RECENT ENGLISH DECISIONS.

In the Court of Exchequer—Hilary Term.

FURBER *vs.* STURMY.

On an execution in a county court against the goods of the defendant, in a suit of A. *vs.* B., certain goods in the hands of C. were seized, who paid a sum of money to release them, and proeeeded by interpleader. It appeared that the goods originally belonged to B., but previous to the execution had been pawned with a pawnbroker, it did not appear by whom, and the duplicates had been deposited in the hands of C. by L. to redeem them, and hold them as security for the money advanced, who redeemed them accordingly. There was no evidence to show the time at which, or the circumstances under which L. became possessed of the duplicates, or that he had any interest therein: Held, that C. was entitled to the money paid to release the goods.

This was an appeal from the decision of a county court. The defendant having obtained a judgment in that court against one B., execution was issued on the 3d March, 1858, and certain goods in the hands of the plaintiff seized by the bailiff on the 21st April, 1858. The plaintiff, who claimed a right to the goods, paid 34*l.* 4*s.* 9*d.* to the bailiff to release them, and took out an interpleader summons, whereupon an issue was tried between himself and the defendant. In the statement of the case it was found that the goods originally belonged to B., and that the defendant was entitled to the money paid to the bailiff by the claimant, unless the claimant was entitled thereto under the circumstances detailed in the case. The goods had been pawned from time to time with different pawnbrokers, but there was no evidence to show by whom; and on the 15th of April, 1857, the pawnbroking tickets or duplicates were deposited with the claimant by one L., upon the terms that they should be redeemed by him, and, when redeemed, held by him as security for the money advanced in redeeming them, and other moneys, until they could be sold by auction by the claimant, who upon such sale should retain the moneys and expenses of the sale, and pay the balance (if any) over to L. The case also found that there was no legal evidence to show the time at which, or the

circumstances under which, L. became possessed of the duplicates, or that he had any interest therein; but the judge of the county court drew the inference from the facts, and found as matter of fact, that if the goods had been pawned by or with the authority of B., L. had the possession of the duplicates, and deposited them in the plaintiff's hands, as a mere agent of the execution debtor; and that before they were handed over to the plaintiff, or any contract or agreement so to do had been entered into, L. had notice of the issuing of the writ of execution. The plaintiff, after he received the duplicates, redeemed the goods, and for that purpose advanced 192*l.* 11*s.* 4*d.*, and sent them to an auction room for the purpose of selling them, where they were seized by the bailiff. The question was, whether the plaintiff was entitled to the money paid by him to the bailiff. This the county court judge decided against the plaintiff, on the ground of the total absence of legal evidence on his behalf, and gave judgment for the defendant, with costs.

Lush, for the appellant.—The plaintiff, having given value to the pawnbroker for these goods, stands in the position of the pawnbroker, whose lien is an effectual bar to any judgment subsequent to the pawning; and even supposing they could be seized in execution as the goods of B., the lien would prevent any sale under that execution. In *Scott* vs. *Scholey*, 8 East, 467, it was held that a mere equitable interest in a term of years cannot be taken in execution on a fieri facias at the suit of a judgment creditor. *Rogers* vs. *Kennay*, 9 Q. B. 592, seems in point. It was there held, that under an execution against the goods of A., the sheriff cannot seize goods which A. deposited with another person as security for a debt. There, goods in the possession of A. having been taken in execution at the suit of B. and C., and an interpleader issue having been ordered to try whether A. (the plaintiff in the issue) had any property in the goods as against B., (the defendant in the issue), it was held that the issue on the plaintiff's part was maintained by showing a lien on the goods for money due to him from C.

Phipson, for the respondent.—All the facts having been found by the county court judge against the plaintiff, the defendant is entitled to retain the judgment, unless it appears, on the facts

found, that as matter of law he cannot do so. [*Pollock*, C. B.—We must look on the statement sent to us as consisting of a decision accompanied by a special case, and we are to say what conclusion we should reasonably draw from the facts therein stated.] The title of the plaintiff does not depend on that of the pawnbroker, but on that of L., by whom the duplicates were given to him. The onus lies on the plaintiff to make out his title to these goods. [*Martin*, B.—That is the whole question. The plaintiff is in possession of the goods, which puts the onus upon you to show your title.] We do so, for we trace the duplicates to L., whose title does not appear, and it is not shown that the goods were pledged by B., the original owner, or by L. as his agent.

Lush, in reply, admitted that the question was, on whom the burthen of proof lay, and cited *Franklin* vs. *Neate*, 13 M. & W. 431.

POLLOCK, C. B.—We are all of opinion that the appellant is entitled to our judgment, and that the judgment of the judge of the county court must consequently be reversed. I can well understand the principle on which he proceeded—he seems to have thought that the writ bound the property, into whosesoever hands it came, unless it was made out with perfect strictness that some other person was entitled to it. Now, I think that the plaintiff's title to it is sufficiently made out to call on us to give judgment against the defendant. The case as it stands does not in the slightest degree displace the fact of the goods being in the plaintiff's own possession; they were pawned, he receives the duplicates of them, redeems and takes possession of them. Surely he has a right to redeem them, as against the original owner, until he is reimbursed the money advanced to redeem them. We are not to presume anything wrong—all presumptions of law proceed on the principle that every man does right until the contrary appears. If, then, the plaintiff had a lien on these goods against the owner, he had equally a lien on them against any person claiming them under a writ of execution. The shortest way is to dispose of the case on this ground, and waive all inquiry as to whether these goods could have been taken in execution when in the possession of the pawnbroker; in

other words, how far the plaintiff is to be looked on as standing in the position of the pawnbroker.

MARTIN, B.—If the present case had arisen with respect to a sum of money greater than the 192*l.* 11*s.* 6*d.* paid by the plaintiff to redeem the goods, a different question might arise; but as his claim is for a sum considerably less, viz., 34*l.* 4*s.* 9*d.*, he stands in the same condition as the pawnbroker; for by paying this money to the pawnbroker he obtains whatever interest the pawnbroker had, and the question is the same as if the execution had been executed on the goods while in possession of the pawnbroker. The pawnbroker found in actual possession of the goods may have become so either lawfully or not. If lawfully, cadit quæstio; if not, the question is, are any facts disclosed in this case (looking on it either as a special case or a special verdict) showing that the creditor of the execution debtor is entitled to take them in execution? Now, I take it, if you seek to disturb a man's possession, you must show that the party under whom you claim was fairly the owner of the property, and that the presumption from possession is not displaced by merely showing that some other person had once been their owner.

WATSON, B.—Possession of property is prima facia evidence of title. These goods originally belonged to B.; that they were from time to time pawned with different pawnbrokers; and not only is possession in the plaintiff proved, but it does not appear that he obtained it wrongfully in any way; and no claim was ever made by B. to the goods, on the ground that what was done by the plaintiff was not lawfully done. The defendant, however, seeks to meet that case by saying that the plaintiff was bound to go farther, and show how the person who gave him the duplicates became entitled to them, which may have been by virtue of transactions five or six years ago. It would give rise to the greatest difficulties in the world if you were to drive every person to show a complete title in such a case; and here the plaintiff has shown a very strong prima facia one.

CHANNELL, B., concurred.—*Judgment for the appellant.*

In the Rolls Court.

DUFAUR *vs.* THE PROFESSIONAL LIFE ASSURRANCE COMPANY.

1. Where the life policy contained a provision that should the assured commit suicide the policy should be void, and the assured died by his own hand, being of unsound mind as found by the coroner's jury; held that the state of mind of the party committing suicide was not material, and that "suicide" could not be distinguished from "dying by his own hand;" which has been held to be within a like proviso. Per Master of the Rolls.

2. Where the assured had deposited the policy with a creditor as security for a debt due and for advances, without notice of the deposit to the office, and the assignee had continued to pay the accruing premiums; held that it was a valid deposit and assignment, and that the assignee, who was also administrator, was entitled to recover the advances made for the assured's benefit.

By a policy of assurance dated in March, 1851, granted by the defendants, the life of James Laird, a surgeon in the navy, then of Bermuda, was insured in the sum of 300*l.* on the proposal of the insured.

The policy contained the following proviso, that "in case the assured shall, during the continuance of this policy, go beyond the limits of Europe, or die on the high seas, except in time of peace, in passing or repassing by land or sea, from one part of Europe to another, or to or from Canada, Nova Scotia, New Brunswick, Australasia, Bermuda, Madeira, Cape of Good Hope, or Prince Edward's Island, or to and from any port or ports of Great Britain inclusive, or being or becoming a military or naval man, shall enter into actual service without the previous license of the directors, or shall commit suicide, or die by duelling, or the hands of justice, (when the policy shall be canceled by the return of the premiums except the policy shall have been legally assigned,) this policy shall be void, and all moneys paid in respect thereof shall be forfeited to the company,"

On the 2d April, 1853, Laird being indebted to the plaintiff, who was his navy agent, in a considerable amount, deposited the policy, with him as security for the balance of his account with the plaintiff then due, or which might thereafter be due to him. No notice of the deposit was given to the office.

From that time, until the death of Laird, the policy remained in

the hands of the plaintiff, who paid all the premiums due on the policy. He received the pay of Laird, and from time to time made advances to him, and at his death, in 1857, there was due to the plaintiff, on the balance of the account between them, 172*l.* 8*s.* 7*d.*

Laird died by his own hand, being of unsound mind, as found by a coroner's jury.

The plaintiff took out letters of administration to the estate of Laird, and applied to the company to pay the whole amount of the policy, on the ground that Laird having put an end to his existence whilst insane, that was not committing suicide within the meaning of the proviso; or at least the sum due to him under the security of the deposit to him. The company declined to do more than return the premiums, contending that the policy was made void by Laird having committed suicide, and there having been no legal assignment of the policy to the plaintiff.

This bill was filed by Dufaur, praying payment of the amount payable on the policy; or an account of all moneys due to him on the security of the deposit of the policy by Laird, and payment by the company.

Palmer, Q. C., and Godfrey for the plaintiff, contended that the defendants were bound to pay the whole policy, on the ground that Laird had not committed suicide within the meaning of the proviso in the policy, *Dormay* vs. *Borrodaile*, 10 Beav. 335, 342; *Cook* vs. *Black*, 1 Hare, 390; *Amicable Life Assurance Society* vs. *Boland*, 4 Bligh, N. S. 194; *Borrodaile* vs. *Hunter*, 5 Man. & Gr. 639; or that the plaintiff was at least entitled to recover the amount due to him on the deposit.

The Master of the Rolls said he was of opinion that Laird had committed suicide within the proviso. The last case cited decided that the state of mind of the party committing suicide was not material. He thought that "suicide" could not be distinguished from "dying by his own hand."

W. W. Cooper, for the defendants, on the second point, contended that the petitioner had no claim on the company, as the policy had not been legally assigned.

THE MASTER OF THE ROLLS.—The question which remains to be

considered is whether this policy has been legally assigned. That depends upon the meaning to be given to the word "legally," which must be taken most strongly against the office, as it is inserted by them for their protection. Now, at law, a policy cannot be assigned except to the Crown; but it is clear that this is not what is intended by the limitation. The word cannot be used here in its technical sense, as opposed to equitable; the word "legal" is generally employed as equivalent to valid, in which sense the courts of law and equity will recognize its meaning. There is a technical sense in which we use the word "legal," that is when we speak of a legal right as opposed to an equitable one; but that is not its meaning in common parlance. I am satisfied that whoever prepared this proviso did not use the word in its technical sense, but meant that the policy must be validly and effectually assigned. Whether this has been done in this case, is a question of evidence. And, upon the evidence, I think it would be difficult to deny that there was a valid deposit of the policy with the plaintiff by the insured to secure advances made for his benefit, and the measure of relief to which the plaintiff is entitled, is the amount due to him in respect of such advances, not exceeding the amount of the policy. An account must be taken of what is due to the plaintiff, unless the account can be settled by arrangement.

In the Court of Queen's Bench.

JACKSON AND ANOTHER *vs.* FORSTER.

1. A life policy contained the following condition: "This policy will be void if the life assured die by his own hands, the hands of justice, by duelling, or by suicide; but if any third party have acquired a bona fide interest therein by assignment, or by legal or equitable lien for a valuable consideration, or as security for money, the assurance thereby effected shall nevertheless, to the extent of such interest, be valid and of full effect." On the 9th July the assured became bankrupt according to the laws of Valparaiso, and his property then vested in the escribano, or officer of the court, who took possession, and on the 15th July assignees were

appointed, to whom all the property passed by operation of law. On the 14th July the assured committed suicide.

Held, that the assignees were not entitled to the benefit of the policy under the above condition, but that the condition was intended to apply where there was a contract and a transfer by the parties.

This was a special case.

The plaintiffs claim the sum of money in dispute in this case as assignees of the estate and effects of the late Mr. Matthew de Bordes, a member of the firm of Mickle & Co., merchants, at Valparaiso, according to the law of that country.

The defendant is one of the directors of the Liverpool and London Fire and Life Insurance Company, and is authorized to sue, and liable to be sued, for and on behalf of the said company.

On the 9th Oct., 1847, Mr. Matthew de Bordes effected with the said company a policy of insurance on his own life.

Amongst the conditions of the said policy, the following is the only material one in this case :—

"This policy will be void if the life assured die by his own hands, the hands of justice, by duelling, or by suicide; but if any third party have acquired a *bona fide* interest therein, by assignment, or by legal or equitable lien for a valuable consideration, or as security for money, the assurance thereby effected shall nevertheless, to the extent of such interest, be valid and of full effect, provided the nature and extent of such interest be proved to the satisfaction of the directors."

On the 9th July, 1856, the firm of Mickle & Co. became bankrupt, according to the course of law at Valparaiso. M. de Bordes was domiciled at Valparaiso at the time of the bankruptcy, and was included therein.

The firm of Mickle & Co. made a cession or surrender of the whole of their estate and effects to their creditors before the Tribunal of Commerce at Valparaiso. The plaintiffs, being creditors of the said firm, were by such tribunal appointed assignees to the estate.

On the beforementioned day the partners in the house of Mickle & Co., including M. de Bordes, according to the law of Chili, and in conformity with the practice of the country in such cases, presented themselves before the judge of the Consulado Court at Val-

paraiso, and then and there declared themselves bankrupts. By that act itself they made in point of law a cession of all their property to the said court. The property from that moment vested by operation of law in the escribano, or notary officially attached to the said court. To the said escribano was delivered by Mickle & Co., the key of their counting-house, as and for a sign of the transfer of all their effects to him; in this act M. de Bordes joined. On the 15th July, 1856, after the declaration of bankruptcy and transfer of the property, a meeting of the creditors of the said firm of Mickle & Co. was called, and assignees were appointed thereat. Upon the appointment of such assignees, *ipso facto*, the property of the bankrupt shifted by operation of law from the said escribano of the said court to and vested in the said assignees.

On the 14th July, 1856, after the said declaration and act of delivery aforesaid, and before the appointment of the plaintiffs as assignees as aforesaid, and before they had any interest in the said policy, M. de Bordes committed suicide. The plaintiffs have not acquired any *bona fide* interest in the said policy by assignment, or by legal or equitable lien for a valuable consideration, or as a security for money, or further or otherwise than as having become such assignees as aforesaid, and having the property of the said firm of Mickle & Co. vested in them in the manner aforesaid. All the premiums due upon the policy had been duly paid up to the time of his death. The question for the opinion of the court was, whether, under the circumstances, the plaintiffs were entitled to recover. If the court should be of opinion in the affirmative, judgment was to be entered for the plaintiffs, against the said company for the said sum of 600*l*. If the court should be of opinion in the negative, judgment was to be entered for the defendant; and in either case the costs to follow the event.

Wilde, Q. C., (*Coleridge* with him,) for the plaintiffs.

On the 9th July, a *bona fide* interest by assignment as security for money passed to the escribano, and on the 15th July it passed from him to the assignees. This was an assignment by operation of law in every respect *bona fide*, and for a good consideration.

(Com. Dig. "Assignee.") The object of this provision in the policy is to prevent the assured committing suicide. [Lord CAMPBELL, C. J.—I should have thought the object was to make the policy a security in the hands of a third person. CROMPTON, J.—You say, if there has been an assignment, the claim is good against the office. Suppose the case of a father insuring his life and assigning to his child, and committing suicide, the child would be a *bona fide* assignee.] There is no difference between an assignment to the creditor or to the whole body of creditors. This is an assignment by operation of law. The 1 and 2 Will. 4, c. 56, vests the property in an insolvent's assignees by virtue of the mere appointment, and they are in the same position as if there had been an assignment; here the assignment was *bona fide*, and as security for money, and there would be also a sufficient consideration, the insolvent's freedom from the pursuit of his creditors.

Macauley, Q. C., (*Raymond* with him,) for the defendant.—The question turns on the meaning of the exception in the policy. That exception clearly contemplates a bargain or contract, and is made in favor of a person who has acquired an interest in the policy by bargain or some act, not merely the standing in the bankrupt's shoes. The terms import an interest passing as from the assured for a valuable consideration, or as a security.

Wilde, Q. C., in reply.—If the company had intended to exclude bankruptcy, they would have said so in the policy. The court will, if possible, support the policy.

Lord CAMPBELL, C. J.—I am of opinion that the escribano cannot be considered a third person who has acquired a *bona fide* interest by assignment, or by legal or equitable lien for a valuable consideration, or as a security for money, within the meaning of the condition. If we were to go the length of holding it within that condition, I think we should go beyond the intention of the parties; for I do not think that it was the intention that this condition should extend to cases like the present, where there is no contract. The escribano and creditors were not consulted; it is clear that there was no contract, and the case therefore is not within the condition.

CROMPTON, J.—At one time my mind fluctuated a good deal, but, upon consideration, it is clear that any person claiming as assignee of a policy must beyond all question bring himself within the meaning of this exception. Now this assignment must be for a valuable consideration, but I don't think an assignment by operation of law can be said to be for a valuable consideration. I think the exception points to a transfer by the act of the parties, and not by the operation of law. To hold otherwise would be to strain the clause. This cannot be called a *bona fide* seeurity for a valuable consideration; the clause rather means where the assignor gets a *quid pro quo*.

HILL, J.—I am of the same opinion. I think these words were used to enable the assured to deal with his policy by sale of it, or as security for money owing. I think the parties meant an assignment by the party himself, or by legal or equitable lien. There must be an act done by the party himself to give a lien; by such means these policies became more valuable, as being capable of being dealt with.

Judgment for defendant.

In the Court of Queen's Bench.

LUCAS AND OTHERS *vs.* BRISTOWE.

A written contract expressed that defendant had bought "fifty tons of best palm oil, expected to arrive in Bristol from Africa, per the Chalco, at 40*l.* 10*s.* per ton, usual tare and draught. Wet, dirty, and inferior oil, if any, at a fair allowance; and if any difference should arise, the same to be settled by arbitration." In an action for not accepting the oil, parol evidence was admitted of a usage of trade at Bristol, to show that a delivery of a substantial portion of best oil with inferior descriptions, in the proportion of one-fifth best and four-fifths inferior, would have been a compliance with the contract:—Held, that the written contract having left undefined what portion of the oil was to be wet, dirty, and inferior, the evidence of usage was admissible as explaining its terms.

Declaration for not accepting fifty tons of best palm oil, ex Chalco, at 40*l.* 10*s.* per ton, with usual tare and draught, and upon the terms that wet, dirty, or inferior oil (if any) should be taken at a

fair allowance. Plea, that the oil, which arrived per Chalco, and which the plaintiffs were ready and willing to deliver to him, was not best palm oil, or fairly within the description in the contract, but was of a totally different quality, which difference in quality was so great, and of such a nature, as not to be the subject of allowance within the true intent and meaning of the said contract. Issue thereon. At the trial, before Crowder, J., at the Spring Assizes at Bristol, it appeared that the action was brought to recover the sum of 156*l.* 15*s.* 9*d.* from the defendant as damages sustained by the plaintiffs for the non-performance of the following contract:—"Bought this day, for John Bristowe, of Messrs. Lucas, Brothers, & Co., of Bristol, fifty tons best palm oil, expected to arrive in Bristol, from Africa, per the Chalco, after the delivery 100 tons previously sold, at 40*l.* 10*s.* per ton, usual tare and draught; wet, dirty, and inferior oil (if any), at a fair allowance; and if any difference should arise, the same to be settled by arbitration. Payment by cash, on delivery, less 2*l.* 10*s.* per cent. discount, end of fourteen days from being ready for delivery in Bristol.—D. M. & Co., brokers." The oil arrived on the 17th October. The cargo consisted of 250 tons, sixty tons of which were best palm oil. The usual proportion of the sixty tons of best oil was allotted to the fifty tons purchased by the defendant. The plaintiffs tendered the oil to the defendant in eighty-seven casks, of which seventeen contained best and the remainder inferior qualities, for which they offered to make an allowance. The defendant declined to accept the oil, on the ground that the delivery of so small a portion as seventeen casks of best was not a performance of the contract. It was proved that palm oil imported from the coast of Africa was more or less adulterated with palm-nut oil, and it was therefore usual in the oil trade for sellers to protect themselves in their contracts of sale by the insertion of an "allowance clause" similar to the one in the above contract. The plaintiffs gave evidence to show, that, according to the custom of the oil trade at Bristol, the delivery of a substantial portion of best oil, together with inferior descriptions would have been a performance of the contract, and that according to the custom one-fifth best would be considered as a substantial portion. The

defendant objected to the reception of this evidence, as being inconsistent with the written contract; but it was received by the learned judge, who directed the jury, that if, according to the custom, the plaintiffs had satisfied the contract, they ought to find a verdict for them. The jury accordingly found a verdict for the plaintiffs for 234*l.* In this term, (April 19.)

Collier obtained a rule to show cause why there should not be a new trial, on the ground that the evidence of mercantile usage was not admissible, citing *Yates* vs. *Pym*, 6 Taunt. 446; and also on the ground of misdirection.

Montague Smith and *Barstow*, now showed cause.—There is nothing inconsistent or repugnant to the written contract in the evidence of the custom which was given to explain it. In *Brown* vs. *Byrne*, 3 El. & Bl. 703; 18 Jur. 700 it was held that everything which shows that the words were used in a mercantile sense is admissible to explain the contract. Coleridge, J., in delivering the judgment of the court. said, 3 El. & Bl. 715; 18 Jur. 702, "But in these cases a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to or inconsistent with the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less. Neither, in the construction of a contract among merchants, tradesmen, or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than 'a thousand,' 'a week,' 'a day;' yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred; 'a week,' a week only during the theatrical season; 'a day,' a working day.[1] In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it only ascertains it by expounding the language." In this contract the word "best" does not stand

[1] See Smith *vs.* Wilson, 3 B. & Ad. 728; Grant *vs.* Maddox, 15 M. & W. 737; and Cochran *vs.* Retberg, 5 Esp. 121.

alone; the contract allows for "wet, dirty, and inferior." What proportion of the oil may be wet, dirty, and inferior must be explained by mercantile usage, otherwise the contract will receive a different construction from what the parties intended when they entered into it. The evidence admitted only explains and carries out the contract. Where there is a custom, and that custom is clearly established, it is only reasonable to suppose that the parties, at the time they entered into the contract, had such custom or usage in view, and contracted with reference to such custom. Both parties must be taken to have known of the custom. *Humfrey* vs. *Dale*, 7 El. & Bl. 266; 3 Jur., N. S. 213.[1] In the agreement in *Yates* vs. *Pym*, 6 Taunt. 446, there was no clause stipulating that an allowance should be made in the event of the bacon not being prime singed bacon.

Collier and *J. D. Coleridge*, contra.—The contract is for fifty tons of best palm oil; the insertion of the words "wet, dirty, and inferior" is to provide, that if by accident a portion should be such, an allowance price should be made to the plaintiffs. The defendant was offered one-fifth best and four-fifths inferior, and a contract, in which the greater portion of the oil is inferior, is, by the reception of the evidence of mercantile usage, substituted for a contract of best palm oil. According to the argument on the other side, if the whole of the oil were inferior it would have been in compliance with the contract, and the defendant would have been bound to accept it. In all cases in which evidence of custom has been received to explain the contract, something definite has been added to the contract which makes it intelligible; the evidence is not to show that fifty means five tons, but something entirely vague and uncertain is to be incorporated into the contract, which destroys it. If the contract is looked at *dehors* the custom, then it has not been performed; if the contract is to be read with the custom, then it is altogether a different contract to the one the parties entered into. In *Humfrey* vs. *Dale*, 7 El. & Bl. 266; 3 Jur. N. S. 213, the evidence did not contradict the contract. In *Truman* vs. *Loder*, 11 Ad. & El. 599; 4 Jur., N. S. 937, Lord Denman, in delivering the judgment of the court, lays it down as a well-known rule that the cases go no further

[1] Affirmed in Exchequer Chamber.

than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract. *Brown* vs. *Byrne*, 3 El. & Bl. 703; 18 Jur. 700, and *Spartali* vs. *Benecke*, 10 C. B. 212, are authorities that parol evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. The case of *Yates* vs. *Pym*, 6 Taunt. 446, is precisely in point. The substance of this contract is for best oil; the insertion of the words "wet, dirty, and inferior oil" is to provide for an accident; if by chance some of the oil is wet, dirty, and inferior, the defendant is to take it, with an allowance.

ERLE, J.[1]—I am of opinion that this rule ought to be discharged. The contract is to be enforced according to the intention of the parties, who must be taken to have understood its meaning at the time they entered into it. The contract was for fifty tons of best palm oil, expected to arrive in Bristol from Africa per The Chalco, after delivery of 100 tons previously sold; wet, dirty, and inferior oil, if any, at a fair allowance. The parties, therefore, entered into a contract for fifty tons of oil, and left it undefined what proportion should be wet, what proportion should be dirty, and what proportion should be inferior. Where persons conversant with the trade, and who know all the circumstances connected with it, leave a portion of a contract undefined, and the time comes when such contract is to be performed, and it is necessary to explain what they have left undefined, the question is not whether a delivery of one-fifth of best oil is a substantial compliance with the contract, but what evidence is admissible to show the true construction of the contract which is left undefined; and the question would be precisely the same if, instead of one-fifth of best oil, four-fifths had been delivered. Somebody would have to decide between the parties what proportion of best oil, wet, dirty, and inferior, the vendor was bound to supply according to his contract. Those who object to the reception of the evidence must point out who is to decide as to the meaning of the

[1] Lord Campbell, C. J., was sitting at Nisi Prius; and Erle and Hill, JJ., were the only judges in court.

contract. Is the judge to say what is and what is not a compliance with the contract? Without local knowledge no judge could construe it. Is the jury to be asked its meaning? The construction of a written contract is not for a jury. The evidence tendered to explain the contract was the evidence of persons conversant with the trade, and in my opinion they are the proper parties to say what is the meaning of the contract. There is nothing in the evidence that contradicts or controls the contract, but it was tendered to explain what was left ambiguous in it. This case falls within the principle laid down in *Brown* vs. *Byrne*, 3 El. & Bl. 703; 18 Jur. 700; and acting on the principle as expounded in that case, I am of opinion that the evidence admitted by the learned judge at the trial was not inconsistent with the contract, and is therefore admissible.

HILL, J.—I am of the same opinion. The parties contracting are silent as to the proportion of oil which is to be considered inferior, wet, and dirty; but there is an established usage of dealing in the trade at the place where the contract was made regulating the proportion of good and bad oil. I think evidence of such usage to explain the contract is admissible.—*Rule discharged.*

In Vice Chancellor Wood's Court.

RE POWELL'S TRUST.

1. A testatrix being possessed of cash in the house, a balance at a savings bank, for the taking out of which she had given notice, and money secured on two promissory notes payable on demand, by her will bequeathed "all her ready money:" Held, that the terms "ready money" included the cash in the house and the balance at the savings bank, but not the promissory notes.

The question in this case arose upon the construction of the will of Mary Powell.

The testatrix by her will, dated the 23d October, 1856, after directing her funeral and testamentary expenses to be paid, made

the following bequest:—"I leave and bequeath unto David, William and Sarah Nutting, and unto Eliza Arthur, all my ready money, to be parted equally between them, share and share alike." The testratrix at the time of her death was possessed of two notes of hand payable on demand, one securing payment of 100*l.* and the other 500*l.*, and a sum of money in the savings bank, notice requiring payment of which had been given by the testatrix shortly before she died, so that the money might have been received upon demand before she died. She had also a small sum of cash in the house. A petition was presented by the legatees to ascertain what they were entitled to under the legacy of ready money.

Charles Hall, appeared for the petitioners;
Wickens, for the Crown; and
Roche, for the executors.

The following cases were cited:—*Manning* vs. *Purcell*, 7 De G. M. & G. 55; *Gosden* vs. *Dotterill*, 1 Myl. & K. 56, *Langdale* vs. *Whitfeld*, 4 K. & J. 426; *Parker* vs. *Marchant*, 1 Y. & Coll. N. S. 290; S. C. on appeal, 1 Phil. 356.

The VICE-CHANCELLOR said the question was, whether the money secured on promissory notes and the money in the savings bank passed under the bequest of ready money. It had been contended by Mr. Hall, that the direction to pay money after payment of debts had been held in many cases to pass the whole residuary estate, as that was the fund out of which the debts would be payable; that, however, could not extend to a bequest of ready money. In *Parker* vs. *Marchant*, it was held that ready money included all moneys actually in the house, and also any balance at the bankers, as, according to the usages of society, at the present time the term ready money applied more to the balance at the banker's than to the money in the house. Following that case, therefore, he had no hesitation in deciding that the sum at the savings bank, as to which notice requiring payment had been given by the testatrix, passed together with the 19*l.* 13*l.*, the amount actually in the house. As to the promissory note the same authority had decided that no money secured on a promissory note could be considered as ready