sold. But it was stipulated that the agreement should not in any measure affect the rights or vary the position of any of the parties. The sale was accordingly made, and the plaintiff became the purchaser. The sale was made for the benefit of the attaching creditors, for the property was deteriorating in value by being kept in package. The case was peculiar, quite unlike the present in its circumstances, and it is not to be understood as a denial of the doctrine generally recognised, that, in actions for damages for taking and carrying away, or for conversion of personal property, the rule that the value of the property at the time of the taking and sale or of the conversion, is the measure of damages, applies only to cases where the property has not been regained by the owner before the trial.

This qualification of the general rule escaped the attention of the learned judge of the Common Pleas. The case should have been submitted to the jury to find whether the articles sold by the constable, were bought by the agent of the plaintiff on his account. If they were, and the actual possession of the plaintiff was never disturbed, the measure of damages was the sum bid at the sale with interest, for that was the real extent of the injury the plaintiff had received.

The judgment is reversed, and a *venire de novo* awarded.

RECENT ENGLISH DECISIONS.

V. C. Kindersley's Court.

LOWNDES *vs.* BETTLE.

Where a plaintiff and his ancestors had been in possession of an estate for eighty years, and a defendant, claiming the estate under a title adverse to that of the plaintiff, threatened to take possession, cut sods, cut down trees, and perform other damage, in order, as he alleged, to assert his right, and to continue to bar the Statute of Limitations, the court granted an injunction to restrain the defendant from doing the threatened acts of injury, on the ground that the mischief to the estate would probably be irremediable.

The cases as to the jurisdiction of the court to interfere by injunction to restrain trespass, show that—

Where the defendant is in possession of the estate, and the plaintiff claims under an adverse title, the court will refuse to interfere except where the acts perpetrated or threatened are acts of such flagrant spoliation as to induce it to depart from the general principle.

Where the plaintiff is in possession and the defendant claims under an adverse title, the tendency of the court has been to grant an injunction: it will at all events do so where the acts tend to the permanent injury or destruction of the estate.

Where the plaintiff is in possession and the defendant is a stranger, the court will generally refuse an injunction, and leave the plaintiff to his remedy at law.

Semble, the gradual tendency of the decisions of the court has been to cease to observe the distinction between trespass and waste, and to interfere in cases of trespass where interference seemed requisite.

Thomas James Selby, late of Wavendon, in the county of Bucks, by his will dated the 19th Aug. 1768, gave and devised to his right and lawful heir at law (for the better finding out of whom he directed advertisements to be published immediately after his decease in some of the public papers), all his manor of Whaddon and Nash, and his messuage called Whaddon Hall, and also Whaddon Chase, with all the deer, together with all the timber and wood growing thereon, and all the coppice-wood part of the same chase; also Whaddon Park, and all his other messuages, farms, and hereditaments, situate in the several parishes of Whaddon and Nash, Great Harewood, Little Harewood, Singleborough, Totenhoe, otherwise Tatnall, Shenley, Mursley, Salden, and Bletchley, in the county of Buckingham, with their appurtenances; to hold the same to his heir at law, his heirs, executors, administrators, and assigns for ever, subject to certain charges and payments; but should it so happen that no heir at law was found, he thereby constituted and appointed Wm. Lowndes, Esq., of Winslow, in the county of Buckingham, major in the militia, his lawful heir, on condition that he changed his name to Selby; and after certain specific gifts and bequests, the testator gave all the residue of his personal estate to Elizabeth Hone, whom he appointed, together with two other persons, executrix and executors of his will.

The testator died on the 7th December, 1772, without ever having been married. Shortly after his death advertisements were repeatedly published in different newspapers for the discovery of his heir at law, but no person was found to prove his right to be heir at law. Various persons, however, claimed so to be, and as such to be entitled to the manors and hereditaments under the limitations contained in the testator's will. In consequence of these claims much litigation ensued, and various actions of ejectment were brought for the recovery of the estates by persons claiming to be the heirs at law of the testator, but no

plaintiff in any of these actions ever succeeded in establishing his claim: See *Davies* vs. *Lowndes*, 1 Bing. N. C. 597; 1 Phill. 328.

By a decree of the Court of Chancery, dated the 28th March, 1783, made in certain suits of *Hone* vs. *Lowndes* and *Lowndes* vs. *Thorne*, it was declared that the will of the testator was well proved, and ought to be established, and that the manor of Whaddon and Nash, and other the premises devised by the will of the testator to William Lowñdes (who by virtue of a royal license had previously taken the name of Selby in substitution for that of Lowndes), were to be considered as belonging to Wm. Lowndes, otherwise Selby, and it was ordered that he should be let into possession thereof, and that all the title-deeds and writings relating to the estates should be delivered to him.

In pursuance of this decree, and within the period of six months from its date, Wm. Selby entered into possession of the estates, and he and his successors in title have, from that time up to the present, remained in possession of them, and the same estates have since the above decree been the subject of various family settlements and other assurances executed by Wm. Selby and his successors in title.

William Selby Lowndes the elder, is the grandson of Wm. Selby. At the time of the attainment of the majority of his eldest son, William Selby Lowndes the younger, in September, 1858, he was seised in fee of the above-mentioned estates, which, by an indenture, dated the 8th September, 1858, were limited and assured to certain uses, being in effect to the use of W. S. Lowndes the elder, for his life, with remainder to the use of W. S. Lowndes the younger, for his life, with remainder to the use of the eldest son of W. S. Lowndes the younger, in tail male, with various remainders over, and ultimate limitation to the use of W. S. Lowndes the younger in fee. W. S. Lowndes the younger has never married.

Although W. S. Lowndes the elder and his son, and their predecessors in title, have, ever since the decree of the 28th March, 1783, been in possession of the Whaddon estates, and in receipt of the rents and profits, various persons from time to time alleged themselves to be the heirs at law of T. J. Selby, the testator, and as such, to be entitled under his will to the possession of the Whaddon estates; amongst these claimants were certain persons of the family and name of "Bettle," and in July, 1861, Jonathan Bettle began to claim the estates.

In September, 1861, the following notice was circulated in the neighborhood of the estates, and a copy sent to W. S. Lowndes the elder:—

"Notice.—Heir at law to the Whaddon-Hall estates.—I, Jonathan Bettle, heir at law to the above estates, do hereby give notice and direct, from the date hereof, that each and every one of the tenants on the above estates do suspend all payments of rent whatever to the present trustee, Mr. Wm. Selby Lowndes, until further notice.

"High street, Berkhampstead, Sept. 10, 1861."

In November and December of the same year Jonathan Bettle wrote and sent to W. S. Lowndes the elder, two letters which contained threats of litigation which he intended to commence.

In May, 1862, Bettle gave Mr. Lowndes notice that he would attend in a few days to assert his right, and that any damage he committed would not be done wantonly, but to continue to bar the statutes.

Mr. *Appleyard*, Mr. Lowndes's solicitor, informed Bettle in reply, that if he trespassed in any way upon Mr. Lowndes's property, means would be taken to remove him. Bettle then wrote another letter to Mr. Lowndes in which he said that he intended as soon as it suited his convenience and that of his friends, "to proceed to different parts of Mr. Lowndes's estate (so called), and cut up sods, cut down trees," &c. He stated that one of his family had cut down twelve trees near the hall.

Under these circumstances Mr. Lowndes, sen., and his son filed a bill against Bettle to restrain him from cutting any timber, &c., upon the Whaddon estates.

The bill alleged that all persons who had claimed to be heirs at law of T. J. Selby, had wholly failed to prove their alleged heirship, and that if any person were then able to prove himself to be his heir at law, the right of such person to claim the Whaddon estates as such heir at law had long since been barred by the Statutes of Limitation; that the persons of the name of Bettle so claiming had no right or title whatever to such heirship, and were none of them the heir or heir at law of T. J. Selby; and that it was also wholly untrue that the family of Bettle had at stated periods since his death regularly asserted their alleged rights to the Whaddon estates, as stated in the defendant's letters, and that the allegations contained in the same letters were without any foundation.

An interim order for an injunction had been obtained in June, 1862, on an affidavit of service, as the defendant did not appear. He, however, subsequently appeared, and by his answer asserted that he was heir at law to the testator, and that though it had been his intention to enter upon the Whaddon estates, he should, however, now prosecute his claim to the same estates as the testator's heir at law under the direction of the court. He entered into no evidence.

Glasse, Q. C., and *H. F. Bristowe*, for the plaintiffs, asked the court to make the former injunction perpetual.

T. H. Terrell, for the defendant, urged that the court had no jurisdiction to do so. It had been settled by the cases that there was no equity unless great and irreparable damage were threatened. He cited *Smith* vs. *Collyer*, 8 Ves. 89; *Kinder* vs. *Jones*, 17 Ves. 110; *Vernon* vs. *City of Dublin*, 4 Bro. P. C. 398 (Toml. ed.); *Haigh* vs. *Jagger*, 2 Coll. C. C. 231; *Earl Talbot* vs. *Hope Scott*, 4 K. & J. 96; *Neale* vs. *Cripps*, 4 K. & J. 472.

Glasse, in reply, cited *Pilsworth* vs. *Hopton*, 6 Ves. 51; *Davenport* vs. *Davenport*, 7 Hare 222.

KINDERSLEY, Vice-Chancellor, after stating and commenting upon the facts very fully, said that cases had been cited, some only of the many which existed on the subject, but he had thought it necessary to go through all that could be found, though he might have overlooked some, and he had done so with great care, because he found that they presented a very unsatisfactory state of the law, and there was great difficulty in reconciling them. The difficulty no doubt arose in part from the very considerable change which had taken place in the views of the court on the subject of granting injunctions to restrain injury to property, as it would now do what, in the time of Lord THURLOW, and the earlier days of Lord ELDON, it would not do. Lord ELDON, in one of his earlier judgments, alluded to the change which was even then taking place, and to the greater facility for granting injunctions which existed, and the later judges had frequently alluded to the continuous modifications which were going on. Another cause for the apparent conflict which had existed in the decisions was, that the cases on the subject had not been distinguished under different heads. He thought that the proper mode of arranging them would be to distinguish between cases

where—first, the party against whom the application for the injunction was made was in possession; and cases where, secondly, the party by whom the application was made was in possession of the estate, and asked the court to protect it. It was obvious that the court would draw a wide distinction between a case where a person claimed to be owner of an estate of which he was in possession, and a case where a person claimed to be owner of an estate of which he was not in possession, yet without taking proceedings at law to recover it, came upon it and performed acts of injury to it. In the former case the court would be very reluctant in interfering to restrain an owner in possession from doing those acts which an owner might properly do. He had, therefore, endeavored to arrange the cases under those two heads, and having so divided them, the next thing he had to discover was the law of the court on the subject, so far as it could be extracted from the authorities. When the defendant was in possession, and the plaintiff, claiming title adversely to the defendant, sought an injunction, he could hardly succeed according to the older cases, as a wide distinction was made between what was then called *waste* and *trespass*. It was considered waste when the plaintiff and defendant had a privity of title, such as being tenant for life and remainder-man. If the tenant for life committed waste, the remainder-man, even if he had no right to the possession, could ask for and obtain an injunction. So, in the case of landlord and tenant, there was a privity of title, and the tenant in possession doing acts amounting to waste, the landlord could get an injunction, because, by reason of the privity of title, it was what the law called "waste." But, when parties did not claim in that way, but by an adverse title, any act by one or by the other was then called "trespass;" and this broad distinction ran through all the cases. He was not going to consider the former cases, but only those of trespass in distinction from waste. Waste, in strictness, ought to be called spoliation, as it was a term commonly used for acts not unlawful, and therefore not waste in the proper sense. Referring, however, only to cases of trespass, he would range these under the two heads which he had before mentioned, viz.: first, where the defendant was in possession and the plaintiff sought the injunction; and secondly, where the plaintiff was in possession and asked the court to restrain acts by the defendant. He would take first the cases where the defendant was in possession, and he would observe, in passing,

that a case could hardly be conceived where a plaintiff out of possession asked for an injunction to restrain from trespass a defendant in possession, unless he did so on an adverse claim; he could not do so as an absolute stranger. The earliest case under the first head was *Hamilton* vs. *Worsefold*, before Lord THURLOW, in 1786, of which there was only a note of Sir Samuel Romilly's in 10 Ves. 290. Not much reliance, however, could be placed on that case, as it was doubtful whether or not there was collusion with the tenants. Lord THURLOW, however, ultimately granted the injunction. The next was *Pilsworth* vs. *Hopton*, 6 Ves. 51, before Lord ELDON in 1801. The defendant was in possession, the plaintiff claimed an adverse title, and Lord ELDON refused the injunction. In *Crockford* vs. *Alexander*, 15 Ves. 138, in 1805, Lord ELDON referred to the above-mentioned case before Lord THURLOW, as indeed he did in other cases, and, singularly, he sometimes mentioned it as if Lord THURLOW had granted the injunction, sometimes as if he had refused it—the truth, perhaps, being that he had refused it at first and granted it afterwards. In *Jones* vs. *Jones*, 3 Mer. 161, in 1817, Sir WM. GRANT said that he did not see any very good reason why the court should not protect real estate pending a suit, but nevertheless refused an injunction, partly on the ground of delay. *Haigh* vs. *Jagger*, 2 Coll. C. C. 231, in 1845, was the case of land with coal under it, which it did not appear that the plaintiffs were working, but the defendants were working out of their own mines into the plaintiffs'; KNIGHT BRUCE, V. C., refused an injunction, though in his judgment he remarked that the Court of Chancery did not then treat questions of destructive damage to property, exactly as it did forty or fifty years back, that its protection in such respects was more largely afforded than it generally had been. *Davenport* vs. *Davenport*, 7 Ha. 217, in 1849, was before WIGRAM, V. C., who there allowed a demurrer for want of equity to a bill praying an injunction; it was a case of ejectment, and nineteen years' possession with recently-discovered title. The next case was *Earl Talbot* vs. *Hope Scott*, 4 K. & J. 96, where the demurrer was allowed. The court was more reluctant to entertain a suit against a person in possession than against one out of possession, and the question as to what constituted possession was of great importance, and ought to be the foundation of distributing the cases. In *Neale* vs. *Cripps*, 4 K. & J. 472, in 1858, WOOD, V. C., granted an injunction against defendants in posses-

sion on the ground that the acts done by them tended to destruction. There were two cases in the Irish courts which he would mention, viz.: *Lord Fingal* vs. *Blake*, 2 Moll. 50, where Lord MANNERS refused the injunction; and *Lloyd* vs. *Lord Trimleston*, 2 Moll. 81. Those were the cases where the plaintiff was out of possession, and the result of them was, that the court would refuse to interfere, except where there was fraud or collusion, or where the acts perpetrated or threatened were so injurious that the court would, notwithstanding the general principle, interfere. He now came to the cases more immediately bearing on the present, where the plaintiff was in possession. These might be again divided under two subordinate heads, first, where the defendant claimed under some colorable title; and secondly, where he was an absolute stranger. It was not easy to distinguish the cases. The latter might be cases of mere spite, but there were such, and he would deal with them first. In *Mogg* vs. *Mogg*, 2 Dick. 670, in 1786, Lord THURLOW refused the injunction, and in *Mortimer* vs. *Cottrell*, 2 Cox 205, 1789, also before Lord THURLOW, being a case where the plaintiff employed the defendant as receiver, the injunction was refused, because it was a case of trespass, and the defendant might at law have been turned out. *Mitchell* vs. *Dors*, 6 Ves. 147, before Lord ELDON in 1801, was a case of coal-mines in work, and was held to be trespass, not waste, and yet an injunction was granted because the mischief was considered irreparable; though his Honor could not see why mischief in the case of coals was more irreparable than in the case of trees. It was true that the value of trees might generally be made the subject of money compensation, yet there might be cases of ornamental timber, and even of a single tree—a decayed stump, for instance, not worth five shillings—and yet the greatest possible mischief might be done by its destruction. *Courthope* vs. *Mapplesden*, 10 Ves. 290, 1804, was a case relating to timber, where a stranger was colluding with the tenants, and Lord ELDON granted an injunction. In *Earl Cowper* vs. *Baker*, 17 Ves. 128, 1810, the defendant, being a stranger, was restrained from taking argillaceous stones from under the sea, because the mischief was irreparable. The plaintiff was the lord of the manor, and his rights extended beyond low-water mark as far as a small barrel could be seen from the shore, and lumps of clay which had become fossilized formed an article of great value for a certain manufacture, from which great profit was derived. Lord ELDON

considered the damage irreparable, not because it was destruction, but because it was taking away the substance of the inheritance; and great stress has been laid on this case on the ground of the character of the mischief. It was, in fact, a case where relief was given in equity, although money would have been a remuneration. He now came to the cases more immediately resembling the present case, which he might briefly state as follows:—Mr. Lowndes and his ancestors had been in possession for eighty years, and the defendant claimed title, not as a mere stranger, but alleging that he was heir, and that the statute was no bar to his claim, because he had barred the statute by having entered and by still claiming to enter upon the estate, and by cutting down trees in order to assert his right. An injunction had been granted in every case but one, and there were elements in some of them which were not to be found here. There were six cases: the first was before Lord CAMDEN, not reported originally, but cited in *Mogg* vs. *Mogg*, *supra*, no name being given to it. It was a case where persons were cutting timber under color of a right to estovers; the plaintiff was lord of the manor, and alleged that they cut down much more than was wanted for estovers, and an injunction was granted. Lord THURLOW said that the case did not apply to *Mogg* vs. *Mogg*, because there was a right to something in the defendants, and until such right was determined it was proper to stay them from doing an act which, if they had no right to do, would be irreparable. *Robinson* vs. *Lord Byron*, 1 Bro. C. C. 587, in 1785, was the case of a water-mill, the defendant being the owner of the stream above the mill, who, in order to vex the plaintiff, sometimes kept back the water, and sometimes deluged the mill; there an injunction was granted. In *Smith* vs. *Collyer*, 8 Ves. 89, 1803, the injunction was refused by Lord Eldon, because it was a case of trespass. Infants were in possession by their guardians, and the defendant claimed as heir. KNIGHT BRUCE, V. C., observed upon the case in *Haigh* vs. *Jagger*, *supra*, hesitating to say that Lord ELDON was wrong, though he was not satisfied that, under the same circumstances, the court would not now have granted an injunction, thereby referring to the change which had taken place in the law upon the subject. *Grey* vs. *The Duke of Northumberland*, 13 Ves. 236, in 1806, was a case of copyholds, and an *ex parte* injunction was granted to restrain the opening of a mine, the defendant claiming as lord of the manor, and Lord ELDON, on motion to dis-

solve (17 Ves. 281), said he would do so unless the right was tried at once at law. *Kinder* vs. *Jones*, 17 Ves. 110, 1810, was also on the application of a lord of a manor, the subject-matter being trees; and Sir WM. GRANT granted the injunction. The last case was *Thomas* vs. *Oakley*, 18 Ves. 184, in 1816. The defendant having a contiguous estate, with a right to enter the plaintiff's quarry and take stone for purposes confined to a part of his estate, had taken stone for the purpose of using it upon other parts of his estate, and Lord ELDON overruled the demurrer. In all these cases the plaintiff was in possession, and the motion was to restrain the defendant claiming under an adverse title, and in all of them injunctions were granted, except in the case of *Smith* vs. *Collyer*. Many other cases might be referred to, containing *dicta*, tending to show the continually increasing feeling and opinion among the learned judges as to the impropriety of observing the distinction between trespass and waste, and the injustice of refusing to interfere in all cases of trespass. What was the court to do in this case, where the plaintiff was in possession apparently and lawfully, and was asking for an injunction to restrain the defendant, who was out of possession, but claiming a title as heir at law (however incapable of support that claim might be), and giving notice, that whenever he found it convenient, he would cut down shrubs, trees, &c., and also reminding the plaintiff that one of his ancestors had cut down twelve trees upon a former occasion? If a person, for the purpose of asserting a right, or keeping alive a claim, desired to do a certain act, this court would not restrain him from doing an act necessary to his title and for his benefit, but nothing could be more absurd than the notions of the defendant on the subject. His opinion was, that although the plaintiff had an eighty years' title, he had a right as heir. Assuming that he was heir, but had not proved himself to be so, it would no doubt under the old rule have been a trespass, as there was no privity of title between the plaintiff and the defendant. The defendant might come on the land and do irremediable damage, incapable of being compensated by money. What the defendant threatened was, not to cut down any particular trees, but what trees he pleased. It appeared to come under the head of irremediable mischief, defined by Lord ELDON to be a destruction of the inheritance, and it also came within that class of cases where the plaintiff was in possession and the defendant was out of possession, and claimed under an adverse title, and in all of