ENGLAND.

(COURT OF CHANCERY.)

The UNITED COMPANY of MERCHANTS of ENGLAND, TRADING to the EAST INDIES - - - - } *Appellants;*

ROGER KYNASTON, Esq. - - - - *Respondent* *.

The Respondent, an impropriate rector, having by a decree of the Court of Chancery been found to be entitled (under the decree made in pursuance of the act 37 Henry VIII.) to the tithes, according to the value, of warehouses in London, occupied by the Appellants, and which never had been rented, the Court has jurisdiction to make an order upon the Appellants to permit inspection, for the purpose of ascertaining the value.

Such an order cannot be executed by force, but operates only on the person, as a foundation for process of contempt, and to take the Bill, *pro confesso*, if necessary.

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THE Respondent, the impropriator or impropriate rector of the parish of St. Botolph without Aldgate, part whereof lies within the city of London, or the liberties thereof, being entitled to the tithes of that parish, in the month of July 1804, filed his bill of complaint in Chancery against the Appellants, who were in possession, as the owners and occupiers of certain warehouses and other premises situate in Gravel-lane, Petticoat-lane, Harrow-alley, Cutler's-street, and Parker's-gardens, within that

* See this case upon the hearing in the Court below, 3 Swan. 248.

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part of the parish lying within the city of London. The bill prayed that an account might be taken of the several sums of money due and owing to the Respondent from the Appellants, in respect of the tithes, rates for tithes, sums or customary payments, or other duties in lieu of tithes, on account of the warehouses and other premises held or occupied by them within such part of the rectory or parish of St. Botolph as aforesaid, or the titheable places thereof, in each year since the said month of May 1804, and that the Appellants might pay to the Respondent the money which should be so found due from them on the taking of such account. The Respondent, by the bill, setting forth a certain decree duly inrolled in the said Court of Chancery, bearing date on the 23d of February 1545, and made by Thomas, then Lord Archbishop of Canterbury, and others, in pursuance of an Act of Parliament passed in the 37th year of the reign of Henry VIII, intituled, "An Act for Tithes in London," and charging that the tithes payable by the Appellants in respect of their premises, and the amount of the several sums to be paid by them, ought to be computed after the rate and in the manner directed by the decree, in proportion to the then or improved or last rent or value of the premises; and insisted upon his right to the tithes after such mode of computation. The Appellants, by their answer, stated "that "all the warehouses and dwellinghouses situate "in the places specified in the bill, were built by "them: that having built, and being themselves "the owners of the warehouses and dwelling-houses, "they did not then, nor ever did, hold the same or

" any part thereof under any yearly or other rent,
" or for any consideration in the nature or in lieu of
" rent, and that no yearly or other rent had at any
" time been paid for the said warehouses or ground.
" That as to all the warehouses then in the occupa-
" tion of them the Appellants, (except some ware-
" houses called Rumball's, about which at present
" there is no question,) thereinbefore mentioned to
" be situate within that part of the said rectory or
" parish which is within the said city of London
" or the liberties thereof, the Appellants never
" having held the same at or subject to any rent,
" and no part thereof having been let since they
" were built, they the Appellants were unable to set
" forth as to their knowledge what was the then
" actual value thereof."

The bill was afterwards amended, and the Appellants put in a further answer, the Respondent replied thereto; and the cause, being at issue, came on to be heard on the 2d day of March 1818, before the Master of the Rolls, when his Honor declared, " That the Respondent was entitled,
" among other things, to tithes after the rate of two
" shillings and nine pence in the pound upon the
" annual value of all the messuages, warehouses, and
" other premises held or occupied by them (the
" Appellants) within the said parish of St. Botolph
" without Aldgate, in the city of London, except
" the said premises called Rumball's warehouses;
" and he did order and decree that it should be
" referred to Mr. Thompson, one of the Masters
" of the said Court of Chancery, to ascertain the
" value of the premises, except as aforesaid, and to

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" take an account of what was due to the Respon-
" dent for tithes at the rate aforesaid; and that the
" Appellants should pay to the Respondent, what
" should be reported due to him on taking of the
" said account, together with the costs of the said
" suit."

In pursuance of this decree, interrogatories on behalf of the Respondent were, in or about the month of November, carried into the office of the Master, for the examination of the Respondent's witnesses as to the value of the warehouses and other premises above mentioned, and three witnesses were then examined on his behalf, namely, Mr. James Burton, William Montague, and Joseph Kaye. In the course of the following December, interrogatories were carried into the Master's office on the part of the Appellants for the examination of witnesses on their behalf, upon which Mr. Dennis Chapman, Mr. John Shaw, Mr. William Pilkington, and Mr. S. P. Cockerell were examined.

All the persons who had been so examined on the part of the Respondent were surveyors or architects, and, together with those examined on the part of the Appellants, were not otherwise practically acquainted with the nature or value of the premises in question.

Under these circumstances, and upon the special ground, that where surveyors alone are examined upon the subject of the value of any particular premises, their several estimates usually differ so widely in amount that it is extremely difficult, and in some instances almost impossible, upon such testimony, to come to any just conclusion as to the value, the

Respondent laid before the Master, in addition to the evidence of the surveyors, the evidence of some experienced warehousemen and wharfingers, whose practical acquaintance with, and knowledge of, the value of premises similar to those, which were the subject of the above inquiry, might assist the Master in forming a judgment upon the matter referred to him.

With this view, the other depositions not having been published, publication was enlarged at the instance of the Respondent, and it was proposed on his behalf to examine two experienced warehousemen, who were stated to be peculiarly well qualified to furnish the Master with practical information; and in order that the testimony of those persons might be as full as possible, application was made on behalf of the Respondent to the Appellants, that those two witnesses might be permitted to inspect the interior of the warehouses in question, preparatory to their being examined.

With this application the Appellants refused to comply, although the other witnesses, who had before been examined, had been permitted to have an inspection of the premises previous to their examination; the Respondent therefore applied to the Court of Chancery for an order upon the Appellants to grant such inspection.

This application was made by motion before the Vice-Chancellor, on the 6th of February 1819, supported by the affidavit of Richard Grose Burfoot, the Respondent's solicitor, when his Honor ordered,

" That it should be referred to Mr. Thompson, the
" same Master to whom the cause stood referred, to

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" inquire, and state to the Court whether an inspec-
" tion of the several warehouses and premises before
" mentioned to be in the occupation of the Appel-
" lants in Gravel-lane, Petticoat-lane, Harrow-alley,
" Cutler's-street, and Parker's-gardens respectively,
" by the said Joseph Sills and Robert Smith, (in
" the said order, by mistake, called William Smith,)
" preparatory to their being examined as witnesses
" upon interrogatories carried into the said Master's
" office by the Respondent, in pursuance of the
" decree made on the hearing of the said cause, the
" 2d day of March 1818, (and which is the decree
" hereinbefore stated,) was necessary for the said
" Master to form his conclusion upon the matters
" thereby referred to him; and after the said Master
" should have made his report, such further order
" should be made as should be just."

The Appellants were dissatisfied with this order, and accordingly applied by motion to the Lord Chancellor to discharge it; but he being of opinion, after argument, that the order was right, refused the motion.

Pending these proceedings before the Lord Chancellor, the Master, in pursuance of the order of the 6th of February, made his report, bearing date the 24th day of March, whereby, after reciting the order, he certified that there had been laid before him the affidavits of Richard Grose Burfoot, Joseph Sills, wharfinger and warehouse-keeper, and Robert Smith, wharfinger and warehouse-keeper, and the further affidavit of the said Richard Grose Burfoot; and the said Master, after stating the purport and effect of those affidavits, " was, upon consideration

" of the said affidavits, and of what had been
" alleged before him by the solicitors for the said
" parties, of opinion that an inspection of the seve-
" ral warehouses and premises hereinbefore men-
" tioned to be in the occupation of the said
" Appellants, in Gravel-lane, Petticoat-lane, Har-
" row-alley, Cutler's-street, and Parker's-gardens
" respectively, by the said Joseph Sills and Robert
" Smith, preparatory to their being examined as
" witnesses upon the interrogatories exhibited by
" the said Respondent before him for the examina-
" tion of witnesses, in respect of the matters referred
" to him by the said decree of the 2d of March
" 1818, was necessary for him to form a satisfactory
" conclusion upon the matters referred to him by
" the said decree."

This report having been filed, the Respondent preferred a petition unto the Lord Chancellor, praying that the report might be confirmed, and that the aforesaid Joseph Sills and Robert Smith might be at liberty forthwith to inspect the several warehouses and premises.

Upon the 7th of April 1819, this petition came on to be heard before the Vice-Chancellor, when counsel for the Respondent attending accordingly, and no one attending for the Appellants, although they had been duly served with a copy of the said petition, and his Lordship's order made thereon, as appeared by affidavit then produced and read, the Court ordered, " That the said Master's said report
" should be confirmed. And it was ordered that
" the said Appellants should permit the said Joseph
" Sills and Robert Smith to inspect the said several

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" warehouses and premises in Gravel-lane, Petticoat-
" lane, Harrow-alley, Cutler's-street, and Parker's-
" gardens respectively, preparatory to their being
" examined as witnesses upon such interrogatories
" as aforesaid."

The East India Company then presented a petition of Appeal to the Lord Chancellor, stating themselves to be aggrieved by the said two several orders of his Honor the Vice-Chancellor, bearing date the 6th day of February and 7th day of April, 1819, and by each of them, and praying that the same might be reversed.

On the 4th day of May 1819, upon the hearing of the petition, the Lord Chancellor affirmed the two orders of the Vice-Chancellor.

From these three orders, bearing date respectively the 6th day of February, 7th day of April, and 4th day of May 1819, the appeal to the House of Lords was presented.

For the Appellants:—

The occupiers of private dwelling-houses, warehouses and premises, are by law entitled to the exclusive possession and enjoyment thereof, and the same cannot, against or without the consent of such occupiers, be lawfully entered by any person, under any pretence whatsoever, except by a lawful warrant or authority for that purpose:

The Court of Chancery has never been, and is not, possessed of any authority to order any subject of this realm to open his doors, and permit an inspection of the interior of his dwelling or premises for any purpose whatsoever; nor is it pretended

that any instance can be found; but, on the contrary, it is admitted that no instance can be found in which the Court of Chancery has ever heretofore assumed or exercised any such authority.

For the Respondents:—

It was competent to, and within the authority of the Court of Chancery, in such a case as the present, to require and compel the Appellants to allow the witnesses of the Respondent to survey and inspect the premises in question:

An inspection of the interior of the above-mentioned premises by Joseph Sills and Robert Smith, previous to their being examined, is necessary, in order that their evidence may be complete and satisfactory, and that the Court may have such full information as is essential to enable it to form a correct judgment, with respect to the true value of these premises:

It is apparent, that unless the witnesses on both sides, in cases like the present, are permitted to have such inspection as is here sought, the Court will in effect be obliged to determine all such cases upon evidence adduced on one side only, and by that party which is most materially interested in depreciating the premises, which are the subject of inquiry, below their real value.

For the Appellant, *The Attorney General*, *Serjeant Bosanquet*, (and *Mr. Wyatt.*)

For the Respondent, *Mr. Wetherell*, *Mr. Ralph Palmer**.

* The arguments were in substance the same as upon the hearing in the court below. 3 Swans. p. 248.

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The Lord Chancellor, in the course of the argument, asked whether, in case of an agreement between landlord and tenant, that the value of timber used in repairs should be allowed at the end of the lease, a right would not exist, and, as incident to the right, a power in a court of equity to compel inspection for the purpose of valuation; and it being observed, in answer to this question, that the right and power in the case supposed, would arise out of contract, he asked whether the act of parliament was not a contract for all parties. The reason (he observed) why all these suits were brought into equity was, because the lord mayor's court was unable to deal with them.

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Lord Redesdale, after stating the bill and answer, the order in question, and the proceedings upon it, made the following observations:—

The question is, whether the order of the 7th of April 1819 can be supported. The ground stated for the Appeal is, that this is a private dwelling-house, and that the occupier is entitled to exclusive possession,—that no adverse entry can be made but by lawful authority—and that the Court of Chancery has no authority to order that an entry should be allowed. As to the first ground of objection, it does not directly apply to the case, because the order is, not directly to compel, but, upon the party, that he shall permit inspection. The objection that the Court has no power, is the material ground of Appeal. If it be true that it has no such power, there are many cases in which there must be a total defect of justice. In this case the Master has re-

ported his inability to form an opinion of the value of the premises, without such inspection as the order requires; and how otherwise is it possible to judge of the value? If there are no means to form any judgment upon this subject, the Court would have no power effectually to execute the decree which has been pronounced in the cause. The result of this state of things would be, that the East India Company would be their own valuers, and the question in the cause must be decided upon evidence furnished by one of the parties to the exclusion of the other. The objection, upon the face of it, appears to be unreasonable.

The arguments urged for the Appellants at the Bar are founded upon the supposition, that the Court has directed a forcible inspection. This is an erroneous view of the case. The order is to permit; and if the East India Company should refuse to permit inspection, they will be guilty of a contempt of the Court, in which case, being a corporation which cannot be affected by personal process, a sequestration issues against their goods, to compel obedience to the order, or, as a preliminary step, to authorize the Court to take the bill *pro confesso*. So it is in the case of insufficient answers, and other proceedings of a suit in equity. The bill cannot be taken *pro confesso*, until the process against the person for contempt has been exhausted. In this case therefore, if the order to permit inspection be erroneous, and not the subject of process for contempt in case of disobedience, the bill cannot be taken *pro confesso*, and the justice of the Court is defeated. In the argument much reliance seems to

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have been placed on Semayne's Case*, which may be considered as the foundation of the objection. But there the question was collateral. It was an action upon the case against a surviving partner, for obstructing the execution of a writ of extent, issued upon a recognizance in the nature of a statute-staple, by shutting the door of his house against the sheriff and jury, who came to extend the goods of the deceased partner. According to one of the resolutions in that case, the sheriff has not authority by law to break open doors to execute process at the suit of a subject, although request be made, and admission to the house refused; and the substance of the reason given for this resolution is, that it would be attended with danger to the public peace. Whether this reasoning stands on a solid ground may be questioned.

On process at the suit of the Crown, where goods are fraudulently removed, and in cases of replevin, the doors of a house may be broken by the sheriff after request and denial. In the latter case the power is given by statute. But how can that reasoning, though ever so well founded, impeach or affect the order made in this case? It is an order operating on the person requiring the defendants to permit inspection, not giving authority of force, or to break open the doors of their warehouse. The only consequence arising from the personal mandate is, that in case of refusal the process of contempt issues, and finally the bill is taken *pro confesso*. The reasoning, therefore, in Semayne's case is out of the question.

* 5 Rep. 92.

It was suggested, in argument for the Respondent, that as courts of equity assist the courts of law to arrive at a judgment in a cause, so by analogy they might assist them in the execution of the judgment upon a *fieri facias*, or otherwise. But this notion is founded upon a mistaken view of the practice of equity. The assistance given to courts of law by courts of equity is to remove legal impediments, as a nominal title in a third person; and this interference is necessary, because the courts of law have no power to remove the impediment. To assist the execution of a writ of *fieri facias* would be to make a new law in courts of equity. They proceed always indirectly by process of contempt, in all cases except where the decision is upon a title to land, in which excepted case they decree possession, and direct the sheriff to execute the decree.

What was the origin of the power of the Court, it might be difficult to determine. It now stands upon usage, and is not confined to cases precisely similar to those which have preceded, but is adapted to emergencies to make the jurisdiction of the Court effectual.

Courts of equity giving judgment on the peculiar subject of their jurisdiction in cases of trust or fraud, or other cases, direct possession to be given, or direct tenants to attorn and pay rents, or compel the specific execution of agreements. In case of chattels, they frequently order specific delivery of the article demanded, but enforce their decrees and orders only by process of contempt. In the case of the silver altar *, which depended on the peculiarity rather than

* *The Duke of Somerset* v. *Cookson*, 3 P. W. 390.

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the intrinsic value of the thing, a jury could not have given an appropriate remedy in damages. In such cases courts of equity enforce obedience by process of contempt, and never, but in the excepted case of a decree for land in a judgment upon title, direct the sheriff to take and give possession by force.

In the case of realty, the Court orders the failing party to deliver possession. If he disobeys the order, the sheriff is directed to put the party in possession, for whom the decree is made. In the case of personal chattels, the Court operates on the person by process of contempt, and effects the end indirectly, which, according to their practice in such cases, is not permitted to be done *per directum*.

In this case the substantial question is, whether such a power in the Court is not necessary for the purposes of justice. It is objected that it is new practice, and that there is no case to be found which warrants it; but the case of *Lord Lonsdale** is directly in point, and much stronger than the case now before us for decision.

This is a case where a plaintiff has a claim for a payment out of property, according to its value; and the Court is unable to ascertain the value without inspection. To the extent of the value the plaintiff has an interest in the property of the defendant, which is the subject of the order which was made after a decree.

In Lord Lonsdale's Case the order was made before the decree, and upon a question where the rights of the parties were uncertain. It might have turned out, after the order of inspection in that case,

* See the Notes at the end of the case.

that the plaintiff had no right. But in this case his right is ascertained. The only difference (which is immaterial) is, that in that case it was a mine, in this a house; but both are equally private property. In that case the result of the inspection was, a discovery that coal to the amount of 3,000*l.* had been taken away from Lord Lonsdale. If the practice of the Court had depended on the will of the party, the defendant in that cause would not have permitted inspection by any person but his own agents. Such an order was made in that case, and there was no appeal against it. So in the case of Lord Byron*, the order was in effect mandatory. But if this had been the first instance, it would not be a substantial objection; for if so, every order made for the first time might be resisted on that ground

The Lord Chancellor :—This appeal is brought before the House, in consequence of a strong impression on the mind of Sir Arthur Pigott, who always misunderstood the order. After the Vice-Chancellor had referred it to the Master, to consider whether it was necessary that inspection should be had, and the motion was made before me to discharge that order, I suggested that the order should not be imperative to inspect, but on the defendants to permit inspection. That suggestion was adopted by the Vice-Chancellor in the order subsequently made, which is now the subject of appeal. This is necessary to be noticed, on account of the reasons appearing in the Respondent's case. That course, I apprehend, is at all events lawful. If the defendants refuse to permit inspection, the Court will then have

* 1 B. C. C. 588. See also *Lane* v. *Newdigate*, 10 Ves. 192.

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to consider what ought to be done; whether they will compel the inspection, and how. No such order has yet been made, but the Court can find the way to do complete justice. The time may come, when the defendants may be of opinion that the order is beneficial to them. I do not at present intimate what I mean; it is sufficient to say, that the means of enforcing what is due to justice can be found.

9th March, 1822.

Ordered and adjudged, That the said Petition and Appeal be dismissed this House, and that the said orders therein complained of be confirmed.

THE memory of the case mentioned by Lord Redesdale in the text, p. 166, had almost perished in the Profession. The attornies and agents of Lord Lonsdale in the cause were dead, and all the Counsel, except Lord Redesdale, to whose kind condescension the Reporter is indebted for furnishing a clue to obtain the following account of the case, extracted from the Register's Book.

The Earl of Lonsdale v. *J. C. Curwen*, Esq.

IN this case the Earl of Lonsdale had filed a Bill against J. C. Curwen, Esq. by which, and the affidavit of John Walker,

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it appeared that the Earl of Lonsdale was seised of the manors of Seaton and Stainburn, and certain closes called the Clossoks, lying on the south side of a rivulet called the Mill Race, near Workington, which divides the manors of Seaton and Workington; that there were mines of coal lying under the Clossoks, belonging to the Earl of Lonsdale, and that J. C. Curwen was seised of lands on the south side of the Mill Race, under which there were mines of coal: That John Walker (who made the affidavit,) had for several years been employed by Mr. Curwen as director of his collieries under ground, and in particular of that part of his collieries where his coals were raised at a colliery called John Pit, and from whence about five years previously, by the direction of Mr. Curwen, he had caused the working of the said pit

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to be extended and carried into and under the closes called the Clossoks for the length and space of 40 yards and upwards; and also caused large quantities of coal to be dug out and taken from under the closes called the Clossoks, to the amount of 600 waggons, or 2,100 tons, of about the value of 300*l.* or upwards: that having been directed by Mr. Curwen to extend the workings farther under the Clossoks, he had remonstrated with Mr. Curwen against his doing so, on which Mr. Curwen had engaged one Edmund Bowness, who had the direction of the E. of L.'s collieries at Clifton, about two or three miles from Workington, to take the charge and direction of the working under the Clossoks; that E. B. afterwards proceeded to have the workings carried on under the said closes to the extent of about 212 yards in length, and in breadth to an average of about 105 yards, and that in consequence of such workings the greatest part of the coals which had been raised at the John Pit for the preceding two years had been dug out of and from under the Clossoks, amounting to 6,000 waggons and upwards, of the value of 3,000*l.* and upwards, over and above the 300*l.* before mentioned: that Mr. Curwen, about the 13th of Aug. then last, gave orders and directions to theworkmen employed in the workings under the said closes to rob or take away several of the pillars which had been left for the carrying on the workings, and which they had ever since been and then were doing, by which means the workings would be destroyed, and it would be rendered impossible for any person to discover the extent of the workings, or the quality of the coals dug and taken away thereout: That Mr. Curwen, in a conversation with John Walker about taking away the coals under the said closes, and the danger of a discovory thereof, asked him whether he (Mr. Curwen) could not drown the workings by letting the water out of his own collieries into the workings, which would prevent any discovery thereof from ever being made, which deponent said he, (Mr. Curwen) might do; on which Mr. Curwen directed him to go on: That Mr. Curwen, by letting the water out of his own collieries into the workings would ruin and destroy the workings of very large quantities of coal belonging to the E. of Lonsdale, to a very large and almost inestimable amount. It also

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appeared by affidavit of J. B. Garforth, that the Plaintiff was seised, &c. and that the Defendant, without permission, was then digging, and carrying away coal from under the lands against the will of the Plaintiff.

The bill prayed an injunction to restrain the Defendant, his servants, &c. from digging or getting coal in or under any of the premises in question, or any part thereof, and particularly from robbing or taking away the pillars which had been left in the workings, and that the Plaintiff, his, &c. might be at liberty to inspect the workings of Defendant under, &c.

10th April 1799. Upon a motion for the purpose expressed in the prayer of the bill, it was Ordered, that an injunction should be awarded to restrain the Defendant, his servants, &c. from digging or getting coals in or under any of the premises in question, or any part thereof, and from carrying on any workings, and in particular from robbing or taking away the pillars which had been left in the workings under the Plaintiff's parcels of land in question, until the, &c. and that the Plaintiff, his servants, &c. should be at liberty to inspect the workings of the Defendant under the Plaintiff's inclosures called the Clossoks—Reg. Lib. A. 1798, p.

7 June 1799. By an order, dated the 7th June 1799, reciting the foregoing order of the 20th April 1799, and that it was alleged that John Howard, &c. as agents on behalf of the Plaintiff, on the 29th of April, had proceeded to inspect the workings of the Defendant in, &c. but were prevented from completing such inspection, because the pipe or air-course which conveyed the pure air had been broken down or taken away, and certain earth, rubbish and other impediments, were lying at the ends, roads or passages leading to the workings; and that on the 3d of May, for the purpose of making a further inspection, the agents of the Plaintiff had made a demand in writing that the Defendant should remove all the obstructions and impediments, and also given notice to the Defendant that they should proceed further in the inspection on the 4th of May, but that the Defendant had refused to allow any further inspection of the workings by the plaintiff or his agents; and that it was the principal object of the suit to have the extent of Defendant's workings under the inclosures ascertained:

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that it was prayed that the Plaintiff, his servants, &c. might be at liberty as often as should be necessary to make further other inspections into the workings of the Defendant, under, &c.; and that in order to enable the Plaintiff, his, &c. so to inspect the same, the Defendant might be directed to restore the several air-courses theretofore used, and existing within the colliery, and to remove the earth, &c. lying at the ends, roads and passages leading to the workings; and that the Plaintiff, his servants, &c. might also be at liberty to use all necessary means to ascertain the workings and the extent thereof: It was ordered that certain persons named in the order should be at liberty to view the mine, and that such persons as the viewers might think proper to appoint, should attend such viewing of the mine; that the Defendant should cause the obstructions to be removed, and open the air-courses as the viewers should think necessary for such inspection; and that the viewers, and such other persons as they should appoint, should be at liberty as often as should be necessary, to make from time to time inspections into the workings of the Defendant under the premises of the Plaintiff, so as to enable the viewers to make a perfect and complete report of the workings.

No further notice of this case occurs in the Register's Book; and according to information communicated by Lord Redesdale, the case was compromised by the payment of a large sum for the coals taken from under the grounds of Lord Lonsdale.

The practice in Courts of Equity of granting orders for inspection of mines, machines, &c. is well settled. But no notice has ever been taken of the point in the books of practice, and no authorities are to be found upon the subject in the Reports of Cases in Equity; except the case in the Court below, of Kynaston *v.* The East India Company, as reported 3 Swan, 248, and upon Appeal to the House of Lords, now reported in the text, and which case, as it relates to warehouses, is distinct from former authorities, and new in its kind. Two cases of orders for inspection extracted from the Register's Book are therefore subjoined.

Walker and others v. *Fletcher and others.*

1804.

WALKER AND OTHERS v. FLEICHER AND OTHERS.

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In this case it appeared from the allegations of the Bill, supported by affidavits, that the plaintiffs being possessed of divers mines of coal at, &c. which they had for a long time (then) past wrought in copartnership; and that John Harris then was seised in fee, in trust for all the plaintiffs, of a close of land (with the mines of coal under the same), which at the east end abutted on a certain close belonging to the defendant John Fletcher, called the Seggs, and on the south side on another close called Flowered Moss; and that the Defendants had begun to work the same: That there was under the close belonging to the Plaintiffs, called Flowered Moss, and the other closes, called Flowered Moss and the Seggs, a mine or vein of coal of very considerable value; and that the Defendant John Fletcher, together with the Defendants Joseph Steel and John Wilson, then were, and for some time then past had been carrying on and working divers collieries and coal-mines in copartnership; and the Defendants as such copartners, or their servants and workmen, about three years before, had sunk a coal pit and erected a fire engine in the close of the Defendant John Fletcher, called the Seggs, at the distance of about 50 yards from the Plaintiff's close called the Flowered Moss, and had ever since worked the said colliery, and had carried on their works from the engine-pit to the rise of the colliery towards the Plaintiff's close: That the Defendants had driven and carried their works towards the south-east corner of the Plaintiff's close, and had caused a drift or course of great width to be dug from the south-east corner, under the Plaintiff's close, for the length of 70 yards; and had also driven four or more boards or drifts out of their colliery into the said drift or course, and had taken from under the Plaintiff's close very great quantities of coals belonging to the Plaintiffs, which was done unknown to the Plaintiffs, and without their privity or consent: That the Plaintiffs had (then) lately begun to sink a coal pit in their close called Flowered Moss, and had thereby or otherwise discovered that the Defendants, or their several workmen or

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agents, had dug or taken such coals as aforesaid: That a few weeks after the sinking of the pit was begun by the Plaintiffs, the Defendant Steel was present, and declared that the Plaintiffs should never have a colliery or pit there, or to that purport or effect: That every means to prevent the same had since been used by the Defendants, and when the defendants found that such their workings under the Plaintiff's close had been discovered, they caused part of such workings which laid near the pit sunk by the Plaintiff to be filled up, and also plugged the bore hole, and made barriers and walls in their workings under the closes called the Seggs and Flowered Moss, or one of them, and had filled the same with wood, earth, clay and other materials, and thereby prevented the water flowing from the coal under the Plaintiff's close, in such manner as it had before done, and the pit which the Plaintiffs had begun to sink and dig was thereby overflowed with water to the depth of four or five yards, so that the Plaintiffs were prevented from working in and sinking the same; and the water also, by being so stopped, in part forced and extended itself to another colliery which the plaintiffs were working, and which was near a quarter of a mile from the Defendant's Seggs close, and was likely to extend much farther, and considerably to injure such last-mentioned colliery: That from the proceedings of the Defendants, which they still continued to pursue, and threatened to carry on to a much greater extent, unless such plugs, walls, dams and barriers were taken away, the plaintiffs were in great danger of losing the whole benefit and enjoyment of their mine or vein of coals under their close, and their workings in other places might and would be greatly damaged; and the defendants by continuing to carry on their workings under the plaintiffs close had taken and got from under the same great quantities of coals of great value: That in order to discover, and if possible to prevent the proceedings of the Defendants, and the injury done thereby to the Plaintiffs colliery, the Plaintiffs had caused to be sunk in their close, the pit before mentioned, which was of the width of five feet, and of the length of seven feet; that the nearest part of the pit was near six yards from the Defendants close called the Seggs; and that when it had been sunk to about the depth of 32 or 34 yards, the Plaintiffs caused a perpendi-

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cular hole to be bored down to the coal, which was at the depth of 35 fathoms, or thereabouts, from the surface, and they found the coals at the bottom of such bore-hole entire; but having had reason to suspect, from the proceedings of the Defendants, and the observations and threats used by them shortly after the Plaintiff's pit was first begun, that the coal had been wrought and taken away within a very short distance of such hole, Jeremiah Harris and Joseph Muncaster, on behalf of the Plaintiff, requested leave of the Defendant John Fletcher, and also of the agents or workmen then attending the Defendant's colliery, that Jeremiah Harris, as coal agent of the Plaintiffs and other persons then present, and along with him, might be permitted to go down into the Defendant's coal mine and view the works, but the Defendant John Fletcher refused to comply with the application, unless Jeremiah Harris could show a legal authority to enable him to do so: That the Plaintiffs not being able to obtain a view of the Defendants colliery by means of such applications, the Plaintiffs caused an oblique hole to be bored in their pit, so as to strike the coal at a little distance from the perpendicular bore-hole, that the oblique bore-hole was made in the hollow works made by the Defendants under the Plaintiffs close called Flowered Moss, and was between five and six feet, or thereabouts, on the east side of such perpendicular hole, and when the boring rods in such oblique state had reached the depth of the coal, which happened on or about the 8th of September then last, the boring rods entered into the hollow working made by the Defendant under the Plaintiffs close, and four or five yards, or thereabouts, to the west of the boundary line between the Plaintiffs Flowered Moss close and the Defendants' Seggs close, from which workings the Defendants, their servants or workmen, or some of them, had taken or carried away the coal; and on further examination it had appeared that the Defendants, their servants and workmen, had taken and carried away the coal under the Plaintiffs close, to within 18 inches or two feet, or thereabouts, of the first perpendicular bore-hole; but the defendants having refused to permit the Plaintiffs or their agents to go into and examine their workings, the plaintiffs were not able more particularly to set forth the extent of the workings of

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the defendants, nor the quantities of coal the Defendants had taken from under the same: That the Defendants had then blocked up their workings, or some of them, under the Plaintiffs Flowered Moss close, by placing framed walls, earth, rubbish, or other works or inventions, to prevent the Plaintiffs and their agents having any access to the same, or making any discovery of the injury done by the Defendants to the Plaintiffs; that the mine or vein of coal under the Defendants Seggs close, and part of Flowered Moss close, belonging to the Plaintiffs which adjoined thereto, dipped to the south, and therefore inclined from the place where the Plaintiffs had sunk the pit towards Seggs close; and that such vein of coal was covered with a bed of coal-metal about eight yards thick, which was covered with a bed of stone about four yards thick, which beds of coal, metal and stone, also dipped in the same direction as the coal, and that the water flowed down sunk beds towards Seggs close: And that soon after the Plaintiff had bored the first-mentioned oblique bore-hole in the workings made by the defendants under the Plaintiffs Flowered Moss close, their servants or workmen, had put or caused to be put, a plug or plugs of wood and iron into such bore-hole; and also made or erected walls, fences or barriers in the drifts or workings, which they had filled with earth, clay, stones and other materials, with intent to make the same water-tight, and thereby prevent the water running down from the coal, and the water soon afterwards began to run, and did afterwards rise in the pit to the height of four or five yards, which was then dug down to just within the bed of stone only; that the Plaintiffs had since endeavoured to let the water pass the pit, and to sink the same to the coal, for which purpose the Plaintiffs had caused another oblique bore-hole to be bored near to the first-mentioned perpendicular hole; but when the boring-rods reached to the place where coal should have been, the Defendants, to prevent the Plaintiffs from drawing the rods, and in order to deprive the Plaintiffs of the use thereof, in sinking the pit deeper, fastened the end of the lowest rods used in boring the last-mentioned oblique hole with an iron fork or key, or other instrument or means, in the hollow works made by the Defendants under the pit so sinking by the Plaintiffs in their

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close, and had actually prevented the Plaintiffs and their workmen from drawing the boring-rods upwards, although a very considerable force had been applied for that purpose, and the boring-rods still remained, and were kept fastened by the defendants in the hole whereby the rods were wholly lost, and rendered useless to the Plaintiffs, and the Plaintiffs could therefore no longer work in or sink the pit as they had intended by the usual and ordinary means pursued by them; and the defendants and their workmen had very lately put and placed several wooden machines, inventions or contrivances, called framed dams, in the hollow works leading out of their coal mines to the colliery and mine under the Plaintiffs close, or communicating therewith, by means whereof the water was dammed or blocked up, so far as the said inventions were capable of doing: And the defendants absolutely refused to pull down the walls, framed dams and barriers, and to permit the water to run as it did before; that in order to deter the Plaintiffs from proceeding further in sinking the pit, J. Fletcher the younger, the son of the Defendant Fletcher, had given notice to the Deponent, who was then employed by the Plaintiffs in sinking the pit, that the Defendants framed dams were then closed, and that whoever should be at the bottom of the Plaintiffs pit would be in danger of being blown up, and that he came to give notice of the danger, that if care was not taken they must abide by the consequence after such notice; that by stopping the water from running off, the Plaintiffs had been hindered a very long time, and been put to a very great additional expense in endeavouring to sink their pit to the bottom, and that the water intended to have been stopped by the framed dams rendered such pit in a great measure useless, by means of the water standing at the bottom thereof, in the hollow works made by the Defendants under the Plaintiffs close; that the Plaintiffs, if the pit had been sunk to the bottom, could not win the residue of their colliery adjoining on account of the coal being laden with water, so stopped by the said framed dams: And the Defendant not only threatened, but actually continued and refused to move the same, and threatened that they would wholly prevent the Plaintiffs from working their colliery, and were endeavouring to make the framed

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dams so tight by wedging as to drive the whole of the water back into the Plaintiffs colliery; and they also threatened and intended to prevent the Plaintiffs from working the coals under their close called Flowered Moss, or whereby the Plaintiffs might be enabled to convert the coals under their Flowered Moss close aforesaid to their own use. And in conformity with the declaration of the defendant Steel, the Defendants had endeavoured and were using and daily pursuing every means in their power to deprive the Plaintiffs from deriving any benefit from their colliery, or from any means of discovering the extent of the injury done to the Plaintiffs by the proceedings of the Defendants and their workmen.

The bill was filed in 1804, praying that the Defendants, their servants and workmen, might be restrained by the injunction of the Court from digging or getting any coals from under the Plaintiffs close, or in any manner digging under the same; and might be ordered to pull down the walls, dams or barriers which they had erected in their workings, whereby the water was prevented from flowing from the coals and colliery under the Flowered Moss close as it did before: And that the workings of the Defendant might be restored to the same state and condition as the same were in before the walls, dams or barriers were made: And that the Defendants, their servants and workmen might be restrained by injunction from making any such erections, or stopping up their works, or otherwise preventing the water from flowing from the beds and veins of coal, and other beds and veins under the said close; and that proper persons to be appointed by the Plaintiffs might be allowed, on reasonable notice being given for that purpose to the Defendants, to inspect the workings of the Defendants under the close called Seggs close, or under or near to the close called Flowered Moss close.

On the 14th of December 1804, a motion was made to the effect of the prayer of the bill; upon hearing which, it was ordered, "That an injunction should be awarded against "the Defendants, to restrain them, their servants, work-"men and agents, from digging or getting any coals from "under the Plaintiffs close in the pleadings mentioned, "called Flowered Moss close, or in any manner digging un-

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" der the same, until the Defendants should fully answer the " Plaintiffs bill; and this Court should make another order " to the contrary; and the Defendants were to be at " liberty to view or inspect the Plaintiffs Agill pit, Walker " pit, and the pit in the plaintiffs said close, called the " Flowered Moss, in the division of the Defendants lands, " on giving a fortnight's notice in writing to the plaintiffs, or " one of them, with the name and description of the person " to view and inspect on the Defendants part. And it was " ordered, that the Plaintiffs should be also at liberty to " view and inspect the Defendants pit mentioned in the " pleadings, on giving the like notice in writing to the De- " fendants, or one of them, with the name and description " of the person to view and inspect on the part of the Plain- " tiff. And it was ordered, that the Defendant should " remove the framed dams or barriers in their works, as " the viewers should direct, who were to cause the same to " be removed unless they should be of opinion that the col- " liery would be thereby destroyed. And it was ordered, " that the viewers or inspectors should be at liberty to " replace such frames, dams or barriers, if they should think " proper, without prejudice to any application the Plaintiffs " might thereafter make, to remove them. And it was " ordered that no alterations should be made by the Plain- " tiffs or Defendants in their respective works till after the " first view or inspection; but so as not to prevent the regu- " lar working of their respective collieries or mines. And " the Plaintiffs were to be at liberty to attend each view or " or inspection of the Defendant, with a viewer or inspector " on their parts; and the Defendants were to have the same " liberty of attending with a viewer or inspector each view " or inspection of the Plaintiffs. And it was ordered, that " all views or inspections subsequent to the first, by either " the Plaintiffs or Defendants be, on giving a like notice in " writing, with the name and description of the person to " view or inspect on their parts respectively."

Browne and others v. *Moore and others.*

In this case it was alleged that the Plaintiff Brown had invented a machine to make bobbin or twist-net, resembling

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the Buckinghamshire lace net, as made by hand with bobbins on pillows, and in April 1811, obtained letters patent for the exclusive enjoyment and use of his invention in England, for the term of 14 years; that suspecting the defendants, who were manufacturers at Nottingham, of pirating his invention, the Plaintiff bought a piece of their lace, which from the circumstances of the beam-thread traversing diagonally across the work; which was peculiar to the Plaintiff's machine; it was sworn by experienced workmen must have been manufactured by a frame essentially similar to the Plaintiff's, with which they were acquainted, and that the lace so purchased was in all essential particulars exactly resembling the lace made by the patent machine of the Plaintiff; that the bobbins or brass jacks of the Defendant's machine, which had been shown to a witness, were exactly similar to the Plaintiff's, which were also peculiar to his patent machine, and never before used in other machines; that a *quondam* partner of the manufactory of the Defendants had explained to a witness the construction and workings of their machine, which according to that description was in all essential points precisely similar in construction to the Plaintiffs machine. These facts being alleged by the bill, and supported by affidavits, an injunction was granted on motion to restrain the Defendants, &c. during the remainder of the term of the letters patent from using the invention of the Plaintiff.—Lib. Reg. A. 1814, 1495.

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Upon application to dissolve the injunction, the defendants having put in their answer, an order was made, that the Plaintiff should bring such action as he should be advised, and that in the mean time the injunction should be continued. The action (it appears) was tried, and failed partly for want of sufficient proof of the resemblance of the machines. Whereupon an application was made for an issue to try whether the Plaintiff's machine was an original machine for making bobbin lace or twist-net, or only an improvement upon any prior existing machine, and if original, whether the net manufactured by the Defendants was a piracy, which was refused; but the Plaintiffs undertaking to bring an action against the Defendants for infringing the patent right, it was ordered

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(on the undertaking of the Defendants) that they should admit on the trial, that since the trial of the former action they had made lace with the machines *inspected* by Mr. Bramah, &c.

It appears, therefore, that there had been an inspection of the Defendant's machine, and the solicitor for the Plaintiff has informed the reporter that such inspection was made under an order of the Court; but he has been unable to find it in the Register's Book. It appears by entries of two orders, on the 22d and 28th February 1817, that after the direction of the new trial, it was ordered on motion, that Mr. Millington, either alone, or in company with Mr. Bramah, on behalf of the Plaintiff, might inspect and see the model of the Plaintiff's machine, marked according to the specification inrolled by Plaintiff J. B. in pursuance of his patent previous to the ensuing trial in the Court of C. P. that Plaintiff should put the machine into a state to work, according to the specification inrolled, &c. and permit Mr. J. M. to see it work in that state on the succeeding morning. —Reg. Lib. A. 1816.