considered to have a *quasi* lien; a right to have as much of it as may be necessary to satisfy his claim applied to its payment when it becomes due.

Granting the correctness of this view it is evident that a voluntary conveyance by a debtor is an attempt to deprive his creditors of their rights and is a fraud against them, and it is at once seen to be true that as Lord HARDWICKE said, "A man actually indebted, conveying voluntarily, always means to be in fraud of creditors." According to this view conveyances to children must be placed upon an equality with those to strangers.

A man may be tempted to steal, by a desire to benefit his wife and children, but if he yields to the temptation, the desire to benefit his family will not make his act honest. "I have always," says Lord HARDWICKE, "a great compassion for wife and children, yet, on the other side, it is possible, if creditors should not have their debts, their wives and children may be reduced to want."

In those cases in which the view taken in *Reade* v. *Livingston* has been dissented from, the idea seems to be that a debtor has a right to do what he pleases with his property, so long as his object and intent are not fraudulent. Where this view is adopted the only remaining question is as to when, if ever, a fraudulent intent should be conclusively presumed. It is evident that if debtors have a right to give away their property, there is no reason why a fraudulent intent should be inferred from the mere fact of the existence of previous indebtedness, where a voluntary conveyance is made to a near relative, by one whose circumstances justify him in making it, and who retains property amply sufficient to pay his debts. Hence if the latter theory be the correct one the rule in *Salmon* v. *Bennett* is unassailable.

BENJAMIN F. REX.

St. Louis.

RECENT ENGLISH DECISIONS.

Court of Appeal. Queen's Bench Division.

LEIGH v. DICKESON.

One tenant in common is not entitled to recover from his co-tenant contribution in respect of repairs done to the common property, although such repairs may have been reasonable and necessary. The proper remedy is by a partition suit, in which the court will take into account all proper expenditure upon the property.

The defendant was assignee of a lease granted by the plaintiff to one P. of an undivided three-fourths of certain premises to which the plaintiff was entitled as tenant in common with another. During the lease the defendant purchased the one-fourth interest of the plaintiff's co-tenant. On the expiration of the lease, the defendant continued in the occupation of the above three-fourths as tenant at sufferance to the plaintiff. *Held*, that notwithstanding the tenancy in common, the plaintiff was entitled to recover in respect of the use and occupation by the defendant of the undivided three-fourths.

APPEAL by the defendant from a judgment of POLLOCK, B.

In 1860, Mrs. Eyles (then Mrs. Worger) was entitled to an undivided three-fourths of a house in Market-lane, Dover, as tenant in common with another; and on the 4th of January in that year, Mrs. Worger, by lease, let to one Prebble, for twenty-one years, her interest at the rent of 33*l.* 15*s.* per annum. This lease contained a covenant on the part of the tenant to execute internal repairs, and, on the part of Mrs. Worger, to execute external repairs.

In 1865 the lease was assigned by Prebble to the defendant, who entered and paid rent. In 1871, the defendant purchased the one-fourth interest of the other tenant in common.

On the 6th of January 1881, the lease expired, and the defendant continued in possession. A correspondence then took place with a view to continue the tenancy, but the plaintiffs, the trustees of Mrs. Eyles, asking for an advanced rent, which the defendant was unwilling to pay, no further agreement was effected. The present action was then brought by the plaintiffs to recover from the defendant the sum of 24*l.* 9*s.* 6*d.* for the use and occupation by the defendant of three-fourths of the premises in Market-lane for 264 days, at the rate of 33*l.* 15*s.* per annum, and also three-quarters' rent of a piece of land and buildings at the rear of it.

The defendant set up a counter-claim in respect of a sum of 80*l.*, which he alleged he had expended in substantial and other proper repairs and improvements upon the premises.

The action was tried before POLLOCK, B., who, upon further consideration, gave judgment for the plaintiff upon the claim for 24*l.* 9*s.* 6*d.*, and also upon the counter-claim.

The defendant appealed.

Finlay, Q. C., and *C. A. Russell*, for the appellant.

Grantham, Q. C., and *Gore*, for the respondents.

BRETT, M. R.—In this case the plaintiffs' *cestui que trust*, Mrs. Eyles, and defendant were tenants in common of a house. The

defendant has done certain repairs which may be taken to have been reasonable and necessary for the maintenance of the house. Thereupon he has paid the cost of the repairs, and has set up a counter-claim against the plaintiffs, the trustees of the co-owner, to recover her share, proportionate to her interest, of the money so paid. That is the substance of the counter-claim. Therefore this is a case in which one person has expended money, and thereupon sues another person to recover that money. The question is whether the circumstances of the case will bring the case within any recognised principle of law which will entitle the defendant to recover against the plaintiffs. It is not pretended that there was any express request by Mrs. Eyles to the defendant to do the repairs or to expend any money on her behalf. What are the legal conditions which entitle a person, who has paid or expended money, to recover that money from another? If the plaintiff in such a case has expended money at the express request of the defendant, there can be no doubt. If the plaintiff has been appointed agent for the defendant in such a class of business as requires an expenditure of his money in order to carry on the business, there is no doubt as to that. The law has gone further, and has said that, although there may be no request from the defendant to the plaintiff in point of fact, nor any act appointing him his agent, yet if the defendant requests the plaintiff to do that which will impose upon the plaintiff a liability, according to law, to pay money, then the law will imply from that request a promise that, if the plaintiff has laid himself under the obligation to pay the money, and has paid it, the defendant will repay the money. The law has lately been extended still further, and it has been decided that if you request a person to pay money in such circumstances that, though the law will not compel him to pay, yet that if he does not there will be an injury to him in his business or social position, even although that business is not recognised in law, the law will imply a promise to repay. That was an extreme case, in my opinion, but it was so decided. It is equally clear, however, that the law has always been that, for a mere voluntary payment, a person cannot compel repayment from any one else, and if the payment was merely voluntary you cannot make another person repay you, on the ground that your money was expended for his benefit, and that he has reaped the benefit of it. If one person pays money voluntarily for another in such circumstances that the other is at liberty to accept or reject

the advantage and he accepts it, then, although the payment was voluntary, he adopts and ratifies what was done for him and becomes liable. But if the money is voluntarily expended in such circumstances that the other is obliged to reap the advantage of it, then his accepting what he was not at liberty to refuse is no evidence of adoption or ratification, and therefore the other must suffer for his generosity.

The question is under which head this case comes. There is a house in which these persons have interests, which, although independent, are in fact combined. The defendant expended money on the property for the purpose of putting it into repair. That, in the first instance, was most certainly a voluntary payment. He was not requested, and there was nothing in the relation of the parties to give him an authority from the other to expend the money. They were not partners: there was nothing in their relation which made one the agent of the other. It was a voluntary payment on the part of the defendant, partly for his own interest, and partly for the advantage of his co-owner. But then it was an advantage which the other could not reject. Therefore the money was voluntarily expended by the defendant. It was an expenditure of which the plaintiff would get the advantage, but without the liberty to accept or refuse that advantage. Therefore the case is within the principle I have mentioned, and the money is not recoverable. At the common law it cannot be recovered as money paid. That is a legal remedy, and if it could be recovered in that way, a court of equity would never have interfered. But there is in this matter a remedy which is entertained by the Court of Chancery. When parties are joined together as co-owners, and they have come to a final disagreement, the Court of Chancery divorces them in a suit for partition, and then does justice between them. In such a suit, this expenditure would be taken into account and regulated between the parties. An old writ was cited which looked like a common-law writ. As far as I understand it, it would be a mandatory writ. I think the proper way to deal with it is to say that it is obsolete, because, as a common writ, it was unworkable, and therefore the matter went to chancery, there being no adequate remedy at law. They took possession of such matters only by writ of partition, and that is the only known remedy in such a case. The strongest evidence that that is so is that, having had the assistance of my learned brothers and of the counsel on both sides, no case has been found,

either at common law or in equity, where one co-owner has been made to pay, as this defendant requires the plaintiff to pay, except in case of a partition suit; and yet this very dispute must have been raised over and over again, and probably is the reason why the court entertains partition suits. If any further reason can be required, it is that, if we upheld such an action, it would enable a part owner to put upon his co-owner expenses which he might be, for reasons good or bad, unwilling to incur. I am, therefore, clearly of opinion, that this counter-claim cannot be maintained, and that the appeal must be dismissed.

COTTON, L. J.—I am of the same opinion. The action was to recover rent, and there was a counter-claim by the defendant for certain sums of money expended on the repair of the house. As regards the rent, I am of opinion that the plaintiffs are right. The defendant says that in ordinary circumstances one tenant in common cannot recover rent from the other tenant in common in possession. Both may enjoy the property, and the one in possession, unless the other is ousted, is not liable for rent. But here the defendant was not originally tenant in common, but he was in possession under a lease. After the expiration of the lease he continued in possession, and before the lease terminated there had been a correspondence about rent and a question as to what amount was to be paid. In those circumstances, when the defendant held continuously under the lease, he must be considered as holding exclusive possession, and, therefore, he was in my opinion, properly held liable to the plaintiffs for rent.

Then, as to the repairs, the question arises upon demurrer to the statement of defence. We cannot tell what the repairs were; but it is stated that the house was in a bad state of repair, and that the defendant expended money in substantial and other proper repairs and improvements upon the premises. I think we must take it that sums of money were expended in necessary repairs for the purpose of keeping the house in tenantable condition. As to the improvements, it was suggested that they should be allowed; but we need not discuss that, because no tenant in common is entitled to improve common property and then say that his co-tenant is to pay him the cost of improvements done without his request.

As to the repairs, no doubt where there are two persons under a common obligation, and one discharges it, the other, on whose be-

half the money has been expended, is liable to him. But one of two tenants in common does not stand in that position to the other, even as regards necessary repairs. There being no suggested request, express or implied, I can see in principle no ground for saying that any common-law action will lie, nor that equity will allow any claim, except in the case I have mentioned, by one tenant in common against another for repairs.

It was suggested that in Fitzherbert's Natura Brevium there is a common-law writ of contribution as between tenants in common. On looking at it, however, I find that it assumes an obligation on tenants in common to do repairs, for at page 162 it says, "To the King and the sheriff * * * if A. shall make you secure * * * then summon * * * B. and C., that they be at W. to show wherefore, whereas they, the said A., B. and C., jointly hold a certain mill undivided in N., and are bound to the reparation and support of the same mill, and the said B. and C. * * * refuse to contribute to the reparation and support of the said mill, to the great damage of the said A., as he saith."

That, probably, may be a writ referring to a case where there was an obligation by tenure, or otherwise, to repair a mill, and one of the persons under such common obligation refused to fulfil it. But that does not apply to a case like the present. No doubt in Coke on Littleton (200b) we find he refers to the writ in this way:— "If two tenants in common, or joint tenants, be of a house or mill, and it fall in decay, and the one is willing to repair the same and the other will not, he that is willing shall have a writ *de reparatione facienda*, and the writ saith, *ad reparationem et sustentationem ejusdem domus teneatur*, whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men." I cannot but think that he has mistaken the writ in Fitzherbert. If the sole owner of a house is not under any obligation to repair, I cannot see how joint owners are. In my opinion there arises no difficulty from the writ mentioned in Fitzherbert. It is not the case, however, that there is no remedy at all. There is no remedy so long as two tenants in common are willing to enjoy the property in its existing state. Unless there is an express or implied request the one cannot recover against the other. But there is a remedy in a partition suit. In the decrees in such suits it is common to have an inquiry whether one tenant has expended money in the repair or improvement of

the property. So long as both parties are agreed to enjoy the property as tenants in common there can be no common-law action, and, therefore, no action in equity in order to make one contribute. But where one tenant in common desires to put an end to that state of things, and asks the other for a partition or sale of the property, then the property is to be held in a different way; the money derived from the sale is directly increased by the expenditure incurred for the benefit or improvement of the property, or, if there is a division of the property *in specie*, the property to be divided is increased. Therefore, if the property is to be divided and enjoyed in a different way, the one who has not contributed at all, and was not bound to contribute, cannot take the property increased in value, or the increase in the amount in money, without making an allowance to his co-tenant. It may be that it is considered that what has been done is adopted by taking the improved value or the improved state of the property in severalty. But it is confined to a partition suit. There is, therefore, a remedy which is available if the tenants in common cannot agree, and it is a sufficient and the only remedy.

LINDLEY, L. J., delivered a concurring opinion.

1. In this country also it is well settled that at common law one tenant in common cannot recover of a co-tenant any part of the amount expended in making repairs, however reasonable and necessary, merely from his relation as co-tenant, and without any express or implied request or promise: *Converse* v. *Ferre*, 11 Mass. 326, PARKER, C. J.; *Calvert* v. *Aldrich*, 99 Id. 74, in which a very satisfactory opinion is given by FOSTER, J.

And it would seem that no action at law lies by one tenant in common against another for damages sustained by the defendant's neglect to repair; certainly not without a previous request to repair, there being no exclusive obligation on the defendant to make the repairs: *Doane* v. *Badger*, 12 Mass. 65; *Mumford* v. *Brown*, 6 Cow. 475.

If this be so as to tenants in common, strictly speaking, it seems still more obvious where two persons own in severalty two distinct parts of a house; as when A. owns the lower portion, and B. the upper part, including the roof. In such case if A. refuses to join with B. in repairing the roof, and B. repairs it at his own expense, he cannot recover any part of such necessary expenditure from A.: *Loring* v. *Bacon*, 4 Mass. 574. And see *Cheeseborough* v. *Green*, 10 Conn. 318.

But the doctrine of contribution *in equity* is more ample than at law, and is founded on the principle that when parties stand in *æquali jure*, equality of burthen becomes equity. And so if repairs be made and paid for by one of the tenants for the common benefit of the others, in equity, they would be held to contribute ratably for such useful expenses. And not only would they be personally liable to contribution, but their estates also would be subject to a lien, whether the tenants agreed to repair or not, if by the repairs a common benefit