letter in which the defendant writes: "You formerly made me an offer of fifty guineas for the exclusive right of publishing in your Parlour Library for ten years Captain Marryat's work 'Monsieur Violet,' [292] which offer I accepted, and wrote to you to that effect." Here is an acknowledgment of a contract whereby the defendant sold "the exclusive right of publishing." How could he do so unless he had it? Is not this an affirmation that the copyright of "Monsieur Violet" did belong to him, and to him only, and that he had sold that right? If we were confined to the words of the receipt alone, I think they would of themselves amount to an express promise that the plaintiffs were to have the exclusive right so long as the copyright should endure; and is not that promise broken if the defendant had not the exclusive right to give them? It appears therefore to me that in this case there was an express warranty, and that we are relieved from considering the more general question.

As to the other points. I have no doubt that the Judges of a Common Law Court take judicial notice, not only of the doctrines of equity, but of those of every branch of English law, when they incidentally come before them. When a question of ecclesiastical law arose, it used to be the practice to move for two doctors. Those learned persons when they came were treated with great respect; but they came as advocates to argue the law, not as witnesses to state it. It has sometimes been said that we know nothing of Parliamentary law: but, if a question of Parliamentary law does come before us incidentally in a matter over which we have jurisdiction, we must decide it, and must inform ourselves as we best can. So in a question of equity. If we do not know the doctrine of equity, we are supposed to have the means of learning it. In the present case I have no doubt that Bentley had the equitable interest in the copyright, and that, if the plaintiffs had not obeyed [293] his notice, he would have obtained an injunction; *Sweet* v. *Cater* (11 Sim. 572).

Patteson J. I agree with my Lord in thinking that the general doctrine as to implied warranty of title on contracts for the sale of personal property, whether executory or not, does not arise in this case, as we cannot but see that there was an express warranty between the parties. In many of the earlier cases the question is whether an affirmation was a warranty. Lord Holt, in *Medina* v. *Stoughton* (1 Salk. 210. 1 Ld. Raym. 593), says that, "where one having the possession of any personal chattel sells it, the bare affirming it to be his amounts to a warranty." Much more is this the case if he affirms that he has the right to convey the exclusive title to it. We cannot take the receipt as the only evidence of the contract, but must look at the correspondence also. Now I think the second letter set out shews very strongly that the defendant meant to say that Monsieur Violet was one of the works which he there mentions, one of the works of his late father of which the copyright belonged to him. Coupling that letter with the receipt, I think there is an express warranty, making it unnecessary to consider the somewhat nice and minute points which were discussed in the judgment in *Morley* v. *Attenborough* (3 Exch. 500).

As to the other point, *Sweet* v. *Cater* (11 Sim. 572), is decisive that there was an equitable assignment in Bentley; and the averment in the plea is confined to an equitable right. There are cases in which a right to recover the price as money had and received on a consideration which has failed would be a sufficient remedy; but the [294] present is a case in which the special damage from the breach of warranty is considerable.

Coleridge J. I did not hear the whole argument: but, upon so much as I heard, I agree with what has been said.

Erle J. concurred.

Judgment for plaintiffs (*a*).

WILTON, Executor of Mary Stinton, *against* DUNN. Friday, June 6th, 1851. Use and occupation. Plea: that the occupation of the premises was by the leave of plaintiff who was mortgagor in possession: that, after such occupation, the mortgagee, who was entitled to the land during the whole period of occupation, gave notice to defendant, claiming the mesne profits: that defendant until such notice was ready and willing to pay plaintiff; and that, from the time of such notice, he was liable to pay the mortgagee. Held, no defence at law. Quære,

(*a*) Reported by C. Blackburn, Esq.

whether actual payment to the mortgagee under pressure of this claim would have been a defence.

[S. C. 21 L. J. Q. B. 60; 15 Jur. 1104.]

Assumpsit by the executor of Mary Stinton. 1st count for use and occupation of certain premises, and undivided shares of premises, in the time of the testatrix. 2d count on an account stated with the testatrix. 3d count on an account stated with the executor.

Plea, as to 100l. parcel of the moneys in the 1st count, 100l. parcel of the moneys in the 2d count, and 100l. parcel of the moneys in the 3d count, that Mary Stinton was seised in her demesne as of fee tail of and in the premises in the first count mentioned, and, being so seised, by indenture enrolled, conveyed them to the use of William John Holt and Henry Wilton the Younger, their executors and assigns, for the term of ninety-nine **[295]** years, upon trust, at the request of Mary Stinton, to raise a sum of money by mortgage; and, subject to the mortgage term, to uses over; whereby Holt and Wilton by virtue of the statutes became possessed of the premises for the term of ninety-nine years. The plea then shewed an assignment by Holt and Wilton of the residue of the term of ninety-nine years to Louisa Smith, by indenture, by way of mortgage, to secure the sum of 200l., with the common proviso that if the 200l. was paid within six months the assignment should be void. Averments that the six months elapsed, and that the 200l. was not paid and still continued unpaid. The plea then proceeded to aver that the said Louisa Smith did not, nor did any assign or assigns of L. Smith, enter upon or take possession of the said undivided parts and shares at any time before the commencement of this suit; but, from the time of the making the last mentioned indenture until the defendant became indebted to the said Mary Stinton in the said first mentioned parcel, the said M. S., as mortgagor in possession but not otherwise, had the controul, management and disposition of the same undivided parts and shares: that, while the said M. S. had such controul, management, &c., and while the said M. S. had no other title to the same than as such mortgagor in possession, defendant, at his request made after the making of the last mentioned indenture, to wit on, &c., and, by the sufferance and permission of the said M. S., granted after the making of the said last mentioned indenture, to wit on, &c., for the time in the first count mentioned, which commenced after the making of the last mentioned indenture, held, occupied and enjoyed the said undivided parts and shares as in the first count mentioned, and thereby became and was indebted to the said M. S. in **[296]** the said sum of 100l., parcel as first aforesaid. That the said Louisa Smith, as such mortgagee as aforesaid, was, under and by virtue of the last mentioned indenture, from the time of the making thereof until and during the whole of the said time while the defendant so held, &c. as aforesaid, entitled to the immediate actual possession of the said undivided parts and shares, and, at and from the time when defendant became so indebted as last aforesaid, and until and at the commencement of this suit, was, and yet is, entitled by action of trespass to recover from defendant the value of the profits of the said undivided parts and shares for and in respect of the said time while the said defendant so held, occupied, possessed and enjoyed the same as aforesaid. That, after defendant became indebted to the said M. S. in the said parcel, and before the commencement of this suit, to wit on, &c., the said Louisa Smith, then being justly entitled to the said mortgage debt of 200l., and to recover the value of the said profits as aforesaid, assigned to Edward Gaubert all her right to and interest in the said mortgage debt of 200l., and the value of the said profits which she the said Louisa Smith was so as aforesaid entitled to recover from the defendant in respect of the time while he so held, occupied, possessed and enjoyed the said undivided parts and shares, and authorized the said E. Gaubert to use the name of the said Louisa Smith for the recovery of the value of the last mentioned profits in whatever manner might be necessary. That afterwards, and before the commencement of this suit, to wit on, &c., the said E. Gaubert gave defendant notice of the said assignment to him, and required the defendant to pay to him the said E. Gaubert the said first mentioned parcel in which the defendant was so indebted as aforesaid, and which **[297]** did not exceed the amount of the value of the profits, which amount the said E. Gaubert was then and still is entitled to recover in the name of the said Louisa Smith from the defendant. That, from the time when defendant became indebted to the said M. S. in the said first mentioned parcel until

and at the time when the said notice was so given to him as aforesaid, defendant was ready and willing to pay the first mentioned parcel to the said M. S. And that, from the time when the said notice was so given hitherto, defendant has been and yet is liable to pay the same to the said E. Gaubert. Averment that the said accounts in the second and last counts respectively mentioned, so far as they relate to the said secondly and thirdly mentioned parcels, were so stated as in the declaration mentioned of and concerning the first mentioned parcel, and of and concerning no other money whatsoever. Verification.

Demurrer, assigning as causes that the plea was an argumentative denial: and others which it is not necessary to notice (*a*). Joinder.

Cleasby, for the plaintiff. Assuming the plea to be well pleaded in form, it is bad in substance. All the cases on the subject are collected in the notes to *Moss* v. *Gallimore* (1 Doug. 279), in Smith's Lead. Ca. (1 Smith's Leading Cases, 310). It was supposed in *Pope* v. *Biggs* (9 B. & C. 245), and *Waddilove* v. *Barnett* (2 New Ca. 538), that notice, given to a person who had been let into possession by the mortgagor after the legal **[298]** estate had been conveyed to the mortgagee, requiring him to pay his rent to the mortgagee, entitled the latter to recover the arrears of rent: but that is overruled; *Partington* v. *Woodcock* (6 A. & E. 690), *Evans* v. *Elliot* (9 A. & E. 342). It is clear that the notice in this case cannot change the contract under which the defendant had already become indebted to the testatrix, so as to enable Louisa Smith to sue on that contract. [Patteson J. Why do you say that is clear? I, indeed, think it impossible that the mortgagee could under such circumstanees recover in an action on contract: but other Judges entertain a different opinion. I never could understand it. Erle J. The plea here does not rest the defence on the supposed effect of the notice in enabling the mortgagee to sue on the contract, but on the ground that the defendant may be compelled to pay this very sum as mesne profits, and that he has received notice of that liability; but it is liability only. He does not say he has paid the money to any one. Lord Campbell C.J. Supposing that there are no formal objections to the plea, the question raised on this record seems to be, whether a liability of this kind, which may or may not end in an actual payment, is a good defence to an action.] In all cases in which there is an outstanding legal estate, the tenant in possession may, in the same manner, be obliged to pay the mesne profits to him who has the right to bring ejectment. Therefore, if this plea is good, a tenant should always be allowed to plead that the legal estate is outstanding in one who claims the rent, and threatens to bring ejectment. Such a plea is bad even when the tenant has under compulsion **[299]** of that threat paid the rent; *Boodle* v. *Cambell* (7 M. & G. 386). [Erle J. If we take notice of what a mortgage is in equity, the mortgagee is privy to the demise by the mortgagor in possession. Lord Campbell C.J. There is great difficulty in our noticing, at law, the nature of the equitable interest of the mortgagor. When there is a legal charge on the land, as in the case of a head landlord and a mesne tenant, an actual payment of the head landlord's rent by the puisne tenant, under pressure of a distress, would be an answer pro tanto to an action by the mesne tenant for his rent, on the principle that the tenant below has been obliged to pay a charge on the land which his intermediate landlord ought to have paid. But a mere liability to be distrained on would be no answer.]

Keating, contrà. The relation between mortgagor and mortgagee at law is that the mortgagor is tenant at sufferance to the mortgagee. [Patteson J. I can never agree to that. I know there are loose expressions in the books as to his being tenant at will, or tenant at sufferance: but he is not, in truth, a tenant at all.] At all events, the mortgagee is entitled to recover the rent from the tenant, as mesne profits. [Lord Campbell C.J. He may bring ejectment and recover the mesne profits with or without notice. Your argument therefore goes so far as to say that the existence of the unsatisfied mortgage is in itself a bar. Actual payment may be good on the ground that the mortgagee is the authorized agent of the mortgagor to receive the rents: but is there any precedent of a plea like this? A defendant may **[300]** in many cases be in great danger from cross claims, from which a Court of Law cannot

(*a*) Cleasby, for the plaintiff, in the course of his argument relied on several objections to the manner in which the title was pleaded: but, as the Court decided irrespectively of them, they are not further noticed.

relieve him. The threat of the mortgagee may afford a ground for going into equity for relief: but can it be a plea in bar at law? *Waddilove* v. *Barnett* (2 New Ca. 538), does not go so far as we must go if we support this plea. Patteson J. In Mr. Smith's note (1 Smith's Leading Cases, 317 b. 2d ed.), to *Moss* v. *Gallimore* (Doug. 279), it is said: "As the mortgagor ceases to be entitled to the rents upon the mortgagee's giving the tenant notice, it follows that the mortgagor cannot afterwards maintain any action for use and occupation against him, either for rent which accrued due after the notice, or for rent which accrued due before the notice but was unpaid at the time when the notice was given. But there is a difference between the modes in which the tenant must plead in the former and in the latter case. In the former case he should plead non assumpsit, and will be allowed to give the mortgage and notice in evidence, for 'when the mortgagee gave notice that the future rent was to be paid to him, it follows that the defendant ceased to occupy by the permission of the mortgagor, but by the permission of the mortgagee;' and, of course, such a defence amounts to a denial of the contract alleged in the declaration, which avers the defendant to have used and occupied the land by the permission of the plaintiff, the mortgagor. But in the latter case, viz. where the rent became due before notice, but was unpaid at the time of notice, the tenant must plead his defence specially, for 'the mortgagor had a right of action against the defendant up to the time when the notice was given, and before the mortgagee required the rent to be paid **[301]** to him:' so that the tenant, by setting up this defence, confesses that the right of action, stated in the declaration, once existed, but avoids it by matter ex post facto, viz. by the subsequent notice from the mortgagee." The propositions cited by Mr. Smith are from *Waddilove* v. *Barnett* (2 New Ca. 538). I think it a grave question whether the latter is not a fallacy. The point in truth did not arise in *Pope* v. *Biggs* (9 B. & C. 245); what fell from the Judges there were dicta merely. And I cannot comprehend how a right of action for the rents already due should be vested in the mortgagor before the notice, and the notice should undo that vested right of action and set up in lieu of it a right of action in the mortgagee. It was so said in *Waddilove* v. *Barnett* (2 New Ca. 538); but that case is beyond my comprehension.]

Lord Campbell C.J. The plea is new; and I am of opinion that this ingenious experiment should not be sanctioned. It calls on us, as a Court of Law, to do that which we have no power to do. We cannot protect this defendant from the threat of the mortgagee. Had the tenant under compulsion of that threat actually paid the mortgagee what was due, it might have been a defence. But this plea does not allege payment: it is a plea of a mere threat which may or may not be carried into effect. No authority has been cited in support of such a plea; and we ought not to make one.

Patteson J. I cannot see how the notice can be said to make this money not recoverable by the mortgagor and recoverable by the mortgagee, without denying **[302]** that the tenant held the premises by permission of the mortgagor. I do not see any way in which the mortgagee could sue this tenant for rent: but it is said that he may bring ejectment, and recover the same sum as mesne profits, and that he has threatened to do so: that, however, is no plea at law.

Erle J. Had it been pleaded that the tenant actually paid the mortgagee under this threat, I should have been inclined to support the plea. There has been so much doubt as to the legal situation of mortgagor in possession and mortgagee, that I say no more than that I think such payment might be a defence. But, as far as I can see on this plea, the present tenant may intend, after having enjoyed the land, to pay neither mortgagor nor mortgagee.

Judgment for plaintiff (*a*).

See, as to the right of the mortgagee out of possession to recover mesne profits, *Turner* v. *Cameron's Coalbrook Steam Coal Company*, 5 Exch. 932, and *Litchfield* v. *Ready* 5 Exch. 939. See also *Mountnoy* v. *Collier*, 1 E. & B. 630.

[303] WILSON, ESQUIRE, *Appellant, against* THE OVERSEERS OF LIVERPOOL, AND RAWDON AND HORSFALL, ESQUIRES, *Respondents.* Saturday, June 7th, 1851. No appeal lay against an order of justices under stat. 8 & 9 Vict. c. 126, ss. 59, 63 (see stat. 16 & 17 Vict. c. 97, s. 98), adjudging that the settlement of a pauper

(*a*) Reported by C. Blackburn, Esq.