properly pleaded, yet it is a matter not necessary to be decided at this time, not being put in issue by the pleadings.

It is considered that the defendant Pope, by making the notes and executing the deed of trust stated in the plea, did not thereby cause the release and discharge of Stonebraker from liability on the original indebtedness, and the demurrer is therefore sustained.

NOTES OF RECENT ENGLISH LEADING CASES.

Sale or Gift by Client to Solicitor.

Tomson *vs.* Judge, 3 Drew, 306.

"It may be regarded," says Professor Parsons on Contr., vol. i., p. 47, "as a prevailing principle of the law, that an agent must not put himself in a position which is adverse to that of his principal." This rule is fully recognized and sternly acted upon in the relation of solicitor and client, and has been recently and emphatically enunciated in the case on which the following note, taken from the London Law Magazine, for February, 1856, is founded.

"As to the cases of purchases by solicitors from their clients, there is no rule of this court," observed Vice-Chancellor Sir R. Kindersley, in the present case, "to the effect that a solicitor cannot make such a purchase. A solicitor can purchase his client's property, even while the relation subsists; but the rule of the court is that such purchases are to be viewed with great jealousy, and the onus lies on the solicitor to show that the transaction was perfectly fair; that the client knew what he was doing, and in particular that a fair price was given, and of course that no kind of advantage was taken by the solicitor. If the solicitor shows that the transaction was fair and clear, there is no difference between a purchase by him and by a stranger." In this case, the evidence showed that Chamberlayne, the client, was on terms of great friendship with Judge, the solicitor; that he had induced Judge to commence practice in the neighborhood where he lived, by promises of support and patronage; and that some months before his death he executed a

deed of conveyance to Judge, which was expressed to be in consideration of £100 for the purchase-money, and contained the usual receipt and covenant for title. The only evidence, independent of the deed, was that of Judge himself. He said that the transaction was never meant as a purchase, but as a gift, and that the consideration was merely nominal, no money having passed. Judge himself acted in the matter as solicitor, and no other was employed.

The property had cost the client £1,200, and was admitted to be worth that sum at the least. It was urged on behalf of Judge that it was intended as a gift, and that the intention of bounty being clearly proved, it would not be disregarded because there was on the deed a statement not strictly consistent; and, further, that the relation between the parties here was not that of a mere solicitor and client, but that of a patron and *protégé*, Chamberlayne having placed himself *quasi in loco parentis*. Having stated the rule of the court as above, in respect of purchases by solicitors from their clients, the Vice-Chancellor proceeds: "Is the rule with regard to gifts precisely the same, or is it more stringent? Less stringent it cannot be. There is this obvious distinction between a gift and a purchase. In the case of a purchase the parties are at arms' length, and each party requires from the other the full value of that which he gives in return. In the case of a gift the matter is totally different, and it appears to me that there is a far stricter rule established in this court than with regard to purchases, and that the rule of this court makes such transaction, that is of a gift from the client to the solicitor, absolutely invalid. To this distinction Lord Justice Turner refers in *Holman* vs. *Loynes*, 18 Jur. 839, when he says, 'The rules against gifts are absolute, and against purchases they are modified.'" His honor referred to *Welles* vs. *Middleton*, (1 Cox, 112,) *Hatch* vs. *Hatch*, (9 Ves. 292,) *Lady Ormonde* vs. *Hutchinson*, (13 Ves. 47,) and ——— vs. *Downes*, (18 Ves. 127,) as supporting the doctrine enunciated by him. The rule being thus clear and unambiguous, the only question that can be fairly discussed in cases similar to the present, is what constitutes the relation of solicitor and client; what number of transactions—and for how long a time—and how shortly before the particular transaction which has

been impeached—are sometimes important considerations. In this case, it was not attempted to be denied that the relation of solicitor and client, which had subsisted for years before the dealing complained of, continued to subsist throughout it, and down to the death of Chamberlayne. Judge was therefore declared a trustee for the plaintiff in the suit, which was for administration.

Measure of Damages.

Fletcher v. Tayleur, 17 C. B. 21.[1]

The measure of damages on breach of contract to manufacture a chattel, is *prima facie* the difference between the market value of the chattel and the price to e paid. 2 Greenl. on Evid., § 261; *Waters* vs. *Towers*, 8 Exch. 401; *Struthers* vs. *Woolston*, 5 W. & S. 106.

The action in this case was brought to recover damages for the breach of a contract for the building and delivery of a ship, which ought, under such contract, to have been delivered on the 1st of August, 1854, but was not, in fact, delivered until March, 1855.

The vessel was intended by the plaintiffs—and from the nature of her fittings the defendant must have known the fact—for a passenger ship in the Australian trade.

The cause was tried at the last Liverpool Assizes, before Crowder, J., who, referring to *Hadley* vs. *Baxendale*, (9 Exch. 341,) directed the jury in regard to the proper measure of damages in these terms, that "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." The jury, under

[1] London Law Magazine, for February, 1856.

the above direction, assessed the damages at £2,750—the difference between the net freight which the vessel probably would have earned had she been delivered at the time stip lated for, and the amount actually earned by her when delivered some months later—freights in the particular trade having *ad interim* considerably fallen.

A new trial having been moved for, on the ground that the damages were excessive, was refused, they not having been *extravagantly* large, by the court, which likewise threw out some hints as to the true mode of assessing damages in actions for breach of contract, which are well deserving of attention. Thus, Jervis, C. J., remarked, that "it would be extremely convenient if there were some general rule as to the measure of damages applicable to all cases of breach of contract, rather than that the matter should be left at large. *May it not be that the breach of a mercantile contract may be susceptible of estimation according to the avevage per centage of mercantile profits?* And Willes, J., added: "It certainly is very desirable that these matters should be based on certain and intelligible principles, and that the measure of damages for the breach of a contract for the delivery of a chattel should be governed by a similar rule to that which prevails in the case of a breach of a contract for the payment of money. *No matter what the amount of inconvenience sustained by the plaintiff in the case of non-payment of money, the measure of damages is the interest of the money only:* and it might be a convenient rule if the measure of damages in such a case as this was held, by analogy, to be the *average profit* made by the use of such a chattel." The method thus suggested for measuring the damages is obviously somewhat different from that usually adopted by the jury under circumstances similar to those above presented, and might not improbably often conduct to a result more satisfactory and equitable than that which could be arrived at according to the present system. Consult *Davis* vs. *Shields*, 24 Wend. 322; *Taylor* vs. *Maguire*, 12 Missouri, 313; *Whiteman* vs. *Coates*, 14 Id. 9; *Furlong* vs. Polleys, 30 Maine, 491; *Smith* vs. *Dunlap*, 12 Ill. 462; *Johnson* vs. *Small*, 2 Cushing, 40; *Freeman* vs. *Clute*, 3 Barb. S. C. 424; *Sugden* vs. *Jenkins*, 3 Sandf. S. C. Rep. 614.