tion made by Wood was perfectly proper. It cannot be permitted to the plaintiff to object that the defendant credited the statement of his assignor. The defendant was not to assume it was untrue, and the law would have assumed that he gave credit to the representation whether he had so testified to it or not. But this objection is wholly immaterial, as the defendant testified without objection, that he entered into the contract relying upon that representation, namely, the representation that he, Wood, had purchased Elwood's hops. This shows beyond all controversy, that he believed the representation to be true, and his statement that he so believed it, was of no importance. The judgment appealed from should be affirmed.

Concur, C. J. DENIO, JJ. MULLIN, HOGEBOOM, INGRAHAM, SELDEN.

RECENT ENGLISH DECISIONS.

Court of Common Pleas.

HANCOCK, ASSIGNEE, *vs.* AUSTIN.

By an agreement between A. and B., A. agreed to pay B. 12*s.* a week for the use of standing room and steam-power for certain machinery belonging to A., in a room the property of B., and to which B. had access to oil the machinery. B., in the absence of A., who had locked his room, unfastened the window, entered, and distrained the machines for rent: *Held*, that trover lay for the conversion of the machines, for there was no distrainable rent issuing out of the standing ground, and that if the whole room was demised, then the entry was unlawful.

This was an action tried before ERLE, C. J., at the Derbyshire Summer Assizes, 1862. The declaration contained a count in trover, and also a count for excessive distress. The defendant pleaded not guilty, by statute 11 Geo. 2, c. 19, § 21. The plaintiff sued as assignee of one Needham, a bankrupt, who occupied a room in a factory belonging to the defendant, in which room he had placed three lace machines, worked by steam-power supplied to them by an engine of the defendant's factory. "For the standing and steam-power for the said machines," Needham agreed to pay 12*s.* a week. The defendant had a right to enter this room for the purpose of oiling his machinery. Previously to his insolvency Needham went out, leaving his door locked, and

the window fastened with a hasp. During his absence the defendant entered the room by pushing back a pane of the window, which was contrived to open, unfastening the hasp by the introduction of his arm, thus opening the window, and admitting himself into the room. The defendant then distrained the three lace machines for arrears of weekly rent due from Needham. The jury found a verdict for the plaintiff generally for 180*l.* Leave was reserved to the defendant to move that the damages be reduced 40*l.*, being the sum assessed for the issues not disputed, on the ground that the exclusive possession of the premises on which the machines stood was not demised to the plaintiff, and that even if it were, the entry by the window without breaking any fastening, was lawful for the purpose of distraining. A rule having been obtained accordingly,

Merewether (*Macaulay*, Q. C., with him) showed cause.—The distress was illegal, because the relation of landlord and tenant did not exist. There was no demise of the room, nor of any part of it. What was granted amounted to an easement only. *Buszard* vs. *Capel*, 8 B. & Cr. 141. Then if the relation of landlord and tenant existed, the mode of entry was clearly unlawful. *Semayne's case*, 1 Smith's L. C. 85, and notes; 9 Vin. Ab. 128, tit. "Distress," E. 2, pl. 6; *Brown* vs. *Glenn*, 16 Q. B. 254; *Curtis* vs. *Hubbard*, 1 Hill's New York Rep. 336; *Ryan* vs. *Shilcock*, 7 Exch. 72; *Attack* vs. *Bramwell*, 32 L. J., Q. B. 146; 9 Jur., N. S. 892; *Sandon* vs. *Jervis*, 27 L. J., Q. B. 279; 4 Jur., N. S. 737.

Field (*Hays*, Serjt., with him), in support of the rule.—There was no demise of the exclusive possession of the room. The defendant was entitled, therefore, to enter it. There was, however, a sufficient demise of the standing room to give a right of distress. There was an exclusive occupation for a fixed time conferred, similar to stallage. *The Mayor of Great Yarmouth* vs. *Groom*, 1 H. & C. 102. The mode of entry was lawful. The defendant had a right to go into the room to inspect his machines; and the window, not being part of the premises demised, was his own. *Gould* vs. *Bradstock*, 4 Taunt. 562; *Ryan* vs. *Shilcock*, 7 Exch. 72; *Tutton* vs. *Darkie*, 5 H. & Norm. 647; 6 Jur., N. S., 983.

ERLE, C. J.—I am of opinion that this rule must be dis-

charged. The action was in trover for the conversion of three lace machines, seized and sold by the defendant. The jury found a verdict for the plaintiff 130*l.*, leave being reserved to the defendant to reduce the damages to 40*l.*, if the court should be of opinion that the defendant could establish his right to distrain. A landlord may enter his tenant's room in the ordinary way if he has a right to distrain; but if the defendant in this case had no such right, the entry was wrongful, and he committed a trespass. It is said that the exclusive possession of the room was not demised to the plaintiff, and that, therefore, the landlord had a right to enter as he did, and so was not guilty of a trespass. The question is, whether there was a distrainable rent? If the room was not demised, then I am of opinion that the money was due under a contract merely, and that the 12*s.* a week, to be paid for the easement of the standing and the power furnished to the machines, could not be distrained for as rent. If the room was demised, then turning the hasp of the window was a trespass, for which the landlord is liable. The defendant is, therefore, in a dilemma, out of which he cannot escape. I think that the action of trover lies, and that the rule must be discharged.

WILLIAMS, J.—I am of the same opinion. Two views have been presented to us. It is said on the one hand, that the whole room was the subject of the demise, and that, therefore, the breaking open of the window rendered the distress invalid. The landlord's right is no doubt qualified, and this would be a breaking, within the rule; but the landlord says, that he did not demise the whole room, but only the stipulated space for the machines, and that he broke his own window only. Can this be maintained? If there was no demise of the room, can it be maintained, that there was a demise of the ground on which the machines stood? I am of opinion that there was no such demise, and that rent did not issue out of the very ground on which the machines stood. There was no reversion. The machines were not fixed, and that fortifies my position. The landlord, therefore, was a trespasser.

WILLES and KEATING, JJ., concurred. Rule discharged.

Court of Common Pleas.

KOEBEL *vs.* SAUNDERS.

Where goods are insured for a voyage there is no implied warranty on the part of the insurers that the goods are seaworthy.

Action upon a policy of insurance upon a ship's cargo of cocoa-nut oil in casks from Cochin to Marseilles.

Fourth plea:—

That the premises so insured were not seaworthy for the said voyage at the time the said ship departed and set sail thereon.

Demurrer.—The grounds of demurrer were stated to be, that there was no implied warranty of seaworthiness of goods insured by a policy, and that the plea did not allege that the loss was attributable to the condition of the goods.

Sir *G. Honyman* appeared to support the demurrer, but

Watkin Williams was called on to support the plea.—It is an implied condition of every contract of insurance that the subject of insurance is in a proper state to encounter the risk insured against. Goods insured ought to be in a condition to encounter the ordinary incidents of a sea voyage without incurring damage, supposing no accident to happen. It is no argument against this plea that it is new in form: *Boyd* vs. *Dubois*, 3 Campb. 133; 1 Park on Insurance 458; 3 Kent's Commentaries 360; *Gibson* vs. *Small*, 4 H. of L. Cas. 353.

WILLES, J.—I am of opinion that the defendant's fourth plea is not a sufficient answer to the plaintiff's claim. It might be sufficient to dispose of the case by saying that the plea is novel in character and principle, and that in actions on policies of insurance, in which questions of a similar kind are so often raised, and in which the ingenuity of counsel suggests all kinds of claims and answers, we should have had instances of attempts to plead such a plea as this, if it had been a good plea. But, besides being novel, the plea is inadmissible as seeking to create a new implied warranty in a contract of insurance. An insurer is not liable to make good damage resulting from any peculiar vice in the thing insured itself, and unseaworthiness is expressly provided for in the law of some countries. But it is necessary to trace the damage for which an indemnity is sought to the unseaworthiness which is proved to have existed. With respect to goods this is familiar law, and is stated in Smith's Merc. Law 359, where, on the authority of *Boyd* vs. *Dubois*, it is said:—