* then instant, for the term of eleven years thence next ensuing. And it was by the said indenture, among other things, agreed that at the end of the said term, all the buildings and improvements on the said lot should be valued and appraised by two indifferent persons, one to be chosen by the defendant, his heirs or assigns, and one by the said *Forsyth*, his executors, administrators or assigns; which two persons in case of disagreement should choose a third, and that the determination of any two of these should be conclusive, and it should then be at the option of the defendant to pay such appraised value or to continue the lease for a further term, not less than seven nor more than fourteen years, at the like rent and under the like covenants; which said indenture was afterwards, on the 9th *October*, 1835, duly registered in the office of the register of deeds for the city and county of *Saint John*. By virtue of which indenture, the said *Robert Forsyth*, on the day first aforesaid, entered into the demised premises and became possessed thereof for the term so granted; and being so possessed, afterwards, on the 21st *September*, 1835, by his certain deed poll, duly signed and sealed with his seal, the said *Robert Forsyth* did assign and set over to one *Elizabeth Farley*, her executors, administrators and assigns, as well the said indenture as the messuages, tenements and premises therein mentioned, to be demised, and

A party suing as assignee of a term, on a covenant contained in the lease, and alleging and making profert of an assignment by deed, is bound to prove it; and if several assignments are alleged, a traverse that the plaintiff became entitled *modo et forma*, puts the whole of them in issue.

Quære. Whether, if an assignment by deed had not been alleged, the acceptance of ground rent by the lessor from a person in possession, was a sufficient recognition of such person as assignee.

In an action by the assignee of a lease against the lessor, on a covenant to pay for improvements according to valuation, the plaintiff is entitled to interest on the amount appraised, from the time it becomes payable. If the lessor refuse to appoint an appraiser, the jury may allow interest on the value of the improvements, as part of the damages.

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and all the estate, right, title and interest of the said *Robert Forsyth*, of and in the same. By virtue of which deed poll, the said *Elizabeth Farley* became possessed of the premises for the residue of the said term; and being so possessed, the said *Elizabeth Farley*, afterwards, on the 25th *March*, 1840, by her certain deed poll duly signed and sealed with her seal, did assign, transfer and set over to the plaintiff, his executors, administrators and assigns, all her right, title, interest and term of years yet to come and unexpired of and in the said premises, to have and to hold &c. By virtue of which last mentioned deed, the said plaintiff on the day and year last aforesaid, became possessed of the premises, with the appurtenances for the residue of the term so granted, until the 1st *February*, 1841, when the said demise ended and determined. The declaration then averred, that at the end of the term there were and still are buildings and improvements on the demised lot to the value of £1,000, whereof the defendant on &c. had notice; and though the plaintiff has always, since the assignment to him, performed and fulfilled all things in the said indenture contained, on the part of the lessee to be performed, and did after the expiration of the term, on the 25th *April*, 1843, duly nominate and choose one indifferent person on his behalf, to value and appraise the buildings and improvements, and did afterwards on the 3d *May*, in the year aforesaid, give notice thereof to the defendant, and request him to choose an indifferent person on his part to value and appraise the said buildings and improvements; yet the defendant did not nor would choose and appoint any person on his part to value the said buildings, nor did he, when so requested, or at any time before or since, pay the plaintiff for the said buildings and improvements, nor grant him a further lease of the premises according to the force and effect of his covenant, though often requested so to do, but hath wholly neglected and refused &c. The fourth count set out a lease from the defendant to one *James Schoales* for the same term as *Forsyth's* lease, and containing similar covenants; also an assignment from *Schoales* to *Farley*, and from *Farley* to the plaintiff, with averments and breach as in the first count.

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The defendant pleaded, among other pleas on which issues in law were taken (*a*), that the plaintiff did not become nor was possessed of or entitled to the said tenements and premises in the said first count mentioned, for the residue of the said term so thereof granted, or any part thereof in manner and form as the said plaintiff hath in the said first count in that behalf alleged. There was a similar plea to the fourth count.

At the trial before *Carter*, J., at the adjourned *Saint John* circuit in *March* 1848, the plaintiff proved a lease from the defendant to *Robert Forsyth*, for a term of eleven years from 1st *February*, 1830, containing a covenant to appoint appraisers to value the buildings, as set forth in the first count of the declaration: a lease from the defendant to *Schoales* for the same term, and containing similar covenants to *Forsyth's* lease; and the assignment from *Schoales* to *Farley*, and from *Farley* to the plaintiff. The plaintiff then tendered in evidence a registered deed, purporting to be an assignment to *Elizabeth Farley* of *Forsyth's* lease, made by *James Peters*, Junior, as attorney for *Forsyth*; but this was rejected without proof of the attorney's authority. Mr. *Edward B. Peters*, the executor of *James Peters*, was then called as a witness, and produced a power of attorney which he had found among *James Peters'* papers; but there was no proof of the execution of it, by the testimony of the attesting witnesses or by evidence of their handwriting, though there was some evidence of the signature being *Forsyth's* writing: it was therefore not admitted in evidence. An assignment of this lease from *Farley* to the plaintiff on the 25th *March*, 1840, was then proved, and it was proved by *Farley*, that for several years before the assignments she had paid the ground rent reserved in both these leases, to the defendant, or to *James Peters* as his agent, and she produced the following account, in the handwriting of *James Peters*, which she had paid:—

" Miss *Farley*, To *C. J. Peters*, Dr.

" 1840. 1st *Nov.* To 1½ year's ground rent of lots on *Princess Street*, - - } £18."

(*a*) See 2 *Kerr* 593; 3 *Kerr* 543.

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It also appeared, that after the assignment the plaintiff had received rent for the *Forsyth* property, and that after the expiration of the leases he had served a notice on the defendant, stating that he (plaintiff) had appointed an appraiser pursuant to the terms of the covenant, and requesting the defendant to appoint another, and to pay the valuation of the improvements or renew the leases. After the receipt of this notice, *James Peters*, on behalf of the defendant, called on the plaintiff's attorney several times, and objected that application should be made to another person to whom the defendant had conveyed the reversion, but nothing was said about the plaintiff's right as assignee. The buildings on the *Forsyth* lot were valued by the plaintiff's witness at £250, and those on the *Schoales* lot at £150.

The learned Judge directed the jury to find for the plaintiff on both leases; but as there was some doubt about the plaintiff's title to the *Forsyth* lease, to state the value of the improvements on each separately: and at the request of the plaintiff's counsel, directed them to allow interest on the amounts, from the 3d *May*, 1843, when notice was given to appoint appraisers. The jury found for the plaintiff, £250 for the improvements on the *Forsyth* lot, and £150 for those on the *Schoales* lot, with interest from the date of the notice.

In *Easter* term last, *Jack* obtained a rule *nisi* for a new trial, on the ground of misdirection upon the right of the plaintiff as assignee, or to reduce the verdict to the damages found on the *Schoales* lease, without the interest. 1 *Chit. Pl.* (5th ed.) 402, 1 *Saund.* 112 b, note (1), *Co. Lit. s.* 483, *Carvick* v. *Blagrave* (*a*), Act 7 *W.* 4, *c.* 14, *s.* 21, were cited.

J. A. Street, Q. C., shewed cause in *Trinity* term last. A parol assignment is sufficient where the assignee of the lessee brings the action on a covenant in the deed which runs with the land. *Noke* v. *Awder* (*b*). And even since the statute of frauds, it is considered that in such an action the assignee is not bound to state in his declaration that the term was assigned to him by deed or writing. 1 *Saund.* 233 b, note (3). The defendant treated *Farley* as the assignee, by receiving the rent from her, and is now estopped from disputing

(*a*) 4 *Moore* 303.

(*b*) *Cro. Eliz.* 373.

puting it. In *Rose. Ev.* 395, it is said, that where the plaintiff sues as assignee and the defendant traverses the title as stated, it will be incumbent on the plaintiff to prove it, either by shewing the *mesne* conveyance from the original lessor, or by shewing that the defendant has paid rent to himself, which will be evidence of the plaintiff's title as assignee. *Doe* v. *Parker* (*a*), *Carvick* v. *Blagrave* (*b*). But at all events, the assignment from *Forsyth* to *Farley* is admitted by the pleadings. [STREET, J. I do not see that: the plea says that the plaintiff did not become possessed or entitled to the premises in manner and form as is alleged in the declaration.] The words "in manner and form," are mere surplusage. If the defendant meant to put in issue the assignment to *Farley*, he should have put it upon the record according to the form in 3 *Chit. Pl.* 1019, that all the estate, right, title &c., of *Forsyth* in the premises, by assignment thereof duly made, did not come to and vest in the plaintiff. If a party traverses only one of several facts, he admits those which are not expressly denied. 1 *Chit. Pl.* 645. *Gale* v. *Capern* (*c*). The plaintiff has a right to in crest, independent of the Act 7 *Wm.* 4, *c.* 14.

Jack in support of the rule. It is laid down in *Co. Lit. s.* 483, that "If a feoffment be alleged by two, and this is "traversed *modo et forma*, and it is found the feoffment of "one, there *modo et forma* is material. So if a feoffment be "pleaded by deed, and it is traversed *absque hoc quod feoffavit* "*modo et forma*; upon this collateral issue *modo et forma* "are so essential, as the jury cannot find a feoffment without deed." That is just the case here: the plea denies that the plaintiff became assignee in manner and form as he has alleged in his declaration; the authority is therefore conclusive, that the jury cannot find the assignment unless the deed is proved. Having chosen to state the assignments, he is bound to prove them. The case of *Noke* v. *Awder* was before the statute of frauds, which was passed for the purpose of preventing such questions as this; for if it were not necessary for the person claiming as assignee to prove a strict legal title, the lessor might be compelled to renew the

(*a*) *Peake Ev.* 283. (*b*) 1 *B. & B.* 531. (*c*) 1 *A. & E.* 102.

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lease to a person in possession, who had no title; or suppose two persons claimed as assignees, what would be the position of the landlord if he renewed the lease to one who could not prove himself the legal assignee? In an action brought by the assignee of a term, all the *mesne* assignments down to himself must be specifically stated; for being privy to them, he is not allowed to state generally that the estate of the lessee came to him by assignment. 1 *Chit. Pl.* 402. If the *mesne* assignments are set out, they must be proved. If it was sufficient for the plaintiff to shew that the lessor by his acts treated him as assignee, it would be sufficient for him in his declaration to state generally that the estate of the lessee came to him by assignment. But the acts of the lessor do not amount to a recognition of *Farley* as assignee: it was of no importance to him who paid the rent—he would receive it from any person, and naturally look to the person in possession. The effect of the payment of rent is very different from the receipt of it—the former is an estoppel, the latter is not; and that distinguishes this case from the cases cited from *Rosc. Evid.*, where the plaintiff claimed as assignee of the reversion; in which case no doubt a payment of rent to him by the defendant would be an admission of his right. The interest is not recoverable unless under the act 7 *Wm.* 4, *c.* 14, *s.* 21, but that only applies to sums certain, therefore interest cannot be allowed at all.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. The question in this case is, whether the plaintiff having sued as the assignee of a lease made by the defendant to one *Forsyth*, and having in his declaration alleged an assignment of that lease by deed from *Forsyth* to *Elizabeth Farley*, and made profert of such deed, can recover in this action on a covenant contained in that lease, without proof of that assignment by the production of it in evidence? The assignment when tendered in evidence appeared to have been executed by *James Peters*, Junior, as the attorney of *Forsyth*. The power of attorney authorizing such execution was stated by the plaintiff's counsel to be in the possession of *Edward B. Peters*, and was produced by him when called on for that purpose;

purpose; but no evidence of the execution of that power by the testimony of the attesting witnesses thereto was offered: the assigment from *Forsyth* to *Farley* was therefore not admitted in evidence. It has been however contended that the facts proved, of the defendant's having received the ground rent from Miss *Farley*, and his agent, *James Peters*, Junior, not having made this defect in the plaintiff's title a ground of objection in negotiations from time to time on the subject of this action, was sufficient to shew a recognition by him (the defendant) of Miss *Farley* as the assignee of the lease. Now if this could be sufficient in any case, it certainly cannot be so where the plaintiff has set out the assignment by deed, and made profert of such deed. The plaintiff has therefore failed in proving his right to sue on this covenant, not having deduced a title to himself from the original lessee.

With regard to the question of interest: it is clear that interest in this case is not recoverable under the Act of Assembly 7 *Wm.* 4, *c.* 14, *s.* 21. But independent of that act we think it was competent for the jury to allow interest by way of damages; and we refer to the following cases—*Pinhorn* v. *Tuckington (a)*, *Swinford* v. *Burn (b)*, *Churcher* v. *Stringer* (*c*), and *Johnson* v. *Durant (d)*. An appraisement under such a covenant as was contained in the lease in question is substantially an award, or quite analagous thereto. If the defendant then had appointed an appraiser, and an appraisement had been made, we are clearly of opinion the plaintiff would have been entitled to interest on the sum awarded, from the day when the same became payable, which if no time were specified would be the day when demanded. As no such appraisement has been or could be made, in consequence of the default of the defendant in not appointing an appraiser, and the plaintiff has therefore been deprived of the appraised value of his improvements and interest, the damage he has sustained through the breach of covenant includes interest in addition to the value, otherwise he does not obtain a full compensation. The same principle must govern this case as that which governs contracts payable in notes, bills or other securities, which would carry interest.

(*a*) 3 *Camp.* 468.
(*b*) *Gow.* 8.
(*c*) 2 *B. & Ad.* 777. *S. C.* 1 *Dowl.* 332.
(*d*) 4 *C. & P.* 227.

The

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The rule was obtained in the alternative for a new trial or a reduction of the verdict, and there must be a new trial unless the plaintiff will consent to reduce the verdict to £150, the damages given on the *Schoales'* lease, with the interest on that amount £44 6*s.* 4*d.*, making in the whole £194 6*s.* 4*d.*

The plaintiff not assenting to this reduction, the rule for a new trial was made absolute.

Monday, 12th February.

SHERLOCK *against* MARGARET M'GEE and OTHERS.

In an action on an administration bond under the act 3 *Vict. c.* 61, *s.* 57, assigning as a breach, a devastavit by the administrator, it must be stated that the estate of the intestate has sustained injury thereby to a certain amount.

An allegation in the assignment of a breach, that goods and chattels came to the hands of the defendant, *as administrator*, necessarily shews that they were the goods and chattels of the intestate.

DEBT by the assignee of an administration bond, conditioned among other things, that the defendant, *Margaret M'Gee*, administratrix of the goods, chattels and credits of *James M'Gee*, deceased, should make an inventory of all the real estate, goods, chattels and credits of the said *James M'Gee*, which should come to her hands, and exhibit the same into the registry of the Surrogate Court of the county of *Charlotte*, on or before &c., and the same goods and chattels, and all other the goods, chattels and credits of the said *James M'Gee*, deceased, at the time of his death, which at any time after should come to the hands or possession of the said *Margaret M'Gee*, or into the hands or possession of any other person for her, should well and truly administer according to law. The declaration, after setting out the bond and condition, averred the indebtedness of the deceased *(a)*, and the recovery of a judgment against *Margaret M'Gee*, as administratrix, and that the same being unsatisfied, the plaintiff made application to the Court of Chancery to have the administration bond put in suit, which was ordered accordingly; whereby and by force of the Act of Assembly the bond was assigned to the plaintiff, and he became entitled to proceed thereon in his own name. Several breaches were then assigned, but the second, third and fourth only are material: they stated in substance, that after the making of the bond, to wit, on the 1st *May*, 1844, divers goods and chattels of great value, to wit, of the value

(a) See *Ante*, p. 116.

of

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of £500, had come to the hands of the said *Margaret M'Gee*, as administratrix as aforesaid, to be administered, and which goods and chattels the said *Margaret M'Gee*, as administratrix, did not well and truly administer according to law, but on the contrary thereof, afterwards, to wit &c., eloigned, wasted and converted and disposed of to her own use, contrary to the form and effect of the said writing obligatory, and of the condition thereof, and contrary to the Act of Assembly in such case made and provided. Demurrer, assigning the following causes. 1. That it is not alleged that the goods and chattels mentioned, were the goods and chattels of the intestate at the time of his death. 2. That even if they were the goods and chattels of the intestate, that the wasting and converting of them would not *per se* constitute a breach of the condition; and that it should have been averred that the estate of the intestate, *James M'Gee*, had sustained an injury to some certain amount by the acts of the administratrix. Joinder.

In *Michaelmas* term last, *D. S. Kerr* was heard in support of the demurrer. It should have been stated positively that the goods and chattels which came to the hands of *Margaret M'Gee*, were the goods and chattels of the intestate, otherwise there cannot be a devastavit, and the estate of the intestate could not receive any injury. The condition of the bond speaks throughout of the goods and chattels of the deceased, and the pleadings ought not to have left the matter to inference or doubt. Secondly. It ought to have been alleged that the estate has been damnified to some specific amount by the eloigning and converting &c. in order that judgment may be given on the devastavit. The fifty seventh section of the act 3 *Vict. c.* 61, which authorizes the administration bond to be put in suit, declares that "recovery may be had thereon to the full extent of any injury "sustained by the estate of the deceased person by the acts "or omissions of such executor or administrator, within the "purview of the bond." An allegation of the extent of the injury then is particularly essential. It ought to be so specific, that the Court may know what they are to give judgment upon, and that the opposite party may know what he

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he is to answer. The administrator may be liable for a devastavit as to the heir or person interested in the real estate, without being so liable to a creditor.

The *Solicitor General* contra. The conclusion of law is, that property which came to the hands of the defendant *as* administrator, is the property of the intestate; it negatives their being the goods of any other person. The legal meaning of the term "as administrator" is, that the property is in the hands of the administrator to be administered. The third breach in *The Archbishop of Canterbury* v. *Robertson* (*a*) is exactly like this, and there was no demurrer there. In that case also, a devastavit was held to be a breach of the condition of a bond well and truly to administer, because it is an injury to the estate; and by the Act of Assembly 3 *Vict. c.* 61, a creditor is just in the same position, and has the same rights under the bond, as the next of kin have in *England*. On the former argument of this case (*b*), the declaration was held bad, because the breach assigned was the mere non payment of a debt, which was held not necessarily to be an injury to the estate; but if a devastavit had been alleged, it was admitted that the breach would have been sufficient. The devastavit is positively alleged here to the amount of £500, and the necessary result is an injury to the estate to that amount.

D. S. Kerr in reply. The case referred to is founded on the *English* act, which differs from our act in not stating the amount to be recovered.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. In this case there was a special demurrer to three of the breaches assigned in the declaration on an administration bond. Two objections were taken to the breaches as assigned. 1. That although it is averred that divers goods and chattels of great value, to wit, of the value of £500, have come to the hands of the said *Margaret M'Gee, as administratrix as aforesaid*, to be administered, it is not averred that such goods and chattels were the goods and chattels of the said *James M'Gee*, deceased, at the time of

(*a*) 1 *C. & Mee.* 690. (*b*) *Ante*, p. 128.

his

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his death; and it was contended, that to constitute a breach of the condition of the bond, for not administering according to law, this averment was necessary. On this point, we think that it necessarily follows that goods and chattels which came to the hands of *Margaret M'Gee, as administratrix as aforesaid*, that is, as administratrix of all and singular the goods, chattels and credits of *James M'Gee*, deceased, must be the goods and chattels which were of the intestate *James M'Gee* at the time of his death. We cannot see how any *other* goods and chattels could be said to have come to the defendant's hands in her character as administratrix.

2. The second objection is founded on the Act of Assembly 3 *Vict. c.* 61, *s.* 57, which provides that the administration bond may be put in suit at the instance of a creditor, legatee, heir, or next of kin, and goes on to provide that "whenever "any bond shall be so put in suit, recovery may be had "thereon to the full extent of any injury sustained by the "estate of the deceased person by the acts or omissions of "such executor or administrator within the purview of the "bond, and to the full value of all the property of the de-"ceased person within the purview of the bond, received "and not duly administered by such executor or adminis-"trator." Under this section, it was objected that there should have been a positive averment of the extent of the injury sustained by the estate in consequence of the eloigning, wasting, and converting, and disposing to her own use of the said goods and chattels by the defendant, this being the limit of the amount to be recovered in the action on the bond. It being admitted on this demurrer that goods and chattels which came to the defendant's hands as administratrix of the intestate, to the value of £500, have been by her eloigned, wasted, and converted, and disposed of to her own use; it was contended on the other side, that this by necessary inference is an injury to the estate to the extent of such amount. The plaintiff's right of action on this bond is entirely derived from the fifty seventh section of the act, and he must on the face of his pleading shew his right within that section. That right is limited to the extent of injury sustained by the estate of the deceased; and we

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think that by the general principles of pleading it should be matter of positive averment, and not matter of inference, that such injury was sustained, and to what amount. On this second ground therefore, we are of opinion that there should be judgment for the defendant on the demurrer.

RIDEOUT *against* STICKNEY.

Any facts which vitiate an award (except misconduct of the arbitrators), may be pleaded in bar to an action on the arbitration bond or on the award, though such facts do not appear on the face of the award.

DEBT on an arbitration bond. The defendant, after setting out the bond and condition on oyer, pleaded that the arbitrators on the 30th *October*, 1847, made an award that the defendant should pay to the plaintiff the sum of £41 &c.; and in making their award did take into consideration and arbitrate and determine upon and concerning matters not submitted between the parties, and not included in the condition of the bond, and did in their award include the sum of £3, to be paid by the defendant to the plaintiff, for the costs and expenses of the said arbitration, which costs and expenses were not expressed in the condition of the bond; which sum of £3 is part of the sum of £41, awarded to be paid by the defendant to the plaintiff. The plaintiff demurred to this plea, and assigned the following causes: 1. That it alleged as a defence matters inconsistent with the face of the award, which are not pleadable. 2. That if such matter was the subject of a plea, it could not be pleaded in bar to the whole action, but only to so much as was awarded for costs. Joinder.

The demurrer was argued in *Michaelmas* term last, by *J. A. Street*, Q. C., in support of the demurrer. The question is whether a party can to an award, good on its face, plead extraneous matter. The general rule laid down in 1 *Saund.* 327 b, is that misconduct of the arbitrators cannot be pleaded, and that the award is conclusive until it is set aside. *Braddick* v. *Thompson* (*a*), *Grazebrook* v. *Davis* (*b*), *Phillips* v. *Evans* (*c*), *In re Hall* (*d*). It is misconduct in the

(*a*) 8 *East*. 344.
(*b*) 5 *B. & C.* 534.
(*c*) 12 *M. & W.* 309.
(*d*) 2 *M. & G.* 847.

arbitrators

arbitrators to award upon matters not submitted to them. *Hill* v. *Coy* (*a*) may perhaps be considered an authority the other way; but the cases on the point were not fully brought before the Court—the remedy of the party in equity was not pointed out—therefore it is submitted, that case was not properly decided. *Mitchell* v. *Staveley* (*b*) does not support it, because there the arbitrators omitted to award upon all matters submitted to them, and there was nothing in the plea inconsistent with the statements on the face of the award. As it does not appear on the face of this award, that the arbitrators have taken into consideration matters not submitted to them, the defendant's only remedy is by an application to the summary jurisdiction of the Court, if the submission can be made a rule of Court; if it cannot, he must apply to a Court of equity to set aside the award. If this matter can be pleaded at all, it can only operate as an objection to so much of the award as was for costs, and not as a bar to the whole action. An award may be good in part, and bad for part. *Bac. Abr. Arbitrament* (E) 1; but a plea being entire, if bad in part, is bad altogether.

Fisher contra. The pleas in this case are such as are recommended in 3 *Chit. Pl.* 978, and *Watson on Awards* 139; they are also warranted by the case of *Hill* v. *Coy*, which was decided on the authority of *Mitchell* v. *Staveley*. None of these cases have been impugned; but, on the contrary, subsequent cases have decided that the objection taken to this award is proper to be pleaded. *Cargey* v. *Aitcheson* (*c*). In *Gisborne* v. *Hart* (*d*), *Lord Abinger* says, "the award may "be made bad by evidence dehors tendered on the part of "those impeaching it, in the same manner as it would be "competent for them to do on applying to have it set aside." If there is no legal and valid award, it is the same thing as if there was no award. *Fisher* v. *Pimbley* (*e*). It is unreasonable, that if arbitrators transcend the authority prescribed to them by the reference, the party complaining of the award should be driven into the Court of Chancery for relief.

J. A. Street, Q. C., in reply. *Gisborne* v. *Hart* is the only

(*a*) 1 *Kerr* 187. (*b*) 16 *East.* 58.
(*c*) 2 *B. & C.* 170. (*d*) 5 *M. & W.* 58. (*e*) 11 *East.* 165.

authority

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authority in favor of the defendant: but Lord *Abinger's* observation is not borne out by the cases. In *Cargey* v. *Aitcheson*, all the objections appeared on the face of the award. The directions of Mr. *Chitty* cannot overrule decided cases.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. This is an action of debt on an arbitration bond. The pleas demurred to, after setting out the bond and condition, and award of £41 to be paid by the defendant to the plaintiff, aver that the arbitrators in their award did include and add the sum of £3 to be paid by the defendant to the plaintiff, *for the costs and expenses of the arbitration, which costs were not mentioned in the submission, which said sum of* £3 *is part of the* £41 *awarded.* There is no doubt that the facts alleged in these pleas are sufficient to invalidate the award, as it is clear that the arbitrators had no power to award costs of reference, these costs not being included in the submission. The only question is, whether as these facts do not appear on the face of the award, they may be pleaded in bar to this action. It appears to us to be clear law, under the whole current of authorities, from Lord *Coke* downwards, that with an exception which we shall presently notice, facts which vitiate an award may be pleaded in bar to an action on the arbitration bond or on the award, although such facts do not appear on the face of the award. *Baspole's* case (*a*), *Banfill* v. *Leigh* (*b*), *Morgan* v. *Man* (*c*), *Mitchell* v. *Staveley* (*d*), *Cargey* v. *Aitcheson* (*e*), *Johnson* v. *Durant* (*f*), *Gisborne* v. *Hart* (*g*). The exception which we adverted to is this, that *partiality and misconduct* in the arbitrators cannot be pleaded in bar to an action on the arbitration bond, or on the award. *Wills* v. *Maccarmick* (*h*), *Braddick* v. *Thompson* (*i*). The reason for this may be gathered from what is said in the cases which contain the doctrine, and that reason seems to be, that partiality and misconduct in the arbitrators involve a question of moral culpability in them, which they could

(*a*) 8 *Coke* 97. (*b*) 8 *T. R.* 571.
(*c*) 1 *Lev.* 127. *S. C. Siderf.* 180. (*d*) 16 *East* 58.
(*e*) 2 *B. & C.* 170. *S. C.* (in Error) 2 *Bing.* 199.
(*f*) 2 *B. & Ad.* 925. (*g*) 5 *M. & W.* 50.
(*h*) 2 *Wilson* 148. (*i*) 8 *East* 344. 1 *Saund.* 327 b, note 3.

have

have no opportunity of answering if such matter were allowed to be pleaded in an action between the parties on the arbitration bond or award, which they might have in a proceeding by affidavit to set aside the award under the equitable jurisdiction of the Court, in cases of submission by rule of Court or by bill in equity. We are therefore of opinion, that the case of *Hill* v. *Coy (a)*, in which the same question was involved as in this case, was well decided by this Court, and that the pleas before us are good, and there must be judgment for the defendant on these demurrers.

Judgment for the defendant.

(a) 1 *Kerr* 187.

TARRATT and ANOTHER *against* WILMOT.

A bill was indorsed specially to a firm consisting of three persons, one of whom afterwards died, and the business was continued by the survivors. In an action by the survivors, the declaration alleged that the bill was indorsed to them: Held, that the declaration might be amended under the act 7 *W.* 4, *c.* 14, *s.* 7.

In an action against the drawer of a foreign bill, the protest is evidence of an acceptance payable at a particular place, and of due presentment at that place.

A bill drawn in *Saint John* was dishonored in *London* on the 16th *October*, the plaintiff not then being the holder; a mail left *Liverpool* for *Saint John* on the 19th *October*, by which the plaintiff could not have given notice of dishonor, but notice was given by the next mail on the 4th *November*, which was as soon as the defendant was entitled to it: Held, that *prima facie* the notice was sufficient, and that the plaintiff was not bound to shew that he had received due notice from the holder of the bill at the time of the dishonor.

ASSUMPSIT by the indorsees against the drawer of a bill of exchange for £250 sterling, described in the declaration as drawn by the defendant in favor of *E. L. Jarvis & Co.* upon *Smithers & Son* of *London*, and by them accepted on the 15th *July*, 1847, payable at *William Deacon's & Co.* in sixty days after sight. The declaration averred in the usual form that the bill was indorsed and delivered to the plaintiffs. At the trial before *Parker*, J., at the *Charlotte* circuit in *April* last, it appeared that the bill was drawn by the defendant in *Saint John*, in favor of *E. L. Jarvis & Co.*, who also resided in *Saint John*, and who indorsed it specially to Messrs. *Tarratts* at *Wolverhampton* in *England*, who carried on business under the firm of *Joseph Tarratt & Sons*. The firm at that time consisted of *Joseph Tarratt*, the father, and *William Tarratt* and *Joseph Tarratt*, Junior, his sons (the two latter being the plaintiffs in this suit); but after the bill became due and before the commencement of this action, *Joseph Tarratt*, Senior, died, and the business was continued by the plaintiffs. The only evidence of the acceptance was the protest, which stated that on the 16th *October* the notary

" went

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" went with the original afore copied bill of exchange to the " house of Messrs. *William Deacon & Co.*, where the same, " drawn upon Messrs. *Smithers & Son* is accepted payable, " and exhibiting the said bill to a clerk I demanded payment " thereof, whereunto he answered that the said bill could not " be paid; whereupon I went with the said bill to the counting " house of the said acceptor, and in like manner demanded " payment thereof—whereunto a clerk answered that the " said Messrs. *Smithers & Son* were not within, and that no " orders had been left respecting the payment of the bill." The 16th *October* was *Saturday*. It did not appear at what time the plaintiffs received notice of dishonor, but if the holder in *London* had sent notice direct to this country, it would have reached *Liverpool* in time for the mail of the 19th *October;* but the plaintiffs, though receiving due notice from the holder, would not be bound to give notice by that mail, and they did not send notice to the defendant until the next mail, on the 4th *November*, which was as soon as the defendant was entitled to it. It was objected on the part of the defendant, that as *Joseph Tarratt*, Senior, was a member of the firm at the time the bill was indorsed, the action should have been brought by the plaintiffs as surviving partners, and that the omission was a fatal variance. The learned Judge allowed the plaintiffs to amend under the act 7 *Wm.* 4, *c.* 14, *s.* 7, subject to the opinion of the Court whether the amendment should have been allowed. It was also objected, that there should have been other evidence of the acceptance by *Smithers & Son;* and that the plaintiffs had not used due diligence in giving notice of dishonor, which should have been sent by the mail of the 19th *October*. A verdict was taken for the plaintiffs by consent, with leave to the defendant to move to enter a nonsuit on all the objections taken.

Accordingly, in *Trinity* term last, *Ritchie* obtained a rule *nisi*, citing *Jell* v. *Douglas* (*a*), *Chitty on Bills* (9th ed.) 490, *Marsh* v. *Maxwell* (*b*), *Turner* v. *Leech* (*c*), *Sedgwick* v. *Jager* (*d*), *Cabell* v. *Vaughan* (*e*).

J. A. Street, Q.C., shewed cause in *Michaelmas* term last.

(*a*) 4 *B. & Ald.* 374. (*b*) 2 *Camp.* 209 n.
(*c*) 4 *B. & Ald.* 451. (*d*) 5 *C. & P.* 199. (*e*) 1 *Saund.* 291.

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It is not disputed that the plaintiffs should have sued as surviving partners; but the objection is cured by the amendment, which was properly allowed under the act. It is not pretended that the defendant was misled by the statement in the declaration, or is any way prejudiced in his defence by the amendment. *Beckett* v. *Dutton* (*a*), *Heming* v. *Parry* (*b*). The averment of indorsement to the plaintiffs was a mere mistake. [CHIPMAN, C. J. You need not labor that point.] Secondly, as to the effect of the protest. All countries give credit to the facts certified by a notary in a protest, and the mere production of the protest is evidence of the dishonor of the bill. *Chit. Bills*, 456. In *Irvin* v. *Crookshank* (*c*), the protest was held to be sufficient evidence of the acceptance, and of due presentment at the place of payment. There are no circumstances to distinguish this case. Thirdly. The holder in *London* was not bound to send notice to the plaintiffs until *Monday* the 18th; it could not be received by them at *Wolverhampton* until the next day, and that was too late for them to send notice to the defendant by the *October* mail. It must be presumed that notice was sent by the holder to the plaintiffs at *Wolverhampton*, because they reside there; and as each party to the bill has his day, the notice could not, under any circumstances, have been received by the defendant sooner than it was. [CARTER, J. Lord *Ellenborough's* opinion in *Marsh* v. *Maxwell* is against you.] His observations apply to inland bills.

G. W. Ritchie in support of the rule. No case has gone so far as to allow the names of the parties to the suit to be amended. The Act 7 *Wm.* 4, *c.* 14, *s.* 7, was passed to prevent the plaintiffs being surprised by the evidence varying from the pleadings; but there was no surprise here, for the plaintiffs knew from the beginning that the bill was not indorsed to them alone. Even if the amendment is made according to the plaintiffs' application, they will still be in the same dilemma as they are now—they will be obliged to introduce a new party. It will be a remodelling of the declaration; in fact it will be a new declaration. The case of *Sedgwick* v. *Jager* (*d*) is conclusive, as to the necessity

(*a*) 7 *M.* & *W.* 157. (*b*) 6 *C.* & *P.* 580.
(*c*) 2 *Kerr* 399. (*d*) 5 *C.* & *P.* 199.

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of proving the acceptor's handwriting. [CARTER, J. There was no proof at all in that case.] In *Irvin* v. *Crookshank*, there was an admission of the acceptance, because the clerk said the bill could not be paid; here the clerk said the acceptors were not within, and had left no orders respecting the bill—there was no admission of acceptance at all—the clerk was evidently ignorant of the whole transaction. [STREET, J. I cannot see any distinction between this case and *Irvin* v. *Crookshank*. The acceptor is bound to leave somebody at the place of payment to satisfy the bill.] No doubt the protest is evidence of all that it can properly prove: it may be evidence of the acts of the notary, and the dishonor of the bill; but it cannot be evidence of the acceptance, a fact which the notary, if examined as a witness, could not prove, and which he does not state, further than by the copy of the bill accompanying the protest. If it was evidence of the acceptance, the copy of the bill would be evidence of facts, of which the bill itself would not be. If it is evidence of the acceptor's handwriting, why is it not also evidence of the drawer's? And if so, what necessity would there be for the production of the bill at the trial, or of any other evidence beyond the protest? Is the protest evidence of all that the notary chooses to state in it? [CHIPMAN, C. J. Not at all.] Without proving the acceptor's handwriting, there is nothing to shew that the holder was authorized in presenting the bill at Messrs. *Deacons'*. The plaintiffs should have proved the day on which they received notice of dishonor; the *onus* is on them, because the knowledge is with them, and it is quite consistent with the evidence that the holder did not give notice to the plaintiffs until the 1st *November*. In *Marsh* v. *Maxwell*, Lord *Ellenborough* held that it was not enough that the drawer received notice in as many days as there were subsequent indorsees, unless it was shewn that each indorsee gave notice within a day after receiving it. So in *Brown* v. *Ferguson* (*a*), cited in the *American* edition of *Chitty on Bills* 489, it is said that the over due diligence of one party to a bill, shall not supply the under diligence of others; and though the drawer or indorser sought to be charged, in fact

(*a*) 4 *Leigh* 37.

received

received notice as early as he would have been regularly entitled to it, yet the holder, in order to charge him, is bound to shew due diligence in each and every party, through whose hands the bill has passed; the *onus probandi* in such case lying on the plaintiff to prove due diligence—not on the defendant to prove negligence. This bill having been protested on the 16th, the defendant was entitled to notice by the mail of the 19th, unless the plaintiffs shew that the time between that and the 4th *November* was consumed in giving notices by the different holders.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. Three questions arose in this case at the trial, and were reserved by consent, with leave to move for a nonsuit, subject to which, a verdict was taken for the plaintiffs.

The first question was, as to the propriety of an amendment allowed by the learned Judge under the Act 7 *Wm.* 4, *c.* 14, *s.* 7. The bill of exchange, on which the action was brought, was drawn by the defendant at *Saint John*, on persons in *London*, in favor of Messrs. *Jarvis & Co.*, who also resided at *Saint John*, and remitted the bill to their correspondents at *Wolverhampton*, in *England*, the Messrs. *Tarratts*, who carried on business as merchants, under the firm of *Joseph Tarratt & Sons*. The firm at that time consisted of *Joseph Tarratt*, the father, and the plaintiffs, his sons, but after the bill became due, and before the commencement of the action, *Joseph Tarratt* died, and the business was continued by the sons. The declaration averred that the bill was indorsed to the plaintiffs, omitting to mention the name of the father, and this defect was allowed to be amended. There was nothing to shew that this matter at all affected the merits of the case, or in any manner prejudiced the defence. There was no evidence of any other transaction between the defendant and the Messrs. *Tarratts*, nor any defence which would not avail equally well in one state of the record as the other; neither indeed was any defence set up at all, except that arising on these reserved points. We intimated our opinion on this point at the argument, and see no ground to change it.

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The second question, which related to the acceptance, has already, we think, been settled by the case of *Irvin* v. *Crookshank* (*a*), and was also disposed of at the argument.

The third and principal question arose on the notice of dishonor, which was sent from *England* by the mail packet of the 4th *November*, 1847, which was as early as necessary; and it cannot be contended that the defendant did not receive the notice of dishonor as soon as he was legally entitled thereto; but it appears that the bill was accepted, payable at a banker's in *London*, and at the time of its falling due, viz. 16th *October*, 1847, was in the hands of a holder in *London*. The 16th being a *Saturday*, the holder had all the 18th to give notice to the plaintiffs at *Wolverhampton*, who might not therefore receive it until the 19th; but even if they received it on the 18th, they had all the 19th to send notice to the prior parties, and from the 19th *October* to the 4th *November*, there was no mail to *Saint John*. At what time the plaintiffs actually received notice did not appear, and it is quite consistent with all the evidence that the holder in *London* did not give due notice to the plaintiffs, and if that were the case the defendant would be discharged. Indeed even if the plaintiffs had paid the bill under such circumstances, it would not revive the liability of the drawer. *Turner* v. *Leech* (*b*). But although the holder might have been guilty of *laches*, there was no actual evidence of any such *laches*, for there was no proof, as already observed, as to the time when the holder sent notice to the plaintiffs. Was it then incumbent on the plaintiffs to have shewn that they received as well as gave notice in due time? On a careful examination of the cases and of the text writers on this subject, we have come to the conclusion (although from the note to *Marsh* v. *Maxwell* (*c*), and *Story on Bills*, *s.* 294, we at first entertained doubts), that the plaintiffs were not obliged to give this evidence. The indorsees of an accepted bill, in an action against the drawer, are bound to give evidence of due notice of the dishonor. Now *prima facie* we think this evidence is given when it is shewn that it was sent by the plaintiffs and received by the defendant by the first

(*a*) 2 *Kerr* 399. (*b*) 4 *B.* & *Ald.* 451. (*c*) 2 *Camp.* 210.

practicable

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practicable conveyance after the time when the plaintiffs could themselves be entitled to notice, if not the holders at the time of the disnonor. If there had been any *laches* by which the plaintiffs would have been discharged, and consequently the defendant also, it would be open to the defendant to shew it, but we do not find it any where decided that the indorsee is obliged to make out a case which would exclude the possibility of *laches*. A bill may pass through many hands in *England* after it is remitted from this country, and it may be returned or not through all those different parties. Now if it were incumbent to shew the time when the notices were actually given between those parties, when the defendant, the drawer, had no cause to complain of not receiving his notice as soon as he was entitled to it, it would raise very serious difficulties in the negotiation of bills, and often lead to much delay and loss in the recovery of them. Indeed in the present case it would have put the plaintiffs to the necessity of having evidence from *England* to shew when the notice reached them; and so in every case when the mail did not happen to be made up on the day after the notice should be received by a holder in *England*, he would have to supply such proof, for in such a state of things *laches* may have been committed.

We do not find any case where this question has been precisely determined. We have therefore considered it with more attention; but we see no inconvenience likely to follow from this view of the law, at all comparable to what would follow from a contrary one. The rule must therefore be discharged.

Rule discharged.

IN RE BAYARD, in the case of FLAHERTY *against* HAWS.

D. L. Robinson moved, in *Michaelmas* term last, on behalf of *Flaherty*, for a rule to compel Mr. *Bayard*, the attorney

A barrister has no legal remedy to recover remuneration for his services; nor has an attorney, who also practises as a barrister, any legal right to retain for counsel fees, money belonging to his client, which comes into his hands as attorney, without the precedent or subsequent assent of the client, express or implied.

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of *Flaherty* in this suit, to pay over monies belonging to the plaintiff, which had come into his hands.

Thomson opposed the motion.

The substance of the affidavits on both sides is sufficiently stated in the judgment of the Court, which was now delivered by

CHIPMAN, C. J. An application was made to the Court in this case, on behalf of *William Flaherty* (the plaintiff) for the exercise of its summary jurisdiction against *Robertson Bayard*, Esquire, one of the attornies, and also a barrister of this Court, who was the plaintiff's attorney in this suit. From the affidavits, it appears that the action was brought by Mr. *Bayard* at the request of *Flaherty*, and was defended; that it was tried at the *Saint John January* circuit, 1848, and a verdict given for the plaintiff for £30, which Mr. *Bayard* has since received, together with the taxed costs, in which was included the charge of £18 16*s.* 5*d.* for the expense of executing a commission to take evidence in *England*. The expenses of this commission having been paid by the plaintiff, it is admitted by Mr. *Bayard* that this item in the taxed costs is to be accounted for to him, making with the damages £48 16*s.* 5*d.* The plaintiff claims about £21 for costs of the commission; but it is clear, from the explanation given by Mr. *Bayard*, that he is only entitled to the sum taxed. The plaintiff admits to have received £16, and it is sufficiently shewn that £4 more has been paid on his order, making together £20, and leaving £28 16*s.* 5*d.* to be accounted for, and this sum Mr. *Bayard* claims a right to retain in part payment of professional charges amounting to £31 1*s.* 9*d.*, the particulars of which are stated in a bill annexed to his affidavit. The only item in this bill arising out of the present suit, is a counsel fee of £1 3*s.* 4*d.* for attending the examination of a witness, taken *de bene esse*, under a Judge's order. The remainder consists of the amount of a bill of costs, £10 3*s.* 5*d.*, in a suit brought by Mr. *Bayard* for the plaintiff against *M'Lardy and another*, which is certainly a taxable item, and of counsel fees in various suits, and on various occasions, in 1845, 1846 and 1847. The affidavit of Mr. *Bayard* states the services performed on the retainer of the plaintiff, the regularity

regularity and reasonableness of the charges, the non payment of fees at the time with the reason therefor, and the ground of retaining the money in hand as the only mode of securing payment.

In regard to the bill of costs in the suit against *M'Lardy*, the plaintiff is entitled upon a proper application to have the particulars, and to have it submitted to taxation, unless he has precluded himself by admission or acquiescence.

For the amount of the taxable items in this bill, although the costs were incurred in another cause, we think the attorney is *prima facie* entitled to a *lien* on the money recovered for Mr. *Flaherty ;* for the *lien* of an attorney so far as it legally exists, is not confined to the costs in the particular cause, except where the rights of third parties intervene. 1 *Chit. Arch.* 108, *Stephens* v. *Weston (a)*.

In *England* there is a well known distinction in the taxation of costs between party and party, and between attorney and client, in almost every case the amount of the latter exceeding that of the former, and the attorney's *lien* extends to what he is rightfully entitled to receive from his own client (*b*). Such was the ancient practice, and it is not altered by the recent rules. Fees paid to counsel in the course of a cause are taxed between party and party at the discretion of the master, who frequently makes deductions on this account, the amount of which however it is usual to allow to the attorney as a matter of course in the bill against his own client. *Morris* v. *Hunt* (*c*). It is said by Mr. Justice *Holroyd*, in the case of *Stephens* v. *Weston*, that " Where an attorney has been at the expense " of obtaining a judgment, it is perfectly consistent with " justice that the debt due to him for costs should be paid " to him out of that debt of which he has been the means of " procuring payment to his client." The necessity for this is the greater when it is considered that the Court will not allow an attorney to take any security whatever, whether by way of mortgage or by bond, bill of exchange or otherwise, for costs *to be* incurred. 1 *Chit. Arch.* 105, 4 *Bro. P. C.* 350. It may however be taken for costs already incurred. *Holdsworth* v. *Wakeman (d)*. Although fees to counsel are

(*a*) 3 B. & C. 535.
(*b*) 3 *Dowl.* 638.
(*c*) 1 *Chit. R.* 544.
(*d*) 1 *Dowl.* 532.

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considered *honorary*, that is, not the subject matter of debt to be recoverable in an action by the barrister, as a remuneration of his services, yet the reason of this is not that the barrister is supposed to bestow his services gratuitously, but that he should be always paid beforehand, because counsel are not to be left to the chance whether they shall ultimately get their fees or not—their emoluments are not to depend on the event of the cause. This is fully set out in the case of *Morris* v. *Hunt (a)*. In this case *Bayley*, J., says, "It is "the duty of counsel to take care if they have fees, that they "have them beforehand, and therefore *the law will not allow* "*them any remedy* if they disregard their duty in that respect. "The same rule applies to the case of a physician, who "cannot maintain any action for his fees." Such is the state of things in *England*, and although in this Province as in most of the other *British* colonies, the position of the profession differs much from that in *England*, from the necessity which exists of uniting in the same person the office of barrister and attorney, the duties of which are frequently much blended, and the attorney is often, as it would appear to have been in the present case, the only counsel of his client—we do not think the *lien* of the attorney here on money in his hands can go beyond what it is in *England*. The same rule must govern in both countries, until it is altered by the Legislature, as has been done in this Province in the case of physicians by the act 56 *Geo.* 3, *c.* 16.

The *lien* of the attorney, or as it would more properly be called in the case of money, *the legal right to retain and appropriate*, is liable to be narrowed and restrained, or taken away altogether, by the acts or agreement of the parties. It ceases to exist where it is inconsistent with an agreement or undertaking between the parties or with the objects for which the money has been received; so also we think it may be enlarged by agreement of the parties, and money recovered or to be recovered in a suit, may be retained by the attorney with the assent, precedent or subsequent, of the client, in order to pay proper counsel fees and for services necessarily performed, but for which the table of fees does

(a) 1 *Chit. R.* 544.

not

not provide remuneration. Such has been the constant practice of the profession in this country, and must necessarily continue in many cases, or the poor would be deprived of the remedy given by the law. There is no want of information generally on the subject of professional duties. The duties of counsel and attornies are not the same. Every man has the right, if he chooses, to dispense with the services of either, and to bring or defend his action, and conduct the prosecution or defence in his own person, or he may employ an attorney to sue or defend and act as counsel in Court; but no man, morally speaking, has a right to expect the services of counsel, either in advising him in his office or in managing his case in Court, without paying him the ordinary and proper fees. His doing so may however be *damnum absque injuria;* the client may act dishonorably, and in a moral sense *dishonestly*, without acting illegally, from the defect of the law in providing a legal remedy, or it may be the *policy* of the law to discourage dealings of this sort. We will not go so far as to say that there may not be circumstances, such for instance as the previous settlement or admission of accounts on that basis, from which an authority to make the charge or an acquiescence therein may be presumed, such as in fact would be evidence of an agreement to retain. But a right derived from the particular agreement of parties is distinct from that arising by operation of law, or depending on a general usage not amounting to prescription. We do not think there could be any such general usage in this Province as would confer the right independently of the common law and of particular agreement *(a)*.

We are not insensible to the inconvenience which may arise from holding that a right to retain money *not already recovered*, for counsel fees may be created by agreement, when the fees are incurred in the suit brought to recover that money, and the attorney is himself the counsel, and that it would militate with the doctrine laid down in *Morris* v. *Hunt*. But while the two branches of the profession are united in the same person, it is difficult to apply all the reasoning in that case to cases here. We cannot divest the counsel who

(*a*) *See* Rushforth *v.* Hadfield, 6 *East* 519; 7 *East* 224.

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is also the attorney of all interest in the event of a case, nor would any rule in regard to counsel fees much tend to secure his indifference to the result. This however may be worthy of further consideration hereafter should the point come up. The present application may be disposed of without touching it, for Mr. *Bayard* does not rest his right to retain for his counsel fees on any actual agreement with *Flaherty* to that effect, but on the legal right of *lien*, and the only fact upon which acquiescence could be presumed, is the delivery and receipt of the bill containing the charges without objection to them at the time; but when we find it stated in Mr. *Bayard's* affidavit, that when he handed Mr. *Flaherty* the account, "he requested him to take the same with him, and look it "over, in order that they might come to a settlement; that "some considerable time afterwards" (but without specifying the time) "the said *Flaherty* came to his" (Mr. *Bayard's*) "office, and handing him the account, stated that he "had looked over it and caused it to be looked over, and that "he could not think of allowing it; and in answer to a pro- "posal made by Mr. *Bayard*, that the account should be "submitted to some respectable member of the profession; "insisted on payment of the full balance, and that he would "only pay such costs as the clerk might tax"—it does not appear to us as amounting to any sufficient evidence of acquiescence, allowing the case to stand on Mr. *Bayard's* own statement; nor do we think if the case were to be sent to a jury on the facts appearing on the affidavit, any agreement or acquiescence could be implied. The performance of the services and the reasonableness of the charges might be a good consideration for an express promise, but could not be held to support an implied one without breaking down the whole principle of the *honorarium*. We do not therefore think it right to dismiss this motion in order that the applicant might go before a jury, which it would be proper for us to do if any agreement existed. *Hodson* v. *Terrall* (*a*).

We consider that in the matter of these counsel fees, Mr. *Bayard* has trusted to the honor of Mr. *Flaherty*. Upon Mr. *Flaherty's* conduct we forbear making any further observation

(*c*) 2 *Dowl.* 264.

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than that, although he had Mr. *Bayard's* account before him, and must have been quite aware of the claim for services performed for him, he neither denied such services nor affords any explanation as to his refusal to pay for them, but stands on his strict legal right of denying payment of that which Mr. *Bayard* had certainly no legal remedy to recover. Mr. *Bayard* has acted with perfect propriety in bringing this question before the Court for its decision; but we feel bound to make the rule absolute for paying over the amount which will be left in his hands after allowing him the bill of costs in the suit against *M'Lardy*, viz. £18 13*s.*, unless he should think there are other taxable items over which his *lien* will extend, and if so, the matter can be referred to the clerk for taxation; and the rule will be made to pay over what the clerk may report to be due to Mr. *Flaherty*.

ALLEN *against* MACKAY.

A practice in the City Court of *Saint John* of awarding to the plaintiff, on judgment by default, the amount claimed in his particulars of demand filed at that time, without any proof of the amount, or any copy of the particulars served on the defendant, is bad, and cannot be rendered valid by the length of time the City Court has been in existence; neither is this practice confirmed by the Act 4 *W.* 4, *c.* 45, *s.* 7, never having been allowed by any superior legal tribunal before the passing of that act.

THIS was a case of review from the City Court of *Saint John*, brought before *Chipman*, C. J., at Chambers, and by him referred to the Court. It appeared by the return, that the plaintiff without filing any particulars of his demand, took out a summons against the defendant for a debt of £4, which was served, and afterwards according to the practice of the Court (*a*), as the defendant did not appear at the return of the summons, an attachment was issued and served. At the return of the attachment, the defendant not appearing after being thrice called, was considered liable to judgment by default, and the plaintiff being called on for the particulars of his demand, produced a paper, of which the following is a copy:

" Mr. *John Mackay*, Dr. To *Henry Allen*.
" To amount of cash, - - £4.
"20th *Sept.* 1848."

Judgment was thereupon rendered for the plaintiff for four

(*a*) See *Berton's Rev. Statutes, Appendix*, p. 15.

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pounds and costs, without any proof of the amount. The return further stated that this judgment was awarded according to the ordinary practice of the City Court, which had existed to the knowledge of the Judges more than twenty years, and they believed, ever since the establishment of the Court, although they admitted that the practice had not been universal; the Court occasionally exercising a discretionary power to call for proof, "when the alderman or common "clerk suspected there might be something wrong connected "with the claim for judgment by default."

Jack, in *Michaelmas* term last, moved to reverse the judgment, and contended that the practice was too unreasonable to be allowed in any Court, even if it could be shewn to be universal since the establishment of the Court, but here it was matter of discretion with the Court whether they would require proof or not, and probably depended on their knowledge of the plaintiff, or the respectability of his appearnnce: such a custom was therefore bad. *Griffin* v. *Blandford* (*a*). There was nothing in the charter to authorize such a practice. The words were, "that the plaint and pleadings in "all causes be *ore tenus*, according to the usage and practice "of the Courts held before our sheriffs of our counties in "our realm of *England*." Nor was there any authority for it in the Act of Assembly 4 *W.* 4, *c.* 45, *s.* 7, which declared that "the practice, process, forms and mode of proceeding in "the said City Court, shall continue the same as now estab-"lished, used and allowed, until otherwise regulated by law." Those provisions only applied to matters of form, such as the summons and attachment, which differed from the forms given by the act, in suits before Justices of the Peace. In a case of *Bryan* v. *Wiggins*, on review from the City Court, the Chief Justice held that this act did not recognize a mere usage of the City Court, unless the same had been established and allowed by competent legal authority. In the same act, ¶ 48, the mode of assessing damages on judgment by default in suits before Justices of the Peace, was pointed out, and an oath was required in all cases except where the action was brought on a note or written security, or where a copy

(*a*) *Cowp.* 62.

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of the particulars of demand had been served on the defendant with the process.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. This is a case of review from the City Court of *Saint John*, in which the order was granted by me at Chambers; and as the question which arises in it is of some importance in reference to the proceedings of the City Court, I adjourned it for hearing before this Court in banc.

The Judges of the City Court return that this judgment was so awarded in accordance with the ordinary practice of that Court, which has existed to their knowledge more than twenty years, and they believe ever since the establishment of the Court; although at the same time they admit that the practice has not been universal, the Court exercising occasionally a discretionary power to call for proof, and consequently to deny judgment without such proof, "where the "alderman or common clerk suspected there might be some-"thing wrong connected with the claim for judgment by "default." Nothing can well be more vague or unsatisfactory than a practice, depending on a discretion exercised apparently without any certain or fixed rule, and which will leave suitors dependent in a measure on the favor of the Court; and occasionally it may be, with exactly similar rights receiving different treatment, according to the respectability of their appearance or situation in life. No length of time during which the City Court has been in existence could give any validity to such a proceeding, unless it has the sanction of law. The practice must be held to be uniform to give judgment without proof, on a default such as was incurred in the present case; and the occasional deviations from it must be held to be irregular, or the practice itself must be considered unauthorized and bad.

We have two points to consider: 1. Whether the proceedings in this case can be supported by any law, or by the practice of the County Courts in *England*, on which by the city charter, that of the City Court is founded; and if not, 2. Whether it is made valid by the clause in the Act of Assembly 4 *Wm.* 4, *c.* 45, *s.* 7, which enacts "That the "practice,

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" practice, fees, process, forms and mode of proceeding in " the City Court shall continue the same as now established " used and allowed, until otherwise regulated by law."

Now it must be remarked that the objection in this case is not merely to the want of proof of the demand for which judgment was given, but there was nothing to fix this demand as that for which the action was brought, and the particular is in itself quite defective as not shewing whether it was for money lent to the defendant, or money paid for the defendant, or had and received by the defendant for the plaintiff. Had there been any account or particulars filed when the summons or attachment was issued, or any served on the defendant with the summons or attachment, there would be something to go by; but here there was nothing. This is not matter of mere form, but of substantial importance, as without this there could be nothing to prevent the plaintiff issuing process in order to recover a demand which he might really be entitled to, and yet on finding the defendant did not appear, putting in a claim and obtaining judgment for a demand wholly unfounded, leaving the other outstanding.

The practice referred to in the quotation from *Hutton*, in the return, as that of the Court of Requests at *Birmingham*, does not certainly warrant that pursued in this case; and we are not told whether in that Court there is or is not a plaint entered as is required in the County Courts, in which the nature of the demand is specified. We are not aware of any law or practice which would warrant the City Court in giving judgment for a demand not arising out of any written security, nor substantiated by any oath, and not even produced until the moment when judgment is called for. Very particular provision is made on this point in the act before mentioned, regulating the proceedings in the Justices' Courts, and although we do not mean to hold that the practice of the City Court, if legal, would have been affected by this provision relating to the Justices' Courts, it may be very proper for the guidance of the City Court in cases where their former practice is found defective.

It has been decided by me at Chambers, in the review case

case cited at the bar, *Bryan* v. *Wiggins* (*a*), that the mere usage, however long, of the City Court, will not give validity to a practice not otherwise established or allowed, within the meaning of the above cited seventh section of the Justices' Court act; and in that opinion, which is even more applicable to this case than that in which it was given, we all concur.

On the whole then, we think the judgment of the City Court in this case cannot stand; and we are unable in this case to award any other judgment than a judgment of reversal, which must necessarily also entitle the defendant to the costs of the review.

Judgment reversed with costs.

(*a*) On review from the City Court of *Saint John*.

CHIPMAN, C. J. *at Chambers*.

The point of practice set up in this case, namely, that of postponing the cause to a subsequent Court day, after examining a witness for the plaintiff, without the consent of the defendant, is without precedent in any other Court, and is peculiarly anomalous and inconvenient in case the Court to which the case is postponed is held before a different alderman, as was the case in the present instance. As the common clerk has power to act by deputy, it may well happen that the associate Judge also may be a different person. In the city charter, the practice of the Sheriff's Court in *England*, commonly called the County Court, is referred to as the foundation of the practice of the City Court; but I can find no such practice mentioned in the books as being the practice of these County Courts. The Act of Assembly 4 *W.* 4, *c.* 45, *s.* 7, is cited on the part of the plaintiff as confirming the practice of the City Court, as it existed at the time of the passing of that statute. The words of the act are, "the practice &c. of the said City "Court, shall continue the same as "now *established, used and allowed*, "until otherwise regulated by law" Now this act cannot be held as recognizing any mere *usage* of this City Court, unless the same be "established and allowed" by competent legal authority. If, for instance, the practice now attempted to be maintained, were found *established* as the practice of the County Courts in *England*, it might be considered under the provision of the city charter, as being established as the practice of the City Court; or if prior to the passing of the Act of Assembly, such practice had been questioned before a superior legal tribunal *and allowed*, this Act of Assembly might have had the effect of confirming it. But utterly unsanctioned as it is, it cannot prevail, and for this reason this judgment cannot be sustained. And of this opinion also is Mr. Justice *Parker*, whom I have consulted on the subject.

It will, I think, meet the justice of this case to alter the judgment of the City Court, and to order a judgment of nonsuit to be entered, which will not conclude the plaintiff from bringing a new action if he thinks fit, and under the circumstances of this case, I shall not award costs to either party.

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BOURKE *against* KEOGH.

A defendant in replevin, claiming the goods under a sale and delivery from *A*, an alleged partner of the plaintiff, pleaded by mistake, that at the time of the taking, the plaintiff had no property in the goods except jointly with *A*; leave was given to withdraw the plea and plead property in himself, on payment of the costs occasioned by his mistake: the Court rejecting a motion made on behalf of the plaintiff for leave to discontinue the replevin suit without payment of costs, and to order the replevin bond to be cancelled.

Lee, on behalf of the plaintiff, obtained a rule *nisi* in *Trinity* term last for leave to discontinue the action without payment of costs, and that the replevin bond should be delivered up to be cancelled. It was an action of replevin in which the goods had been delivered to the plaintiff, no claim of property having been put in by the defendant. The defendant had appeared to the action, and pleaded that at the time of the taking, the plaintiff had no property in the goods except jointly and undividedly with one *James W. O'Doherty*, who was still living &c. *Chit. Arch.* (6th ed.) 842. 1033, *Crosse* v. *Bilson* (*a*), *Banks* v. *Brand* (*b*), were cited.

Jack shewed cause in *Michaelmas* term last, on affidavits, stating that the plaintiff and *O'Doherty* were partners in trade, and that the latter had *bona fide* sold and delivered the goods in question to the defendant before the commencement of this suit; that the defendant had intended to plead that before such sale and delivery, the plaintiff had no property in goods, except jointly with *O'Doherty*; and he now asked leave to withdraw his plea in abatement, and plead property in himself.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. In this case, both parties are in a difficulty if the case stands in its present position. The plaintiff must fail on the issue tendered, and forfeit the replevin bond; and the defendant, though successful, would not obtain a return of the goods. If the plaintiff's application be granted, he is saved from any injury in the suit or on the bond, and retains the goods, thereby virtually succeeding in every way without any trial as to the merits of the case. On the other hand, if we allow the course asked for by the defendant on shewing cause against the rule, the plaintiff sustains no injury if he has been right in bringing the action, and the case may be fairly tried and determined on the merits. Both parties ask a

(*a*) 6 *Mod.* 103. (*b*) 3 *M. & S.* 525

favor

favor of the Court, to which neither is entitled as a matter of right. In such a state of things, we think it better to adopt that course which would be the most likely to do real justice between the parties; namely, that the defendant should be allowed to withdraw his plea in abatement, and plead property in himself, on paying the costs of this application, and any other costs which the plaintiff has been put to in consequence of the mistake in pleading by the defendant, if any such costs there be. A rule may be drawn up accordingly.

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END OF TRINITY TERM.