ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER.

BULLEN—*Appellant.*
MICHEL (Clerk)—*Respondent.*

BILL, by Vicar of Sturminster Newton, for vicarial tithes in kind against several occupiers of farms. Answers (separate) setting up farm moduses. Issues directed, and the issue respecting Bagber farm (Bullen's) tried. Proof for Appellant Bullen, Plaintiff in the issue, by the evidence of old persons that a sum of 5*l.* 3*s.* 4*d.* had been invariably paid for the vicarial tithe of Bagber farm for about sixty years past. Offered in evidence for Defendant (the Vicar), to prove rankness, a rate-paper, from which it appeared that the whole parish had, during the same period, paid rates in the same way in lieu of vicarial tithes, amounting together to 68*l.* Offered also certain entries, without date, but proved to be of the hand-writing of the end of the thirteenth or beginning of the fourteenth century, in a book called the Chartulary of Glastonbury Abbey: viz. an entry of the ordination of the Bishop on the appropriation of the church of Sturminster to the Abbey: and the entry immediately following, beginning with the words "portions of "the church of Sturminster assigned to the vicarage to be "ordained to remain in the same for ever," and then enumerating the several articles with the value of each, without any allusion to a money payment in lieu of the tithes, and making the whole vicarage of the clear yearly value of 9*l.* 12*s.* 5¼*d.* This entry was offered as a copy of, or extract from, the endowment, the original being lost. The book was produced from the muniment room of the Marquis of Bath, who had lands which had belonged to the Abbey, but not in Sturminster Newton. Besides entries in which the Abbey was concerned, the book contained several idle stories, and a great deal of other miscellaneous matter. The rate-paper and Chartulary rejected, and verdict for the modus. But the Court of Exchequer, being of opinion that these documents ought to be admitted, ordered a new trial. Proof for Appellant as before, and the rate-paper and entries in the Chartulary read for the Respondent, besides

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other documents, to rebut the presumption of a modus. Verdict for Respondent, and against the modus; and new trial, moved for on the ground of the alleged improper admission of the Chartulary in evidence, refused—and appeal to the Lords from this order of refusal.

Objections to the admission of the entries:—1st, that the book did not come from the proper custody; 2d, that the endowment itself could have been no evidence on this issue; and if it could, yet the entry respecting the portions assigned to the Vicar did not purport to be a copy or extract, and was not good secondary evidence; 3d, that this was *res inter alios acta*.

The order of the Court of Exchequer refusing the new trial *affirmed* by the House of Lords on the grounds, 1st, that the entries had been properly received in evidence, the custody being proper, the entries being authentic copies of instruments of which the originals would have been good evidence; and *res inter alios acta* being in this case no objection, and also that the whole of the rate-paper was proper evidence on this particular issue: 2d, that, supposing the entries to have been improperly admitted, the verdict was warranted by the other evidence, and that it signified nothing to say that the Jury might possibly have come to their conclusion upon the ground of the Chartulary, because the object of an issue out of equity was to satisfy the conscience of the Court; and where the evidence was such as fully to satisfy the conscience of the Court, a Court of Equity was not bound, either in tithe causes or others, to order a new trial, or to direct an issue originally at all; exercising, however, a sound discretion in each particular case, whether to do so or not.

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Parties. Parish and manor of Sturminster Newton.

THE Respondent, Michel, is Vicar of the Parish of Sturminster Newton in the County of Dorset; and the Appellant, Bullen, is the occupier of Bagber farm in that parish. The question was, whether a certain payment in lieu of small tithes for that farm was or was not a *modus*.

The parish contains from 4000 to 5000 acres of land, the greater part of which was formerly under

the plough; but now the lands are converted into pasture or meadow, except about 240 acres. There are in the parish seven fields called "the Common "Meads," containing about 120 acres, divided into small allotments held in severalty till the hay is cut, after which they become common to all the tenants of the manor of Sturminster Newton. This manor, comprehending the greater part of the lands in the parish, and the advowson of the rectory, formerly belonged to the Abbey of Glastonbury, as did also the advowson of the vicarage from the time of its endowment till the dissolution of the monasteries by Henry VIII.

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From 1743 till 1800, the incumbents were the Rev. Henry St. Loe, the Rev. John Bird, and the Rev. William Butler. There was no evidence that any tithes, great or small, had been paid in the parish during the memory of any living person; but, during the incumbencies of the three persons mentioned, every occupier of land in the parish paid a certain money-rate for the small tithes of the whole of his land, exclusive of the Common Meads, the occupiers of which paid a certain other distinct rate for the meads.

Tithe-rates.

The Respondent was instituted in 1800, and accepted the rate payments in 1800 and 1801; but, thinking them inadequate to the value, he gave notice that they were to determine on St. Thomas's-day, 1802, and invited the occupiers to make new compositions, which being refused and the payment of the tithes in kind resisted, he filed his bill in the Exchequer in M. T. 1804, against Bullen, Williams, Rabbetts, Dashwood, and Atchison, five of the

1800. Respondent instituted Vicar.

Tithes in kind refused.

Bill, 1804.

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principal occupiers, praying an account and payment of the single value of all their tithes, except corn and grain. The defendants answered separately, admitting the Respondent's title as Vicar, but insisting that the payments were moduses, or ancient customary payments to the Vicar in lieu of all tithes except corn and grain, exclusive of certain lands occupied by Dashwood and Atchison in the Common Meads, the tithes of which were admitted to be due.

Answers, 1806. Modus.

May 5, 1810, decree. Issues directed.

The cause was heard in Nov. 1809, and on May 5, 1810, it was decreed that the parties should be referred to trials at law, in feigned actions, in the nature of issues upon the several farm moduses laid by the Defendants in their separate answers; and an account was ordered of what was due to the Vicar from the two Defendants Dashwood and Atchison, for tithes admitted to be due in respect of the Common Mead lands, the other three Defendants having no lands in the Common Meads. The Vicar procured a re-hearing of the cause upon that part of the decree which directed issues; but the Court, Jan. 22, 1812, affirmed the decree. The form of the sixth issue, the only one now in question, was as follows, viz. "Whether from time im-

Form of the issue.

"memorial the occupiers or occupier of the farm "and lands called Bagber farm have or hath paid, "and have or hath been accustomed to pay, and "ought of right now to pay, to the Vicar of the "parish of Sturminster Newton, on St. Thomas's "day in each and every year, a certain modus, or "ancient customary yearly payment of 5*l.* 3*s.* 4*d.* "for, in lieu, and full satisfaction and discharge of

" the tithe of hay and grass seeds, and of all other " titheable matters and things (except corn and " grain) yearly arising, growing, and renewing upon " and throughout the said farm and lands called " Bagber farm." And it was further ordered that the Appellant should be Plaintiff, and the Respondent Defendant at law in the said issue.

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The Defendants in equity, being Plaintiffs at law, had an opportunity of setting down the issues in the order most advantageous to themselves, and they selected the sixth as the first to be tried, being that of the Defendant Bullen, the present Appellant, whose farm, called Bagber farm, contains 146 acres, 3 rods, 25 perches, and whose tithe rate was 5*l.* 3*s.* 4*d.*, being about 8¼*d.* per acre. The record next in order was that of the Defendant Williams. The issues in these two records were tried at Dorchester, before Mr. Justice Chambre and a special Jury, on July 17 and 18, 1812.

Bagber farm.

On the trial of the issue as to Bagber farm, Bullen, the Appellant, proved by the testimony of some old persons, that no tithes in kind had, within their recollection, been rendered for Bagber farm; but that the above-mentioned payment had been annually made in lieu of the vicarial tithes. Receipts given by Mr. St. Loe and his successors were produced to prove the same payment; and it appeared on the cross-examination of one of the Appellant's witnesses, that the payments for the rest of the parish, as well as for Bagber, were collected from one and the same paper called " the rate-paper."

First trial, July, 1812. Appellant's evidence.

The Vicar on the other hand, to show that the payment was so large that it was incredible it should

Respondent's evidence.

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have been made so far back as the time of legal memory, produced several documents, hereinafter more particularly mentioned, to prove the value of the vicarage at different periods. The Respondent then offered to give in evidence—1st, "the rate-paper," to show that the uniform payment in lieu of tithes was not peculiar to Bagber, but extended over the whole parish; 2d, certain entries in a book, called a Ledger-book or Chartulary (hereinafter more particularly mentioned) of the Abbey of Glastonbury, brought from the muniment room of the Marquis of Bath; 3d, certain accounts of the reeves of the Abbey for the manor of Newton (also found in the custody of the Marquis of Bath), for the purpose of showing that the reeves obtained allowances and acquittances in their accounts with the Abbey for various articles of small tithes arising from demesne lands of the manor, as having been rendered in kind at different periods subsequent to the time of legal memory. These three last heads of evidence were rejected by the Judge; and, the evidence being the same on the second issue, verdicts were found on both records in favour of the moduses.

Evidence offered and rejected.

Verdict for the modus.

Motion for a new trial.

On Nov. 10, 1812, the Respondent obtained an order of Court to show cause why a new trial should not be granted, on the ground of the rejection of the above-mentioned evidence; and cause having been shown in H. T. following, judgment was reserved; and the Chief Baron Macdonald having in the mean time resigned, the matter was re-argued before Sir Vicary Gibbs, his successor, and the other barons, on Feb. 21, 1814. The objection to the rate-paper, or rather to the general application of it,

Objections to the rejected evidence.

was that the other payments were not proper evidence on the particular issue. The reeves' accounts were not at all produced on the second trial. The objections to the chartulary were—1st, that it did not come from the proper custody; 2d, that the entry could not be received as secondary evidence of the endowment, not purporting to be either a copy or extract, and that even the endowment itself would be no evidence; 3d, that at any rate it was not admissible evidence between the present parties, being *res inter alios acta*. On Feb. 23, 1814, the Chief Baron Gibbs delivered the opinion of the Court that the rejected evidence ought to have been received; and a new trial was accordingly ordered.

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New trial ordered.

The cause was tried on March 18, 1814, at Dorchester, before Mr. Justice Bayley, and a Special Jury. The evidence for the Appellant was as follows:—

Second trial, March, 1814.

The depositions of Amos Chin (a witness who had been examined for the Appellant in Equity, and was since dead) were read, and proved his knowledge of the farm for 70 years; that it had always during his recollection consisted of the same parcels; and that no tithes in kind had ever, to the witness's knowledge or belief, been set out to, or demanded by, the Vicar. The depositions of another witness, James Castleman, examined in Equity, and unable to attend at Dorchester, were also read, and proved his knowledge of the farm for sixty or seventy years, he having himself occupied it three years, and always lived near it; that it always, during his recollection, consisted of the same parcels; that no tithes in kind had ever, to the witness's knowledge,

Appellant's evidence. Modus.

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been paid to, or demanded by, the Vicar; that he had heard that payments had been made to the Vicar about Christmas in lieu of the tithes of the parish. Richard Moore, aged 72, proved that he had collected the payments for tithes from about the year 1760, and that his father collected them when he first remembered. He proved the hand-writing to about sixteen receipts, for the sum of *5l. 3s. 4d.*, expressed to be paid by a Mr. Joyce, a former occupier of Bagber farm, and other succeeding occupiers, due at St. Thomas's day, in different years, from 1754 to 1791, most of them expressed to be "for a year's tithe," some of them "for rates," or "rates for tithes," and some generally for the farm. These receipts comprised the rates for three other farms, occupied along with Bagber farm, but now in other hands, which made the total payment *7l.* 14*s.* 6*d.*

Rates.

On his cross-examination he said that, on the Sunday before St. Thomas's day, he always gave a public notice, which was read by the clerk in the church, that the tithes of the parish were to be paid on the 21st of December; that he collected for the whole parish from a rate, and that the papers shown him were some of those rates; that the whole parish was under these money payments; that when he first knew the parish the Common Meads stood by themselves. He proved the paper indorsed "The "rate for the Common Meads" to be that from which he collected the rates for the Meads. Examined by the Judge, he stated that in collecting the rates he made no distinction between Bagber farm and the other parts of the parish. He believed

Mr. Joyce was the only person who required a receipt (his payment was the largest). In general the payments were only marked off on the rate-paper.

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From the rate-paper thus referred to by Moore it appeared that the sum total of the yearly payments was about 68*l.* exclusive of the Mead payments, which amounted to about 10*l.* more, making about 78*l.* in the whole. Of this evidence for the Appellant it was afterwards observed by Lord Redesdale that it was not conclusive; but raised a presumption of a *modus*; and that, as it was proved that all the payments were made in the same way as this for Bagber farm, the presumption must be that all of them were moduses, or that none of them was so.

Lord Redesdale's observations on this evidence.

To rebut this presumption the Respondent produced several documents to show, as already stated, that the payments were so large that it was incredible they could have been made so far back as the time of legal memory. But, first, Richard Moore proved that he collected from all the persons named in the rate-paper, in the same manner as from the occupiers of Bagber farm; that the gross sum of the rates remained the same, though the number of payments was afterwards increased; that he collected the Common Mead tithe-rates from another rate-paper; that most of the lands in the parish had the appearance of ridge and furrow, as if formerly ploughed. Then an extract from Domesday Book was read, to show the state of the parish, and the value of land there at the time of that survey. It was then found that the church of Glastonbury held the manor of Newton, consisting

Respondent's evidence.

Rankness.

Rate-paper.

Domesday book, 1086.

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of 25 carucates (that is to say, from 2,400 to 3000 acres, the contents of a carucate being from 100 to 120 acres), besides which there were 14 carucates in demesne which were never taxed. There were at that day (as at present) three mills, and only sixty-six acres of meadow. The woods were two miles and a half long, and one mile broad (now there is scarcely any wood). The whole had been formerly worth 30*l.*, but at the time of the survey was only worth 25*l.* Eleven carucates were then worth 7*l.* (being about 1½*d.* per acre). This extract, Lord Redesdale afterwards observed, proved little except the extent of the parish.

In order to introduce the Chartulary, Charles Bowes proved a search in the Bishops of Bristol and Salisbury's Registries (it did not appear that any search had been made in the Augmentation Office) for the original endowment, or a record of it, and that none was to be found. Thomas Davis, Steward of the Marquis of Bath, produced the

The Chartulary. Account of it.

book, called the Chartulary, from the muniment room of the Marquis, who was proprietor of certain lands which had once belonged to the Abbey, though he had none in Sturminster Newton. This book, together with entries relative to the rights of the Abbey, contained a great deal of miscellaneous matter, including several idle stories; such as, an account of the giants who originally inhabited the British island, a genealogy of the kings of England, beginning from Adam, something *de pondere lanæ*, a calendar, a list of bulls and licences, &c. Then,

Entries with respect to Newton.

after an entry of the date 1333, came the entries, without date, relating to the appropriation of the

rectory and endowment of the vicarage of Newton. The first was entitled "Ordinacio Dñi Epĩ et capituli Saŕ super donacionē et appropriacionē Eccłæ de Nywtonē et Sturminster." And then followed the ordination; and after that, with the title "*Ordinacio Vicarie de Sturminstre*" prefixed, came the second entry, supposed to be a copy or extract of the endowment, stating the portions of the church of Sturminster *assigned* (the appropriate technical term used in ancient endowments) to the vicarage, to be ordained to remain in the same for ever. "Porc̃oes ecc̃e de Sturmynstr' assignate vicarie ordīande in eaď ꝑpetuis tēꝑibȝ duratuŕ Mansū cū gardīo & valet, &c." Then the several articles, with the annual value of each, were separately stated, from which it appeared that the net annual value of the vicarage was, at the time of the entry, 9*l.* 12*s.* 5¼*d.* There was no mention in it of any money payment in lieu of tithes. A witness proved the hand-writing to be of the time of the 1st, 2d, or 3d, Edwards, or about the end of the 13th or beginning of the 14th century. The taxation of Pope Nicholas (afterwards mentioned) proved that the endowment itself must have been made before 1291; and the Judge, having over-ruled objections which had been urged against the reading of the entries, stated to the Jury that the entry appeared to be contemporaneous with the endowment, and was material evidence, as raising the inference that such a money payment as that now contended for could not then have existed. In the early part of the book there was an Index or summary of the contents, entitled, "*Kalendar Sequentis Operis*," in

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Read for the Respondent.

Entry. Supposed copy of, or extract from, the endowment, and supposed date about 1269.

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which, at the commencement of the enumeration of those instruments which related to Newton, the following entry appeared, "*Deficit Ordinatio Vicarii Nywton.*" This entry was read on the part of the Appellant, but it did not seem to be considered as of much weight even by the Appellant's counsel.

Valor of Pope Nicholas, 1291.

The valor or taxation of Pope Nicholas, in 1291, was then read, by which it was found that the vicarage of Sturminster Newton was then of the estimated yearly value of 10*l.*, and that the rectory was estimated to be worth 13*l.* 6*s.* 8*d.*, making in the whole 23*l.* 6*s.* 8*d.* Of this, it was observed by Lord Redesdale that, being a taxation, the estimate must be supposed to be rather under than above the real value.

Ad quod damnum, 37 Ed. 3.

A writ of *ad quod damnum*, directed to the King's Escheator for the county of Dorset, in 37 Ed. III., to inquire whether it would be to the prejudice of the Crown to license the conveyance in mortmain, by Hugh Pembrigge and others, to the Abbey of Glastonbury, of three messuages, and 195 acres of land in East Bagber (being that quarter of the parish in which the Appellant's land is situate), and the inquisition thereupon taken on oath, were read, whereby it appeared that the Jury were charged to inquire, amongst other things, how much these lands were worth by the year in all issues, according to the true value of the same, and that the jury on their oaths assessed the value at 2*l.* 2*s.* 2*d.*, being 2¼*d.* per acre.

Observation by Lord Redesdale on this part of the evidence.

So that, as was afterwards observed by Lord Redesdale, upon the supposition of a modus, the payment of 5*l.* 3*s.* 4*d.* being about 8*s.* 4*d.* per

acre, the vicarial tithe alone of an acre of Bagber farm must have been, so far back as the time of legal memory, of from three to four times the whole value of an acre of East Bagber, in 37 Ed. III., which is within the time of legal memory. The general ecclesiastical survey, taken in pursuance of an act of parliament in 26 Henry VIII., was read, whereby it appeared that the vicarage of Sturminster Newton, with the chapel of Bagber annexed, was stated to be of the clear yearly value of 16*l.* 16*s.* 6¼*d.* A terrier, returned to the Bishop's Court in 1784, of the glebe-lands belonging to the vicarage was read, to show the quantity to be sixty-five acres; the annual value of which, in 26 Henry VIII. (1535), appeared by the survey of that date to have been 4*l.*, or about 1*s.* 3*d.* per acre.

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Upon this evidence the Jury found a verdict for the Vicar, and against the modus. The records of the remaining issues were withdrawn by consent, and it was agreed that they should abide the event of this cause; and a rule of *nisi-prius* was made accordingly, which was afterwards, May 17, 1814, made a rule of Court. In May, 1814, the Appellant, on objections stated to the admissibility and relevancy of the entries in the Chartulary, obtained an order *nisi* for a third trial of the issue as to Bagber farm; but, upon cause shown, that order was, on Jan. 25, 1815, discharged: the Court, with the exception of Mr. Baron Wood, being of opinion that the entries had been properly read in evidence. Against this order of discharge, of Jan. 25, 1815, Bullen appealed to the Lords, praying

Verdict. No modus. Appellant moves for a third trial. New trial refused. Appeal.

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the House to reverse the same, and order a new trial of the issue as to Bagber farm. It appeared from a statement of one of the counsel for the Respondent, in answer to a question by the Lord Chancellor, that they were permitted to read the entries in the Chartulary only for the purpose of raising the inference that tithes in kind had been paid to the Vicar within the time of legal memory, and were prevented from using them as evidence of an endowment within legal memory, so as, on that ground, to upset the prescription.

Reasons of appeal.

The reasons of appeal in the Appellant's case, signed Lens, Dauncey, Gazelee, Casberd, and Heald, were these.

1st, Because the said book called the Chartulary was not sufficiently authenticated by being traced to the proper custody, so as to render the same legal evidence.

2d, Because, supposing the said book to have been sufficiently authenticated, the entries therein are not of such a nature as to be legally receivable in evidence. They do not purport to be an original instrument, nor a copy of an original instrument, nor a substitute capable of being received in the absence of an original instrument; nor do they profess to be an extract of any description, or an original declaration proceeding from any particular party. They are entries evidently referring to some prospective act; yet so indefinite and uncertain in their nature as to be incapable of any specific title or denomination; and if it were possible to contend that they might be construed as

an original endowment, which it is submitted is impossible, it is obvious that the instrument would not be derived from the proper custody.

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3d, Because supposing the said book to have been duly authenticated, and the entries therein from their nature to be legally admissible in evidence, such entries are not appropriate evidence with reference to the issue on the record; for the endowment of the vicarage so far from being a subject of dispute, or constituting a necessary part of the Respondent's proofs, is admitted by the very nature of the Appellant's own case; and as to that, which is the only point in issue, namely, the mode in which tithes are payable annually for Bagber farm, those entries cannot be received in evidence, although as to another point, if it were a matter in controversy, they might be considered as legal proof.

4th, Because those entries are not legal evidence as between the parties upon the present record; for they cannot be considered in the light of a public act, in which the world at large may be supposed to have borne a part, nor of an act to which the Appellant or any former owner of Bagber-Farm can be construed to have been a party. They seem to have been the unauthorized act of certain individuals, as against whom it may be conceded such entries would be evidence, but as against the Appellant, or in other words, the owner or occupier of Bagber farm, who had no participation or concern in their formation, nor any knowledge whatsoever of their existence, those entries, on the

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ground of their being *res inter alios acta*, are inadmissible in evidence.

Sir S. Romilly and *Mr. Dauncey* at the bar contended (for the Appellant) that the Judge (Bayley) was mistaken in supposing that the entry as to the portions of the church of Sturminster was contemporaneous with the endowment; and if the entry was received in evidence on mistaken grounds, there ought to be a new trial, because it was impossible to say what effect this mistaken view of the subject might have had on the minds of the Jury, or what would have been the verdict if it had been clearly shown that the entry was not contemporaneous with the endowment. The endowment must have taken place previous to the year 1290, and these entries must have been made subsequent to the year 1333, or the 7th of Ed. III., as the preceding entry was of that date; so that it was manifest from the book itself, that the entries in question could not have been contemporaneous with the endowment. It was manifest also that the entries ought not to be received in evidence, for, supposing that the endowment itself might be read, if produced, this entry as to the portions assigned to the vicarage did not purport to be a copy nor an extract from either copy or original. But even the endowment itself would have no evidence on this issue, as it was no question between the Rector and Vicar. If there had been never so many moduses, none of them would appear from the endowment, which would merely show the tithes as-

signed to the vicarage, without saying any thing as to how they were paid. Even as between the rector and vicar, this entry could have been no evidence; it was no diary of acts done at the time, and was accompanied by no act whatever. At any rate it was clearly *res inter alios acta* with respect to Bullen; and if such entries were admitted as evidence against third parties, the rector and vicar might make entries, cutting down all moduses at their pleasure. The only judgment given by the Court of Exchequer as to this book was that it came out of a proper custody, leaving the rest open. But it was left by Mr. Justice Bayley very strong to the Jury in this way, that the enumeration of the articles was indicative of the payment of the tithes in kind, and that the total value was of such a size, as to be inconsistent with the notion that so large a modus had existed so far back as the time of legal memory: so that this entry had a weight given to it which it did not deserve; and it was impossible to say that, without this, the verdict would have been as it was; for the opinion of the Jury might have been formed on this very document so left to them.

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Vid. Aveson, v. Lord Kinnaird, 6 East. 188.

Pell (Serjt.) and *Gifford* (for the Respondent). The whole weight of the cause was not laid by Mr. Justice Bayley on the Chartulary, for great stress was laid on the rate-paper which was in evidence on the second trial; though on the first, Mr. Justice Chambre had refused it, thinking that the other payments were not good evidence on this issue. If this payment was a modus, all the others must be moduses; and then it was a fair question

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for the Jury, whether so large a sum as 68*l.* could have been paid in lieu of the vicarial tithes of this parish so far back as the time of legal memory. There were other documents likewise to show that there could have been no such payment for this farm so far back as the time of legal memory. From the taxation of Pope Nicholas, the inquisition on the writ of *ad quod damnum*, &c., it appeared incredible that the payment could have existed at that period. But the Chartulary was good evidence between these parties. This was clear law, that an entry or declaration made by a person against his own interest, was evidence between other persons who were neither parties nor privy to that entry or declaration—not, of course, in the person's life time, because then he might himself be called. *Roe, d. Brune v. Rawlings*, 7 East. 279.—*Higham v. Ridgway*, 10 East. 109; in which latter case an entry in a book by a man-midwife, of his having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as *paid*, was held to be evidence as to the age of the child. So an attorney's book was evidence between other parties, *Warren, d. Webb, v. Grenville*, 2 Str. 1298. A terrier was evidence against the Rector, though no party to it, *Illingworth v. Leigh*, 4 Gwill. 1615. These cases furnished a sufficient answer to the objection that the entries were *res inter alios acta*. To the same purport were the cases of *Stead v. Heaton*, 4 T. R. 669—and *Doe, d. Reece, v. Robson*, 15 East. 32.; in the latter of which cases Lord Ellenborough (C. J.) said, "The ground upon which "this evidence has been received is that there is a

" total absence of interest in the persons making the " entries to pervert the fact, and at the same time " a competency in them to know it." And per Bayley, (J.) " It has long been an established " principle of evidence that, if a party, who has " knowledge of the fact, make an entry of it, " whereby he charges himself, or discharges an- " other, upon whom he would otherwise have a " claim, such an entry is admissible evidence of " the fact, because it is against his own interest." The entries were made when the book was in the custody of the Abbot of Glastonbury, who was Rector of the church of Sturminster. The whole of the tithes belonged *de jure* to the Rector, and whatever he admitted to be due to the Vicar was against his interest; and, on the principle of the decisions, such entries were evidence as between third parties. The endowment itself would clearly have been admissible evidence, as in *Scott v. Smith*, 1 Ves. Beam. 142. where M. R. admitted an endowment, and held that the endowment, being within legal memory, negatived the prescription. The Bishop's registry had been searched, and the endowment could not be found; and when the original was lost, any secondary evidence might be given—a copy, minutes, an extract, or evidence of one who had read it. It was not necessary to show that the entry was an exact copy: if it was a true account of the matter it was sufficient. *Underhill v. Durham*, Freem. 509, 2 Gwill. 542.—*Greene v. Proude*, 1 Mod. 117. If the entries gave a true account of the subject, it was no good objection to the admissibility of the evidence that the book con-

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tained miscellaneous matters: *Moore v. Mayor of Hastings*, 10 State. Tri.* The account of the giants, &c., properly speaking, formed no part of the book. Such idle stories were often written by the monks on the blank leaves of abbey books. The custody was clearly the proper one, as the Marquis of Bath possessed some of the lands which had belonged to the Abbey, and the possession of a person having such lands was sufficient; and the case must be argued as it would have been previous to the dissolution of the monasteries, and as if the book had come from the Abbey. And it was not only admissible, but material evidence, and so it had been considered by the Court of Exchequer, when that Court ordered a new trial; for the mere admissibility would have been no good ground for a new trial, if the book had contained nothing of consequence. But suppose this book out of the question, the other evidence was amply sufficient to support the verdict; and if so, the Court would not send the matter to a new trial; for the intent and object of an issue out of equity was to inform the conscience of the Court; and if the Court was satisfied on the rest of the evidence that the verdict was right, there could be no good reason for sending the case to a new trial, though the objections to this book should appear to be well founded. *Warden and Minor Canons of St. Paul's v. Morris*, 9 Ves. 155.—*Pemberton v. Pemberton*, 11 Ves. 52.

* Fol. Ed. Appdx. 138.

Vid. Richards v. Symes, 2 Atk. 319.

Sir S. Romilly (in reply). The doctrine contended for on the other side, with respect to these issues, would render the judgment of juries on the facts of no avail. The evidence for the modus was not slight,

as the payments had been proved to have been invariably made for sixty years past, the period of limitation of a writ of right; and it was difficult to conceive how a farm modus could be proved in any other way. The rate-paper could properly be evidence only in as far as it related to the payment made for this farm; and it would be unjust to raise an inference from the other payments against the Appellant on this issue. As to the book called a Chartulary, they might as well have produced the Chronicles of Thomas Herne; and, besides, no evidence was given of a search for the endowment in the Augmentation Office.—(*Gifford.* That was not before made a ground of objection).

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Lord Eldon (C.) Considering that this is a case of great consequence, and that it is impossible for me, during the few minutes that remain before the time when the Judges are to attend on very important business,* to address your Lordships so fully on this case as I wish to do, I shall say nothing as to the affirmance or disaffirmance of the judgment at this moment. If the entries in this book have been properly received in evidence, and their effect accurately stated and justly construed (as I know of no noble Lord who thinks the verdict wrong in that view of the case), then the cause may be decided in that way. If the book has not been properly received, then there may be other important matters to be considered.

* Vid. Doe, d. Oxenden, v. Chichester, ante, p. 65—91.

I understand that it was determined below, both on the first hearing and on re-hearing, that these issues ought to be directed; and considering that new trials were afterwards twice applied for, and

Whether it was right to have originally directed any issue in this case.

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that on the first application, all the Judges, and on the second, all, except Baron Richards, I think, were of opinion that the directing of the issues at first in this case was right; it is difficult to say here, now, that to have directed these issues originally was improper; and I should not be disposed to say any thing on that point, without looking at the record and the evidence, and the whole proceedings in the Exchequer. But I have no difficulty in saying, after forty years' experience, that a Court of Equity has a right itself to determine questions of fact without the assistance of a Jury. A Court of Equity may, and often does, in the exercise of its judicial discretion, call for the assistance of a verdict by a Jury. But if it can, to its own satisfaction, itself decide upon the evidence, it is not bound to send the matter to be tried by a Jury. This is as clear in tithe as in other causes; and if the original decree, so far as it directed the issues, had been appealed from, the weight of evidence appears to be so much on one side that I should have found it difficult to say that any issue ought in this case to have been granted. But issues were directed, and we must now take it that this was properly done.

A Court of Equity may itself decide on facts, without the assistance of a Jury, though, in the exercise of its judicial discretion, it does often call for that assistance: but it is not bound to do so; and this is as clear in tithe causes as in others.

With respect to the case of the Warden and Minor Canons of St. Paul's, that case was decided not merely by the humble individual who now addresses you, but also by this House. The case was brought here by appeal, and this House, well assisted at the time, concurred in this doctrine—that where, on trial of an issue out of a Court of Equity, evidence is improperly rejected, if in looking at that evidence the Court is satisfied that, though it

Warden and Minor Canons of St. Paul's v. Morris. 9 Ves. 155.

Where, on the trial of an issue out of Equity, evidence is improperly rejected, if the Court is satis-

had been received, it ought not to have produced a different verdict; and that if the verdict had been the other way, that verdict ought not to stand; the refusal to grant a new trial is in the proper course of proceeding. I thought that, in the case of the Minor Canons of St. Paul's, there existed no good reason to direct an issue at all. But an issue had been there directed; and it was considered that it was properly done, as the order had not been appealed from. Lord Kenyon disposed of it very speedily, there being, as he said, nothing to try. Another issue in the same case was tried at bar in the Exchequer, and some material evidence was offered. Three Judges were of opinion that this evidence ought not to be received; and one (Baron Graham) thought that it ought to be admitted; and upon that ground a motion was made before me for a new trial. I declared that I thought Baron Graham in the right, and that I should have admitted the evidence; but, considering the nature of the functions of a Court of Equity, and the principle upon which it calls for the assistance of a Jury, the object being to satisfy the conscience of the Court, I could not agree to send the case again to a Jury, when, even though the evidence were admitted, the verdict ought not in my opinion to be different; and when, if should be so, the conscience of the Court would not only not be satisfied, but would on the contrary be dissatisfied. And then it becomes a matter of nice distinction—if no new trial ought to be granted, though evidence has been rejected which ought to have been received, where, if that evidence had not been rejected but admitted, the court is of opinion that the verdict should be

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fied that, though it had been received, it ought not to have produced a different verdict; the refusal to grant a new trial is in the proper course of proceeding. This doctrine sanctioned in Dom. Proc. 9 Ves. 155. Issue there directed per Lord Loughborough.

If the Court is not bound to grant a new trial, where evidence has been rejected which ought to have been admitted, provided the verdict is right, it is a nice distinction, to say, that on account of the admission of

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the same; it becomes a matter of nice distinction then, to say, that because evidence has been admitted which ought to have been rejected, a new trial ought to be granted, though the Court should be of opinion that, even if that evidence had not been received but rejected, the conclusion ought to be the same upon the other evidence.

evidence which ought to have been rejected a new trial ought to be granted, though the verdict should be right independent of that evideuce.

I have said so much to-day, because I take it to be indisputably clear that these tithe causes, as well as others, may be decided by a Court of Equity, without directing issues; the Court of course exercising a sound discretion in each particular case, as to whether in that case an issue ought or ought not to be sent to a jury. But if there is any where a notion that a Court of Equity is bound on all questions of fact to direct an issue or issues, I say that it is contradicted by my experience, and by the administration of the law for a long series of years.

It is indisputably clear that in tithe causes, as well as others, a Court of Equity may decide without sending an issue to a Jury; the Court in each case exercising a sound discretion whether it will do so or not.

If your Lordships should determine the question on the first point, I am anxious to protect this decision against an inference that we decide any thing as to what a Court of Equity ought to do if the evidence had been rejected.

First point, that the Chartulary was properly admitted in evidence.

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Chartulary.

Lord Redesdale (after stating the case). The book, which was produced as the Chartulary or Ledger-book of the Abbey of Glastonbury, was of this kind. The steward of the Marquis of Bath proved that it had been kept in the muniment room of the Marquis, who was proprietor of certain lands which had formerly belonged to the Abbey; and it is well known such books are sometimes found in the possession of private individuals, who have got lands which had belonged to the Abbey. The proper cus-

tody perhaps was the Augmentation Office. But the fact is, that these Chartularies, or Ledger-books, have in some instances got into the hands of private persons, instead of being kept in the Augmentation Office.

Objections to the Chartulary.

The objections that were made to the reading of the entries in this book were of three descriptions:— 1st, that the custody was not the proper one, an objection however which seems not to have been pressed at the last trial; 2d, that the entries did not contain evidence in itself proper to be received; and 3d, that, if they did, the matter was *res inter alios acta*, with which the owner of Bagber farm had nothing to do.

Nature and description of the book.

With respect to the book itself, many observations were made upon it as containing matter not at all connected with the possessions of the Abbey. But, as far as I can judge from this writing, there are, from the sixteenth page for a considerable extent into the book, various entries with which the Abbey was concerned, and such as are usually found in this sort of books belonging to Abbeys; for the monks were in the habit of transcribing instruments which concerned the Abbeys, and also of transcribing public instruments as far as they related to their own interests. It is that kind of book therefore in which ancient deeds and instruments are usually transcribed for the sake of reference and preservation, as is the custom in families which have a muniment room.

The entries.

Search was made in the Bishop's registry to ascertain whether an endowment of the vicarage existed, but none was found. Then this book was produced, and it contains entries which appear to

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Stat. 15 Rich. II. cap. 6.

be transcripts of two instruments: 1st, the ordinance of the Bishop of Salisbury for the appropriation of the church to the Abbey. Now it was expressly required by the statute 15 Richard II. cap. 6. that, on the appropriation of churches, the diocesan should ordain that the Vicar be well and sufficiently endowed, and that statute I take to have been in affirmance of a practice before existing, and that it was, previous to that statute, required that in cases of appropriation the Vicar should be properly endowed, and that it was the duty of the ordinary to see that this was done. The instrument of which this seems to be a copy is the ordinance of the Bishop on the appropriation of the church to the Abbey of Glastonbury, in which it was provided that the endowment should be ten marks at least, "*quæ valeat annis singulis ad firmam tradi pro* "*decem marcis ad minus, &c.*" This is very important if it be an authentic copy of an authentic instrument, as the next instrument is conformable to it, and is entitled "*Ordinacio Vicarie de Sturminstre.*" But it has been said that this title was not originally in the book, as it is written in a very small compass. But in looking over the book I find all the titles put in the same way, and the matter is not at any rate of much consequence. This entry begins with the words "*Porciones Ec-*" "*clesiæ de Sturmynstre Vicarie Ordinande in eadem*" "*perpetuis temporibus duratur̃ mansum cum gar-*" "*dino, &c.*" and then expresses the several articles.

The entries conformable to each other.

That entry is in conformity to the preceding instrument; for, if an allowance was directed, on the appropriation, as a provision for the Vicar; and that was not made, the law was that the appropriation

was void; and though at this distance of time it is to be presumed that every thing was rightly done, yet at that time, unless the vicarage was endowed as appointed by the Bishop's ordinance, the appropriation was void; and it was important for them, therefore, to preserve the ordination, and the endowment making provision for the Vicar in terms of the ordinance for the appropriation. Then these entries appeared to be copies of authentic and contemporaneous instruments, the one immediately following and corresponding to the other. So the several articles were enumerated, and the value of each, making the annual value of the vicarage 9*l*. 12*s*. 5¼*d*. after all charges deducted.

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And copies of authentic contemporaneous instruments.

The question is whether this copy so produced was properly admitted in evidence; and first it was made a question whether the original, if produced, would have been admissible evidence. Your Lordships observe that this evidence was offered to rebut a presumption which the Jury were called upon to draw from the Plaintiff's evidence, that this was an immemorial payment. To rebut that, the Vicar produces evidence to show that it was impossible to draw that presumption, and that the Jury ought to presume the other way; because, from what appeared to be the value of the whole at three several times, and the value of one parcel at another time, this sum of 5*l*. 3*s*. 4*d*. for Bagber farm was so much beyond what it could possibly have been in the time of Richard I., that it was impossible it could be an immemorial payment. Upon the principle of some of the arguments for the Appellant, no evidence could ever be given to show that a modus was too rank. You never can prove directly the

Evidence with reference to the rankness of an alleged modus.

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Res inter alios acta.

Taxation.

Survey, 26 Hen. VIII.

Ad quod damnum.

The original instruments, of which the entries are copies, would have been evidence.

value of the several articles in the time of Richard I. You can only show what has been reputed to be the value; and in questions of reputation, *res inter alios acta* is no objection, and so it seems to be admitted in other parts of the case. The taxation of Pope Nicholas was *res inter alios acta*. The occupier of Bagber farm had nothing to do with it. But it is evidence of the value of the vicarage as estimated for the purposes of that taxation. So the survey of 28 Henry VIII. is *res inter alios acta;* but these surveys are constantly admitted in evidence, not as an accurate account of the precise value, but as an estimate of the value from which the Jury may draw an inference. So it is with regard to the inquisition *ad quod damnum*, in the 37th of Edward III. The occupier of Bagber farm had no concern with it; but it was admitted to show that at that time the tithes were estimated to be of such a particular value, from which the Jury might draw their inference.

I take it then the original instruments, if they could have been produced, would have stood on the same ground as the taxation of Pope Nicholas, the inquisition on the writ of *ad quod damnum*, the survey, and a variety of similar evidence, such as old leases of other lands, from which the Jury may draw their inference. They are evidence of reputation, as to matters where no other evidence can be had, to rebut the presumption raised for the other side; for it is merely a presumption.

This being the view I have of the matter, the only question then is whether the entries in this book are evidence of these two instruments. If the originals could be produced, these entries could

not be evidence. But search has been made, and the originals cannot be found; and, as a great authority observes, if we shut our eyes to that sort of inferior evidence in cases where no other can be had, we shall do constant injustice. The best evidence is often lost through carelessness, the injuries of time, and various other circumstances; and secondary evidence is then admitted to raise a presumption or inference where no direct evidence can be had. This then is the next best evidence; and perhaps evidence still more inferior might have been admitted if this could not have been produced. This, however, appears to be the best after the originals; for what is it? These two instruments seem to have been copied by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the Abbey, because it was important for the interests of the Abbey that the instruments should be preserved; and for the same reason it might be presumed that they were faithful copies; at least there appeared to have existed no motive to make them otherwise, and they were found in a situation where they were likely to be kept. The second instrument was particularly important to the Abbey as following the appropriation, and being evidence to show that the vicarage had been endowed to the extent required, and that the appropriation was consequently good and not void. It was material for the Abbey also that the values should be correct, and especially that they should be high enough, as it was necessary that the endowment should be of the value of ten marks at least; and is it credible then that, if this one little farm paid the sum of 5*l.* 3*s.* 4*d.*, the circumstance,

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And, as the originals cannot be found, the copies in the book are evidence.

The entries are the next best evidence after the originals.

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The entries are admissible and material evidence.

Entry contemporaneous with the endowment.

when they were valuing the whole vicarage tithes, should not have been mentioned in this instrument? This therefore is in my opinion evidence proper to be received, and decisive on the subject.

It has been objected that the Judge stated to the Jury that the latter entry was contemporaneous with the endowment. Supposing that to be a ground of objection, it is little better than cavilling about words; for the meaning was that it was made about the same time. But even critically speaking I should be of opinion that it was made at the same time, and preceded the actual appointment of the Vicar, for the words are, portions, &c. assigned to the vicarage *to be ordained.*

But, though the Chartulary were rejected, the other evidence abundantly sufficient to support the verdict.

Design of issues out of Equity is to inform the conscience of the Court.

But supposing the objection to the admission of the entries in this book as evidence to be well founded, what is to be done on the application for a new trial? The design of the trial is to inform the conscience of the Court, and any special matter ought to be indorsed on the *postea.* It is not a verdict to be put on record for judgment, for none is given upon it; but it is to inform the conscience of the Court, and that is the right way of considering it. Then, when I look at what the other evidence is, it appears to me amply sufficient to warrant the verdict. The Appellant's evidence is the slightest I ever remember to have seen in such a case. The evidence was, that all the parish was covered by these immemorial payments to the amount of about 70*l.* a year in the whole; the very slightest presumption of immemorial payment. To rebut that, there is the taxation of Pope Nicholas, the writ of *ad quod damnum*, and inquisition thereon, in the 37th Edward III., and the survey of

26 Henry VIII., all of which must be founded on the grossest error if this be a true immemorial payment. The inference is that this could not be an immemorial payment; and the verdict is therefore right, though the entries in this book had been improperly admitted. The conscience of the Court then is sufficiently informed, and there appears no good reason to grant a new trial; and in my opinion, therefore, the judgment ought to be *affirmed*.

I have gone more at length into the case than usual, as the question is of great importance with reference to the trial of cases of the same nature. I am satisfied that the book called the Chartulary was properly received in evidence, and that, if it were not so, the verdict is still right, and that the Court below was therefore justified in refusing to send the matter to another trial.

And, though the Chartulary were out of the question, the conscience of the Court is sufficiently informed by the other evidence, and there is therefore no good reason for another trial.

Lord Eldon (C.) I shall comprise what I have at present to say upon this case in a narrow compass. The suit was instituted twelve years ago, and the question is whether an issue shall for the third time be directed; there being already one verdict for the Appellant establishing the modus, and another for the Respondent against the modus. But though this cause has endured twelve years already, yet, if it be necessary, regard being had to the course of a Court of Equity in these cases, we must subject the parties to what we know belongs to a third trial.

This was a bill filed in the Court of Exchequer by the Vicar of Sturminster Newton, for an account and payment of tithes in kind; and there is this singularity in the case, that all the lands in the

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parish, except the Common Meads, if the defence can be supported, are covered with moduses, the whole of them amounting to 68*l.*, being contracts for valuable consideration so long ago as the time of Richard I., and that too exclusive of the tithe of corn and grain; and a Jury was to be called upon to conclude that the tithes of this parish, excluding those of corn and grain, amounted, in pecuniary value, in the time of Richard I., to 68*l.* a year. We know what was the value of money at that time; and then consider that the Rector was to have the tithe of corn and grain; and if so, I think there is hardly any clergyman who would not wish at this day, I mean if there are no moduses, to have the living of Sturminster Newton; for if the tithes of that parish were of such value then, what must their value be now?

The Defendants however stated these moduses, and that they were ready to pay them. It was proved (so it is stated in the Judge's notes) that for a long time tithe had not been paid for this farm *qua* tithes, but certain payments in money; and that no tithe in kind had been paid during that period. Then the rate-paper was given in evidence, which Justice Chambre had refused at the first trial, and it was contended that the only use that could be made of it was this, not that any inference could legally be drawn from the whole as to any particular place, but that, *reddendo singula singulis*, what was applicable to farm A. should alone be read as to farm A., and what was applicable to farm B. should alone be read as to farm B., and so on. Now it appears to me that this is clear evidence with quite a different application. In the

The rate-paper evidence in this view, that all were immemorial payments, or that none were so.

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case of the Warden and Minor Canons of St. Paul's, a book of rates containing a variety of payments was produced, and was taken as evidence in this view, that it must be contended that all of them were customary payments, or that it might rationally be inferred that none were so. The rate-book then seems to me not merely good, but most material evidence, upon this issue.

The evidence independent of the Chartulary sufficient to satisfy a Court of Equity, and no trial at all need have been directed.

Now on considering, in addition to the rate-paper, the taxation of Pope Nicholas, the inquisition on the writ of *ad quod dammum*, and the survey, 26 Hen. VIII., I confess I am surprised that any issue at all should have been directed, as I can now state that it appears to me that, independent of this Chartulary, there is demonstrative evidence that this is no modus; and it is not the principle of a Court of Equity, because there is a question of fact which may be tried by a Jury, on that account merely, to send it to be so tried. That is not the principle of a Court of Equity.

It is not the principle of a Court of Equity, merely because there is a question of fact which may be tried by a Jury, to send it to be so tried.

Mr. Justice Chambre, at the first trial, thought that neither the rate-book nor the Chartulary ought to be received. On a motion for a new trial the Court was of opinion that the rate-book and Chartulary ought to be received in evidence; and it was made a question at the bar, as to the Chartulary, whether the judgment of the Court of Exchequer was merely that it was competent or admissible evidence, or whether the judgment was, that it was not only admissible, but that it ought also to have some effect. If I were sitting to decide whether this book was competent evidence, and were of opinion that, though competent, it ought to have

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no effect, I could never think of sending it to a jury if satisfied that the direction to the jury ought to be that, after looking at the book, they were to shut it again as if they had never seen it; and if there was any difference of opinion on that point among the Judges below, I agree with the majority that it must have some effect; though they said, very properly, that they could not appreciate what effect it ought to have on the minds of the Jury, because that might depend on circumstances, and on the nature and import of the whole evidence.

If on the trial of an issue out of Equity the verdict is right, though there may have been miscarriage in the conduct of the trial, that is no good reason for directing a new trial.

Then the cause was sent to another trial, and your Lordships will recollect that this was to satisfy the conscience of the Court. I am of opinion that no issue ought to have been directed, as the evidence appears to me completely satisfactory without any issue. It is impossible this could have been a payment at, and ever since, the time of Richard I.; and I cannot admit that, consistently with my oath, I ought, if a verdict is right, either to direct or refuse a new trial by reason of any miscarriage in the conduct of the previous trial. Speaking in the hearing of persons on the other side of the bar for whom I have the highest respect, I must say, that in nine cases out of ten the object of these issues is misunderstood. We send issues out of the Courts of Equity, and they proceed upon them as they usually do at trials at *nisi-prius*, and think that sufficient on issues out of Courts of Equity. For instance, in cases of wills, where the subject in question may be of the greatest consequence, we send the matter for trial upon an issue, *devisavit vel non*, and a Court of Equity is not satisfied unless

The design of issues out of Equity often misunderstood at *Nisi prius*.

the will is proved by the three subscribing witnesses. They however usually call only one witness, who proves the signing by the testator, and the attestation of himself and the others, in the testator's presence, leaving it to the other side, if they think proper, to call the other witnesses, for reasons understood among themselves; and then it has been said that the issue must be tried over again, which shows on what foundation the thing proceeds; and that issues out of Courts of Equity depend on different reasons, and lead to different conclusions, from those of issues in trials between man and man.

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Vid. Doe v. Smith, 1 Esp. N. P. C. Longford, v. Eyre. 1 P. Wms. 741.—Bul. N. P. 264.

I beg leave here again to mention the case of the Warden and Minor Canons of St. Paul's. An issue was there directed which was first tried in the King's Bench, and afterwards in the Exchequer at bar. Material evidence was offered, and three Judges were of opinion that it ought not to be received; but Baron Graham thought that it ought, and on that ground they moved for a new trial. I looked over the whole of the proceedings, from the beginning to the end, to see whether the verdict ought to have been different if the evidence had been received; for it would be curious if you were to send a case for trial to give an opportunity for admitting evidence, when, if that evidence were taken, and a different verdict given in consequence, your conscience would not thereby be satisfied but dissatisfied. I declared my opinion that Baron Graham was right, and the other Judges wrong: but I further said, that, even if the evidence had been received, it ought not to have produced a different

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Though on the trial of an issue out of Equity, evidence has been rejected which out to have been received, if the Court is satisfied that the verdict is right, and that though the rejected evidence had been admitted it ought not to have produced a different verdict; the Court will not grant a new trial merely because of the rejection of evidence which ought to have been admitted.

And, on the same principle, though evidence has been admitted which ought to have been rejected, if the verdict is good upon other evidence, the Court will not

verdict: and that, if a different verdict had been given, I would have granted a new trial. Such being my opinion, I could not grant a new trial merely because evidence had been rejected, which, if received, ought to have made no difference in the conclusion. That however does not rest merely on my opinion, but on that of this House, well assisted at the time when that case came before it on appeal.

This House then having so determined that, though evidence had been rejected which ought to have been received, yet if you were satisfied on all the evidence, that, if that evidence which was rejected had been admitted, the verdict ought still to have been the same, you ought not to send the matter to another trial.—Such being the opinion and judgment of this House in that case, it is difficult to say that, in this case, merely because some evidence may have been received which ought not to have been admitted, though the verdict is good upon the rest of the evidence independent of that evidence which ought, as is contended, to have been rejected; that, in this case so put, you ought to grant a new trial. My own opinion clearly is, that this verdict is good upon the rest of the evidence, and that therefore, even upon the supposition that the disputed evidence has been improperly received, no new trial ought to be granted.

Then have the entries in this book been properly received in evidence? It has been said that even the endowment itself, if it had been produced, ought not to have been received. Not received, my Lords!

June 13, 1816.

TITHES.—MODUS.—RANKNESS.—ISSUE.—EVIDENCE.—NEW TRIAL.

By what evidence can you negative such an issue as this? We produce general evidence of the value of the lands, and show that the value of the whole lands was not equal to your alleged tenth at the time of Richard I. On what principle was the taxation of Pope Nicholas received? On what principle the inquisition in the 37th of Edward III.? On what principle the survey in 26 Henry VIII.? On what, but this, that, from the nature of such issues, they must be met by this general evidence of value, and that evidence is demonstrative that the payment in this case could not be a real modus; because, upon that supposition, your tenth must be of greater value than that tenth and the other nine parts together, which is impossible.

grant a new trial, merely because some evidence had been admitted, which ought to have been rejected.

The endowment itself would have been good evidence.

Then as to the custody in which the book was found, it is the natural and proper custody for such a book; for, as to this purpose, it is the custody of the Abbey of Glastonbury. I do not trouble your Lordships about the question, whether the Judge was right in saying that this entry was contemporaneous with the endowment. The entry appears to be a transcript of the original instrument, and, within the scope and principle of all the authorities, ought to be received as evidence. The result is clear, and on this ground alone the new trial might be refused; and I should have thought it unnecessary to touch upon the other parts of the case, had it not appeared to me in the course of the argument, that notions were entertained respecting the functions of a Court of Equity, which rendered it proper not to dispose of this case without taking

Custody proper.

The entries in the Chartulary were properly admitted in evidence, and on that ground alone the new trial might be refused.

June 13, 1816.

TITHES.—MODUS.—RANKNESS.—ISSUE.—EVIDENCE.—NEW TRIAL.

Order refusing the new trial *affirmed.*

care that your Lordships' decision, if it should rest on this point, should not prejudice the other points in the cause.

Appeal dismissed, and the order complained of *affirmed.*

Agent for Appellants, VANDERZEE,
Agent for Respondent, FORSTER, COOKE, and FRERE.

ENGLAND.

ERROR, FROM THE COURT OF KING'S BENCH.

BENSON—*Plaintiff in Error.*
WHITE—*Defendant in Error.*

May 17, 1816.

BILL OF EXCHANGE.—ERROR.

ACTION by indorsee of a bill of exchange against the acceptor.—Declaration states in first count, that payment was demanded at the place where the bill was made payable, without averring that payment was *refused;* and, after other counts, declaration states in conclusion, that the acceptor had not paid any of the sums in the declaration mentioned. Judgment entered up generally on the whole of the declaration, and error brought for want of averment in the first count of a *refusal* to pay. Held to be no error in this case, and Judgment *affirmed.*—(Vid. Butterworth v. Le Despenser, 3 Maule. Sel. 150.)

Action.

THIS was an action brought in the Court of King's Bench by the Defendant in error, as indorsee of a bill of exchange, for the sum of 500*l.*, to recover