APPENDIX.

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NOTE I.

On the case of GREEN AND OTHERS *v.* BIDDLE, *ante, p.* 1—108.

THE editor has supposed, that the learned reader would not be dissatisfied to see collected together the authorities from the civilians, and also from the common law, and the decisions of the Courts of equity, bearing upon the principal question in the above case. The leading principles of the civil law on the subject, are stated by Justinian as follows:

"*De edificatione ex sua materia in solo alieno.*

"Lib. II. tit. 1. § XXX. Ex diverso, si quis in alieno solo ex sua materia domum ædificaverit, illius fit domus cujus solum est. Sed hoc casu materiæ dominus proprietatem ejus amittit, quia voluntate ejus intelligitur esse alienata; *utique si non ignorabat, se in alieno solo ædificare:* et ideo, licet diruta sit domus, materiam tamen vindicare non potest. Certe illud constat, si, in possessione constituto ædificatore, soli dominus petat, domum suam esse, nec solvat pretium materiæ et mercedes fabrorum, posse eum per exceptionem doli mali repelli; *utique si bonæ fidei possessor fuerit, qui ædificavit.* Nam scienti, solum alienum esse, potest objici culpa, quod ædificaverit temere in eo solo, quod intelligebat alienum esse."

"*De fructibus bona fide perceptis.*

"§ XXXV. Si quis a non domino, quem dominum esse crediderit, *bona fide fundum emerit, vel ex donatione, aliave qualibet justa causa, æque bona fide acceperit,* naturali ratione placuit, fructus, quos percepit, ejus esse pro cultura et cura: et ideo, si postea dominus supervenerit, et fundum vindicet, de fructibus *ab eo consumptis* agere non potest: *ei vero,*

qui alienum fundum sciens possederit, non idem concessum est; itaque cum fundo etiam fructus, licet consumpti sint, cogitur restituere."

" Lib. IV. tit. 17. § ii. Et si in rem actum sit coram judice, sive contra petitorem judicaverit, absolvere debet possessorem; sive contra possessorem, jubere ei debet, ut rem ipsam restituat cum fructibus. Sed, si possessor neget, in præsenti se restituere posse, et sine frustratione videbitur tempus restituendi causa petere, indulgendum est ei; ut tamen de litis æstimatione caveat cum fidejussore, si intra tempus, quod ei datum est, non restituerit. Et, si hæreditas petita sit, eadem circa fructus interveniunt, quæ diximus intervenire de singularum rerum petitione. Illorum autem fructuum, quos culpa sua possessor non percèperit, sive illorum quos perceperit, in utraque actione eadem ratio pene habetur, si prædo fuerit. Si vero bonæ fidei possessor fuerit, non habetur ratio neque consumptorum, neque non perceptorum. Post inchoatam autem petitionem etiam illorum fructuum ratio habetur, qui culpa possessoris percepti non sunt, vel percepti consumpti sunt."

So, also, the Napoleon code, which is in a great measure copied from the civil law, declares, (liv. 2. tit. 2. art. 546.) that " the property of a thing, whether moveable or immoveable, gives a right to all which it produces, and to every thing which is inseparably united with it, whether naturally or artificially.

" This right is termed the *right of accession.*

" 547. The natural or artificial fruits of the earth, the civil fruits, and the increase of animals, belong to the owner by right of accession.

" 548. The fruits thus produced belong to the owner of the thing producing them, provided he reimburses the expense of the labour bestowed upon it by third persons.

" 549. A mere occupant does not make these fruits his own, unless he is a *bonæ fidei* possessor: in the contrary case, he is bound to restore the products, with the thing, to the owner who claims it.

" 550. He is considered as a *bonæ fidei* possessor, when he possesses, as proprietor, in virtue of a title to the property, of the defects of which he is ignorant. He ceases to be such, the moment these defects are known to him.

" 551. Every object which unites and incorporates itself with the thing, belongs to the owner, according to the rules hereinafter established."

" 555. Where plantations, buildings, and other works, have been made or erected by a third person, with materials belonging to him, the owner of the land has a right either to retain them, or to compel such third person to remove them.

" If the owner insists upon the suppression of the plantations and

buildings, it must be done at the expense of the person who has made or erected them, without any indemnity to him; he may even be adjudged in damages, if there be ground for it, for the injury done to the owner of the land.

"If the owner chooses to preserve the plantations and buildings as his own, he must reimburse the value of the materials and labour bestowed on them, without regard to the more or less augmentation in value of the land. But if the plantations, buildings, and other works, have been made or erected by a party who has been evicted from the possession, but who was not adjudged to restore the fruits, by reason of his being a *bonæ fidei* possessor, the owner cannot insist upon the suppression of the said works, plantations, and buildings, but shall have the election, either to reimburse the value of the materials and labour, or to pay a sum equal to the augmented value of the land."

So, also, in the law of Scotland, which is mainly founded upon the Roman law—"A *bonæ fidei* possessor is he who, though he is not really proprietor of the subject, yet believes himself proprietor, on probable grounds. A *malæ fidei* possessor knows, or is presumed to know, that what he possessed is the property of another. A possessor *bona fide*, acquired right, by the Roman law, to the fruits of the subject possessed, that had been reaped and consumed by himself, while he believed the subject his own. § 35. *Inst. de rer. div.* By our customs, perception alone, without consumption, secures the possessor. Nay, if he has sown the ground while his *bona fides* continued, he is entitled to reap the crop, *propter curam et culturam*. But this doctrine does not, according to *Bankt.* I. 214. § 19. reach to civil fruits, *e. g.* the interest of money, which the *bonæ fidei* receiver must restore, together with the principal, to the owner.

"*Bona fides* necessarily ceases by the *conscientia rei alienæ* in the possessor, whether such consciousness should proceed from legal interpellation, or private knowledge; for the essence of *bona fides* consists in the possessor's opinion that the subject is his own." *Lib.* 20. § 11. *de her. pet.* 20 *Nov.* 1662, *Children of Woolmet.* The decision, 14 *March*, 1626, brought by Viscount Stair, in support of the contrary opinion, proves no more than that an assignation, without intimation, is an incomplete deed. *Mala fides* is sometimes induced by the true owner's bringing his action against the possessor, by which the lameness of his title may appear to him; sometimes not till litiscontestation, which was the general rule of the Roman law; and, in cases uncommonly favourable, it is not induced until sentence be pronounced against the possessor." (*Erskine's Princ. of the Law of Scotland*, B. 2. *tit.* 1. *s.* 13, 14.)

Pothier has discussed this subject with his usual precision: and the following translation of a few passages from his treatise "*Du Droit de Propriété*" may not be unacceptable to the learned reader.

"335. A *malæ fidei* possessor is bound to account for all the fruits of the thing recovered which he has received, not only those which he received after the judicial demand, but those which have come to his hands subsequent to his unlawful possession: *Certum est malæ fidei possessorem omnes fructus solere præstare cum ipsa re.* L. 22. Cod. *de rei vind.*

"He is held accountable, even for those proceeding from the crops which he has sown, and the labour he has bestowed on the land; but from these must be deducted the value of the seed and labour expended by him.

"The reason is, that all the fruits which the land produces are accessaries to the land, which, as soon as they are gathered, *jure accessionis*, become the property of the owner of the land, as we have seen *supra*, n. 151., instead of belonging to him whose labour has produced them; from whence this maxim: *Omnis fructus non jure seminis, sed jure soli percipitur.* L. 25. D. *de usur.*

"He is held accountable, not only for the fruits which are the products of the thing itself, and which are termed *natural fruits:* he ought, also, to account for the *civil fruits*, as we have seen in the preceding paragraph.

"336. A *malæ fidei* possessor is not only held accountable for the fruits which he has received, but even for those which he has not received, but which the owner might have received, if the land had been restored to him: *Generaliter*, says Papinian, *quum de fructibus æstimandis quæritur, constat adverti debere, non an malæ fidei possessor fruitus sit, sed an petitor frui potuerit, si ei possidere licuerit.* L. 62. § 1. D. *de rei vind.*

"The reason is, that a *malæ fidei* possessor contracts, by the knowledge which he has that the property does not belong to him, the implied obligation to restore it to the owner; on failure of which, he is responsible for the damages and interest resulting from this obligation, in which are included the fruits which the owner has failed to receive.

"The heir, or other representative of the *malæ fidei* possessor, even if he supposes in good faith that the property belongs to him, is held accountable for all the fruits received subsequent to the unlawful possession of the deceased to whom he succeeds, in the same manner as the deceased would be held accountable, if he were still living; because, in his character of heir he has succeeded to all his obligations, and his possession

is merely a continuation of that of the ancestor, and is infected with all its vices, as we have observed in the preceding article.

"337. According to the principles of the Roman Law, a *bonæ fidei* possessor is not liable to restore the fruits received by him before the litiscontestation, except those which at that period specifically remain; but he is responsible for all the fruits subsequently received, in the same manner as a *malæ fidei* possessor; *Certum est malæ fidei possessores omnes fructus præstare; bonæ fidei vero, extantes post litiscontestationem, universos.* L. 22. Cod. *de rei vind.*"

"340. That which we have laid down, as to a *bonæ fidei* possessor not being responsible for the fruits received and consumed by him before the suit, only applies in those cases where he has received and consumed them whilst his *bona fides* continued; but where he has had notice, although long before the judicial demand, that the property of which he is in possession belongs to another, he can no longer receive for his own profit the fruits proceeding from it, nor discharge himself from the obligation of restoring those which specifically remain, by afterwards consuming them."

"341. The principles of our French law, in respect to the restitution of the fruits, in an action *in rem*, in the case of a *malæ fidei* possessor, are the same with those of the Roman law, as they have already been explained.

"As to a *bonæ fidei* possessor, he is not bound to restore any fruits received by him before the judicial demand. I do not find that in our practice, (different in that respect from the Roman law,) that the demandant can claim the fruits which specifically remain in the hands of the occupant at that period, where they have been previously received.

"But by the notice which is given to a *bonæ fidei* possessor, in which the demandant exhibits to him a copy of his title deeds, and which has consequently, in this respect, in our law, the same effect as the litiscontestation in the Roman law, he ceases to be any longer a *bonæ fidei* possessor, being considered as informed of the demandant's right by this notice; he cannot, therefore, be any longer considered as entitled to receive the fruits, and must be adjudged to restore all those which he has received subsequent to the notice."

"343. Where, in the action *rei vindicationis*, the demandant has established his right, the possessor is adjudged to restore him the thing recovered; but in certain cases, where the possessor has disbursed a certain sum, or contracted an obligation for the removing an encumbrance, for the preservation or amelioration of the thing which he is adjudged to restore, the judgment is rendered upon condition that the demandant

shall reimburse the possessor for the sums he has expended, and indemnify him in other respects."

" 344. The second case is that to which Papinian refers in the latter part of the law *sumptuum in prædiam factorum exemplo:* where the possessor has incurred any necessary expenses for the preservation of the thing, (other than ordinary repairs,) which the proprietor would have been obliged to incur, if the possessor had not, the owner cannot compel the possessor to restore the thing, unless he first reimburses to this possessor the amount thus expended by him, with the interest thereon, if it exceeds the fruits which the possessor has received, which are to be set off against it.

" We have excepted from the operation of our principle the expenses of ordinary repairs, because these are a charge upon the fruits, and for this reason, a *bonæ fidei* possessor, who receives for his own account the fruits before the judicial demand, without being subject in this respect to make restitution to the owner, ought not to claim against the latter the expenses of ordinary repairs incurred by him during the same period, these expenses being a charge upon the usufruct which he has enjoyed.

" 345. There is a distinction between a *bonæ fidei* and a *malæ fidei* possessor, in respect to the expenses which they have laid out, which were not indispensably necessary, but only useful, and which have merely contributed to ameliorate the property.

" In respect to a *bonæ fidei* possessor, the owner cannot compel him to restore the property, without first reimbursing the expenses, although they were not indispensably necessary to the preservation of the property, and have merely augmented its value.

" Justinian gives an example of this principle in the case of a *bonæ fidei* possessor, who has erected a building upon the land; and he decides that the owner cannot recover the land unless he first offers to reimburse this expense to the occupant: *Si quis in alieno solo ex sua materia domum ædificaverit ..... illud constat, si in possessione constituto ædificatore soli dominus petat domum suam esse, nec solvat pretium materiæ et mercedes fabrorum, posse eum per exceptionem doli mali repelli, utique si bonæ fidei possessor fuerit qui ædificavit. Instit. tit. de rer. div.* § 30.

" 346. This principle, that a *bonæ fidei* possessor ought to be reimbursed the expenses of utility which he has laid out upon the property, is subject to several exceptions, which must be considered as implied in the text we have just cited from the Institutes, as Vinnius has remarked in his commentary.

" The first is, that the possessor ought not to be reimbursed precisely

and absolutely for the amount of the said expenses, but only for the amount which they have augmented the property in value.

" This is what Paulus teaches us in the case of a *bonæ fidei* purchaser who has erected a building upon land which had been previously mortgaged; Paulus says, *Jus soli superficiem secutam videri .... sed bona fide possessores non aliter cogendos ædificium restituere, quàm sumptus in extructione erogatos, quatenus res pretiosior facta est, reciperent. Lib.* 59. § 2. D. *d pign.*

" This results from the principle on which is founded the obligation of the proprietor to reimburse the expenses of the *bonæ fidei* possessor.

" This obligation arises only from that rule of equity, which forbids one person from enriching himself at the expense of another, without the fault of the latter. According to this rule, the owner ought not to profit, at the cost of the possessor, of the expenses which the latter has incurred; but he thus profits by it only so far as his property is augmented in value by these expenses; he ought not, therefore, to repay more than to that amount, even though the possessor has paid more.

" On the other hand, even if the value of the property is augmented to a greater amount than the expenditure laid out upon it, the owner is not obliged to repay more than the expenditures; because, although he has profited to a greater amount, he has only profited, at the expense of the possessor, to the amount of the sums actually laid out by him.

" The second exception to the principle, that a *bonæ fidei* possessor is entitled to be reimbursed his expenditures of utility, at least to the extent of the increased value of the property, is, that the rule is not so inflexible but that the judge may sometimes depart from it, according to circumstances. This is what Celsus teaches: *In fundo alieno quem imprudens ædificasti aut conseruisti, deinde evincitur, bonus judex variè in personis causisque constituet: finge et dominum eadem facturum fuisse;*[1] *reddat impensam et fundum recipiat, usque*[2] *eò duntaxat quò pretiosior factus est; et si plus pretio fundi accessit, solum quod impensum est. Finge pauperem qui si id reddere cogatur, laribus, sepulchris avitis carendum habeat: sufficit tibi permitti tollere ex his rebus quæ poscis; dum ita ne deterior sit fundus quàm si initio non fuerit ædificatum. Lib.* 38. D. *de rei vind.*

" In the case put by Celsus, if there be this equitable consideration in favour of the occupant, that the owner ought not to profit, at his expense,

(1) *Id est, maximè hoc casu debet reddere impensam, sed etsi facturus non fuisset regulariter debet reddere.*

(2) This refers to *impensam reddat.*

by the augmentation in value which the land has received from the expenditures laid out on it; on the other hand, there is another equitable consideration, still more strong, in favour of the owner, to which the other must yield, which is, that equity still less permits the owner to be deprived of his inheritance, for which he may be supposed to have a just affection, because he is unable to reimburse expenditures which he did not wish to have laid out upon the property which he has no desire to sell, and which would answer all his purposes in its original condition.

"Where the expenditures of utility, laid out by the *bonæ fidei* possessor, are so considerable that the owner is unable to repay them, before taking possession of his land, and these expenditures have, at the same time, produced a considerable augmentation in its rent, it seems to me that the interests of the respective parties may be conciliated by allowing the owner to take possession, upon condition that he should charge the land with the repayment of the amount of these expenditures by instalments. By these means, the just rights of both parties will be preserved; the owner is not deprived of his land, for want of the means of payment, and at the same time he does not profit, at the expense of the occupant, by its increased value."

Our author then proceeds (No. 348.) to state, that there are expenditures which may augment the value of the thing, supposing the owner to wish to sell it, without increasing the rent or profit derived from it, supposing him to wish to retain it for his own use; in which case, the owner is not obliged to reimburse the *bonæ fidei* possessor, unless the owner be himself a dealer in such articles, and has, therefore, derived a pecuniary benefit from the increased value of the thing. And he quotes, as an example of the application of this rule, a case put in the Digest, of a slave in the hands of a *bonæ fidei* possessor, who has instructed him in painting, or some other elegant art, and the slave being reclaimed by his master, the latter is not responsible to the possessor for his increased value, unless the master be himself a dealer in slaves.

He then states (No. 349.) a third exception to the rule, which obliges the owner to reimburse the *bonæ fidei* possessor the expenses of utility laid out on the property, which is, that the rents and profits received by the occupant are to be first deducted.

"350. As to a *malæ fidei* possessor, the Roman law seems to have denied him the reimbursement of the expenses not absolutely necessary for the preservation of the property, although they may have augmented its value, and only to have allowed him the privilege of carrying off such articles as could be severed without injury to the property, and leaving it in its original state. *Malæ fidei possessores*, says the Emperor Gor-

dian, *ejus quod in alienam rem impendunt, non eorum negotium gerentes quorum est, nullam habent repetitionem, nisi necessarios sumptus fecerint; sin autem utiles, licentia eis permittitur, sine læsione prioris statûs rei, eos auferre.* *Lib.* 5. Cod. *h. t.*

"The same also says elsewhere, *Vineas in alieno agro institutas solo cedere, et si à malæ fidei possessore id factum sit, sumptus eo nomine erogatos per retentionem servari non posse incognitum non est.* *Lib.* 1. *tit. de rei vind. in fragm.* Cod. *Gregor.*

"Lastly, Justinian, in the Institutes, *de rer. div.* § 30. after having stated, that he who has built upon the land of another is entitled to a reimbursement of his expenditures by the owner, adds, *utique si bonæ fidei possessor sit; nam si scienti solum alienum esse, potest objici culpa, quod ædificaverit temerè in eo solo quod intelligebat alienum esse.*"

Pothier then states, that notwithstanding these positive texts, Cujas (Obs. x. cap. 1.) supposes, that the *malæ fidei* possessor is to be put on the same footing, in this respect, with the *bonæ fidei* possessor, and is equally entitled to be reimbursed his expenditures, by which the land has been increased in value. Our author, after having refuted this notion, proceeds to observe, that in practice it is left to the discretion of the judge to decide, whether the owner ought to indemnify a *malæ fidei* possessor for the expenses of utility, to the amount of the increased value of the land, according to the nature and extent of the *mala fides* of the possessor, whether it is characterized by circumstances more or less criminal.

See, also, *Huber. Prælect. lib.* 5. *tit.* 3. *de Hered. Petit.* § 12—19. *Pothier, Pandect. Just. in Nov. Ord. Digest. Tom.* 1. *p.* 186—191. *Ib. p.* 201—204. *Argou, Instit. au Droit Francais, Tom.* 2. *liv.* 4. *ch.* 17. *Domat, Loix Civiles, liv.* 3. *tit.* 5. *sec.* 3.

The subject under consideration has been treated somewhat at large by Lord Kaimes, in his *Principles of Equity*. The following citations will show that the author's notions of abstract justice, and his legal principles deduced from them, are in general accordance with the law of England, as well as with the doctrines of the civilians.

In his third book, (the first chapter of which is entitled, "*What Equity rules with respect to Rents levied upon an erroneous title of Property,*") he says: "With respect to land possessed upon an erroneous title of property, it is a rule established by the Roman law, and among modern nations, that the true proprietor, asserting his title to the land, has not a claim for the rents levied by the *bonæ fidei possessor, and consumed.* But though this subject is handled at large, both by the Roman lawyers, and by their commentators, we are left in the dark as to the reason of the rule, and of the principle upon which it is founded." * * * * *

"If the common law afford to the proprietor a claim for the value of his rents *consumed*, it must be equity correcting the rigour of the common law, that protects the possessor from this claim: but if the proprietor have not a claim at common law, the possessor has no occasion for equity. The matter, then, is resolvable into the following question: whether there be or be not a claim at common law? And to this question, which is subtle, we must lend attention." * * * p. 270, 271. 2d ed.

Lord Kaimes then proceeds to an investigation of this point, and, at the close of the inquiry, observes: "And thus it comes out clear, that there is *no action at common law* against the *bonæ fidei possessor*, for the value of the fruits *he consumes;* such an action must resolve itself into a claim of damages, to which the innocent cannot be subjected." * * * p. 273. "But suppose the *bonæ fidei possessor* to be *locupletior* by the rents he has levied:" * * at common law "there is no remedy, for the reason before given, that there is nothing upon which to found an action of reparation of damages in this case, more than where the rents are consumed upon living. But *that equity affords an action, is clear;* for the maxim, '*quod nemo debet locupletari alienâ jacturâ,*' is applicable to this case in the strictest sense." p. 274.

By *common law*, Lord Kaimes evidently must mean the unwritten law of Scotland; since the common law of England has doubtless always afforded some remedy for the recovery of rents and profits, both where the *fruits have been consumed*, and where the tenant is *locupletior*. It would indeed strike one, that the famous maxim of the Roman law, of which Lord Kaimes has made so judicious a use, viz. "that no one ought to profit by another's loss," is applicable to the case of *fruits consumed*, not less than to the supposition, that the tenant is *locupletior*. The fruits consumed are certainly *gain* to the tenant, and *loss* to the proprietor, quite as much as fruits hoarded up are. But in ordinary cases, it is to be supposed, that the tenant is a gainer and *locupletior*, (in Lord Kaimes' sense of the word,) and hence the distinction may not be very important; since he allows that equity will grant relief even against a *bonæ fidei possessor*, in case he be *locupletior*.

In another place, *(Book* 1. *part* 1. *art.* 1.) Lord Kaimes considers the case of a *bonæ fidei possessor*, and the melioration of real property in his possession.

"The title of land-property being intricate, and often uncertain, instances are frequent, where a man, in possession of land the property of another, is led, by unavoidable error, to consider it as belonging to himself; his money is bestowed without hesitation in repairing and meliorating the subject." (p. 99.) "Every one, in that case, must be sensible of

a hardship, that requires a remedy; and it must be the wish of every disinterested person, that the *bonæ fidei possessor* be relieved from this hardship. That the common law affords no relief, will be evident at first sight." (p. 98.) But "a Court of equity interposes, to oblige the owner to make up the loss, as far as he is *locupletior*." (p. 99.)

The maxim of the law of England, on this subject, seems to have always been *quod caveat emptor*. This is the general spirit of the common law doctrine as to the transfer both of personal chattels and of real property. Where there is an outstanding judgment or mortgage, concerning which the purchaser is ignorant, the maxim is applied, so far as the land itself, and the title to it, claimed by persons other than the vendor and vendee. If there be a remedy, then, for the *bonæ fidei possessor*, it is, as Lord Kaimes observes, only to be found in a resort to a Court of equity; and there, as we shall presently see, (in the case of Dormer *v.* Fortescue,) the relief will depend upon the evidence of *bona fides*.

The authorities in the common law of England are numerous and uniform, from the earliest times, in support of the doctrine laid down by the Court in the case in the text, concerning rents and profits. "Est autem ista recognitio (says Bracton) sive assisa triplex et pœna multiplex ut infra de restitutione damnorum: Est enim personalis quia persequitur eum, qui fecit disseisinam propter factum quia ipse fecit; persequitur etiam eum ad pœnam propter injuriam; persequitur etiam rem quoad restitutionem et in hoc est rei persecutoria."....." Acquiritur vero per assisam istam non solum ipsa res spoliata corporalis verum etiam omnes fructus medio tempore percepti cui competit querela. Item non solum ipsa res sed in ipsa re pax et quies. Item non solum pax et quies in proprio, sed libertas et perturbationis evacuatio, de quibus mentio facta est in principio." (*Lib.* IV. *De assisa novæ disseysinæ. Cap.* VI.)

Nearly the same thing is to be found in *Fleta;* take the following citations:—"Et quo casu, si talis intrusor teneat se in possessione ejici poterit impunè vel donator per assisam novæ disseisinæ seisinam suam recuperabit." *Fleta, Lib.* III. *Cap.* 15.

"Domino vero proprietatis competit remedium versus ejectorem per assisam novæ disseisinæ et perinde recuperabit tenementum dampnâ vero minimè." (*Id. L.* IV. *C.* 31.)

And *Brooke* also, in his abridgment, is equally explicit. "Nota (says he) per ascun justices et sergeants, si disseysor fait feoffment, le disseysie reenter il recouvera son dammages per severals briefes de trespass tam vers les feoffees come vers le disseysor et in assyse de rent le playntife recovera tout son dammages vers le tenaunt pour xx. ans co-

ment que il nad estre tenaunt mes per un moys. 33 Hen. VI. 46." (*Bro. Abridg. part* I. *fo* 202. § 13. *tit. Damages.*)

The extent to which the principle is carried in this place, is warranted by the statute 6 Edw. I. commonly called the statute of Gloucester, which enacts, (among other things,) "that the disseisee shall recover damages in a writ of entry upon novel disseisin, against him that is found tenant after the disseisin." (*Vide Plowden*, 204.) The statute of Marlbridge, 52 Hen. III. c. 16. had before given damages in a writ of mort auncester against the chief lord.

It is also laid down in Brooke's Abridgment, "that if a man disseise me and enfeoff persons unknown, and then retake an estate to himself and ten others, and only two of these ten take the profits, the disseisee shall have an assise against the disseisor, and not against the ten feoffees, for the profits; and it shall be no good plea for the disseisor in this case to say, that he received nothing of the rents with the ten others." (See also, folio 121. b. § 22. Part II. tit. *Pernor de profits et rents;* and titles *Assise. Disseisor and Disseisin. Trespass.*)

Lord Coke says, that "in actions where dammages are to be recovered, and the land is the principall," (some hold the opinion,) that "the demandant never counteth to dammages, and yet shall recover them." "Others doe hold the contrarie." (*Co. Litt.* 356 *a.*) And in Mr. Butler's note upon this passage, he says, that "Sir Edward Coke, in his commentary upon the statute of Gloucester, 2 *Inst.* 286., observes, that regularly in personal and mixed actions, damages were to be recovered at common law; but that in *real* actions NO *damages were* to be recovered at the common law, because the Court could not give the demandant that which he demanded not; and the demandant in real actions demands no damages, either by writ or count. The assise was a mixed action, and, therefore, if upon the trial the demandant made out his title, his seisin, and his disseisin, by the tenant, he had judgment to recover his seisin, and his damages for the injury sustained." *Co. Litt.* 355 *b.* Note (1.)

It thus appears, that, by the old law, damages were formerly recovered by the demandant in a writ of *assise.* But by the modern law, "the action for *mesne profits* is consequential to the recovery in ejectment." (Per Lord Mansfield, 2 *Burrow*, 668.) Undoubtedly, the substitution of the modern action of ejectment, for the *assise* and the ancient action of ejectment, has produced this change.

In the case of *Goodtitle* v. *Tombs*, (3 *Wils. Rep.* 120.) Lord Chief Justice Wilmot says, "Before the time of Henry VII. plaintiffs in ejectment did not recover the term, but, until about that time, the *mesne profits* were *the measure of damages.* I brush out of my mind all fiction

in an ejectment, the nominal plaintiff, and nominal defendant, the casual ejector—the *dramatis personæ*, or *actores fabulæ*, and consider the recovery by default, or after verdict, as the same thing, viz. a recovery by the lessor of the plaintiff of his term against the tenant in the actual wrongful possession of the land. By the old law of practice, in an action of ejectment, (as I said before,) you recovered nothing but damages—the measure whereof was the *mesne profits:* no term was recovered. But when it became established that the term should be recovered, the ejectment was licked into the form of a real action; the proceeding was *in rem*, and the thing itself—the term only, was recovered, and nominal damages, but not the mesne profits; whereupon, this other mode of recovering the mesne profits, in an action of trespass, was introduced, and granted upon the present fiction of ejectment; and, I take it, that the present action is put in the place of the ejectment at common law, which was, indeed, a true and not a fictitious action, in which the *mesne profits* only, and not the term, were recovered; for it was no other than a mere action of trespass. You have turned me out of possession, and kept me out ever since the demise laid in the declaration; therefore, I desire to be paid the damages to the value of the mesne profits, which I lost thereby; this is just and reasonable." (3 *Wilson's Rep.* 120. See, also, 2 *Dunlap's Practice*, 973, 974. 1068, 1069.)

Both in the English practice, and that of the United States, the plaintiff who recovers judgment in ejectment, is entitled to his action for the rents and profits received by the defendant anterior to the time of the demise laid in the ejectment. (3 *Bl. Com.* 205. *Adams' Eject.* 329. 2 *Dunlap's Prac.* 1070.) And the statute of limitations is a bar to a recovery of the rents and profits received beyond six years before the bringing the action. (*Bull. N. P.* 88. Hare v. Furey, 3 *Yeates' Rep.* 13.)

In Van Alen v. Rogers, (1 *Johns. Cas.* 281.) it was determined by the Supreme Court of New-York, that if the tenant has made buildings and other improvements, antecedent to the time when the plaintiff's title accrued, under a contract with the then owner, he will not be allowed for them in an action for the mesne profits, brought by a devisee, but must seek his compensation from the personal representatives of the devisor. In the case of Murray v. Gouverneur, (2 *Johns. Cas.* 441.) it is said, by Mr. Justice Kent, that the action for mesne profits is an equitable action, and will allow of every kind of equitable defence; and that a *bonæ fidei* purchaser, without notice, may set off the value of repairs made upon a house, against the amount of the rents and profits.

It is observed by Mr. Adams, in his valuable treatise on the action of

ejectment, that it has been said by some, that the plaintiff is entitled to recover the mesne profits only from the time he can prove himself to have been in possession; and that, therefore, if a man make his will and die, the devisee will not be entitled to the profits until he has made an actual entry, or, in other words, until the day of the demise in ejectment; for that none can have an action for mesne profits, unless in case of actual entry and possession. Others have held, that when once an entry has been made, it will have relation to the time the title accrued, so as to entitle the claimant to recover the mesne profits from that time; and they say, that if the law were not so, the Courts would never have suffered plaintiffs in ejectments to lay their demises back in the manner they now do, and by that means entitle themselves to recover profits, to which they would not otherwise be entitled. The latter seems the better opinion; but these antecedent profits are now seldom the subject of litigation, from the practice of laying the demise and ouster immediately after the time when the lessor's title accrues." (*Adams' Eject.* 334, 335.)

Where a fine, with proclamations, has been levied, an entry to avoid it will not, in the action for mesne profits, entitle the plaintiff to the profits between the time of the fine levied, and the time of the entry, although they probably may be recovered in a Court of equity. (*Compere* v. *Hicks*, 7 *Term Rep.* 723. *Dormer* v. *Fortescue*, 3 *Atk.* 124.)

And this conducts us from the decisions of the Courts of law to those of equity. In the case of *Dormer* v. *Fortescue*, referred to in the text, it was decreed, that "the defendants should account with the lessor of the plaintiff, Dormer, for all the rents and profits of the estates, from the time when *his title first accrued.*" "I am well satisfied," says Lord Chancellor Hardwicke, "in my opinion upon this case, and that the plaintiff is entitled to the rents from the accrual of his title, and that in this Court he has a right to demand them." * * * "There are several cases where this Court will do it," (*i. e.* decree an account of rents and profits,) "and several where they will not: but I can by no means admit the latitude in the anonymous case in 1 *Vernon*, 105., or, rather, in that *note of a case.*"[1] "For if a man brings an ejectment bill for possession, and an account of rents and profits, where there is no mixture of equity, the Court will oblige the plaintiff to make his election to proceed here or at law, and if at law, he must proceed for the whole there." * * "But,

(1) "Where a man is put to his election, whether to proceed at law or in this Court, if the bill be for the land, and to have an account of the mesne profits, he may elect to proceed in an ejectment at law for the possession, and in equity upon the account, because at law he can recover damages for mesne profits from the time only of the entry laid in the declaration." (1 *Vern.* 105.)

as I said before, there are several cases where this Court does decree an account of rents and profits, and that from the time the title accrued." * * * In this case, it appears, that the settlement under which the plaintiff's title arose was in the hands of the defendants, and detained by them, though I do not say it was fraudulently obtained, but still the plaintiffs could not come at it, without the assistance of this Court. The plaintiff, it is true, brought his ejectment before he brought his bill here, and from hence the defendant's counsel have inferred, that he knew his title: but how did he know it? Why, only by guess; for it is plain, the plaintiff did not so much as know there was this two hundred years' term standing out, for the deed, by which it was created, is not so much as mentioned in the bill, and he only knew it by its being read in the cause." (3 *Atk.* 124.)

This case affords us also some assistance upon the nature of a *bona fide* possession, which has been already discussed in the former part of this note.

"It is objected," said Lord Hardwicke, "that where a man is *bonæ fidei possessor*, he shall not account according to the rule of the civil law: and the rule of this Court, and the civil law, is stronger in this respect than the law of *England*."

"But where a man shall be said to be *bonæ fidei possessor*, is where the person possessing is *ignorant of all the facts and circumstances relating to his adversary's title*."

This last interpretation confines the case of *bonæ fidei possessor* within very narrow limits; and wherever there *be colour of dispute* as to one's title to land, even from the time the title accrues, the tenant must be considered, according to Lord Hardwicke, as a *malæ fidei possessor*.

NOTE II.

To the case of HUGHES *v.* MARYLAND INSURANCE COMPANY, *ante, p.* 311.

WASHINGTON, J. The question, in this case, is, whether the action is maintainable. The objection to the action of debt, where the penalty is uncertain, is, that this action can only be brought to recover a specific sum of money, the amount of which is ascertained. It is said, that the very sum demanded must be proved; and on a demand for thirty pounds, you can no more recover twenty pounds, than you can a horse, on a de-

mand for a cow. Blackstone says,[1] that debt, in its legal acceptation, is a sum of money due, by certain and express agreement, where the quantity is fixed, and does not depend on any subsequent valuation to settle it; and for non-payment, the proper remedy is the action of debt, to recover the specific sum due. So, if I verbally agree to pay a certain price for certain goods, and fail in the performance, this action lies; for this is a *determinate contract.* But if I agree for no settled price, debt will not lie, but only a special action on the case; and this action is now generally brought, except in cases of contracts under seal, in preference to the action of debt; because, in this latter action, the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined, and which, if the proof varies from the claim, cannot be looked upon as the same contract of which performance is demanded. If I sue for thirty pounds, I am not at liberty to prove a debt of twenty pounds, and recover a verdict thereon; for I fail in the proof of that contract which my action has alleged to be specific and determinate. But *indebitatus assumpsit* is not brought to compel a specific performance of the contract, but is to recover damages for its non-performance; and the damages being indeterminate, will adapt themselves to the truth of the case, as it may be proved; for if any debt be proved, it is sufficient.

The doctrine laid down by this writer, appears to be much too general and unqualified, although, to a certain extent, it is unquestionably correct. Debt is certainly a sum of money due by contract, and it most frequently is due by a certain and express agreement, which also fixes the sum, independent of any extrinsic circumstances. But, it is not essential, that the contract should be express, or that it should fix the precise amount of the sum to be paid. Debt may arise on an implied contract, as for the balance of an account stated, to recover back money which a bailiff has paid more than he had received, and in a variety of other cases, where the law, by implication, raises a contract to pay.[2] The sum may not be fixed by the contract, but may depend upon something extrinsic, which may be averred, as a promise to pay so much money as plaintiff shall expend in repairing a ship, may be sued in this form of action, the plaintiff averring that he did expend a certain sum.[3] So, on promise by defendant to pay his proportion of the expenses of defending a suit, in which defendant was interested, with an averment that plaintiff had expended so much, and that defendant's proportion amounted to so much.[4]

(1) 3 *Black. Com.* 154.
(2) 3 *Com. Dig.* 365.
(3) 2 *Bac.* 20.
(4) 3 *Levy*, 429.

So, an action of debt may be brought for goods sold to defendant, for so much as they were worth.[1] So, debt will lie for use and occupation, where there is only an implied contract, and no precise sum agreed upon.[2]

Wooddeson, 3d vol. 95., states, that debt will lie for an indeterminate demand, which may readily be reduced to a certainty. In Emery v. Fell, (2 *Term Rep.* 28.) in which there was a declaration in debt, containing a number of counts for goods sold and delivered, work and labour, money laid out and expended, and money had and received; the Court, on a special *demurrer*, sustained the action, although it was objected, that it did not appear that the demand was certain, and because no contract of sale was stated in the declaration. But the Court took no notice of the first objection, and avoided the second, by implying a contract of sale, from the words which stated a sale. These cases prove, that debt may be maintained upon an implied as well as upon an express contract, although no precise sum is agreed upon. But the doctrine stated by Lord Mansfield, in the case of Walker v. Witter, (*Douglass*, 6.) is conclusive upon this point. He lays it down, that debt may be brought for a sum capable of being ascertained, though not ascertained at the time the action was brought. Ashurst and Buller say, that whenever *indebitatus assumpsit* is maintainable, debt is also. In this case two points were also made by the defendant's counsel; first, that on the plea of *nil debet* the plaintiff could not have judgment, because debt could not be maintained on a foreign judgment; and, secondly, that on the plea of *nul tiel record*, judgment could not be entered for the plaintiff, because the judgment in Jamaica was not on record. The Court were in favour of the defendant on the second point, and against him in the first, by deciding, that debt could not be maintained on a foreign judgment, because *indebitatus assumpsit* might; and that the uncertainty of the debt demanded in the declaration, was no objection to the bringing of an action of debt. The decision, therefore, given upon that point, was upon the very point on which the cause turned. But, independent of the opinion given in this case, is it not true, to use the words of Buller, "that all the old cases show, that whenever *indebitatus assumpsit* is maintainable, debt also lies." The subject is very satisfactorily explained by Lord Loughborough, in the case of Rudder v. Price,[3] which was an action of debt, brought on a promissory note, payable by instalments, before the last day of payment was past, in which the Court, yielding to the weight of authority, rather than to the reason which governed it, decided, that the action could not be supported, because, the contract being entire, would

(1) 2 *Com. Dig.* 365. (2) 6 *Term Rep.* 63. (3) 1 *H. Black.* 550.

admit of but one action, which could not be brought until the last payment had become due, although *indebitatus assumpsit* might have been brought. But his lordship was led to inquire into the ancient forms of action on contracts, and he states, that in ancient times, debt was the common action for goods sold, and for work and labour done. Where *assumpsit* was brought, it was not a general *indebitatus assumpsit;* for it was not brought merely on a promise, but a special damage for a nonfeasance, by which a special action arose to the plaintiff. The action of *assumpsit*, to recover general damages for the non-performance of a contract, was first introduced by Slade's case, which course was afterwards followed. In the case of Walker v. Witter, Buller, also, stated, that till Slade's[1] case, a notion prevailed, that on a simple contract for a certain sum, the action must be debt; but it was held, in that case, that the plaintiff might bring *assumpsit* or debt, at his election.

Thus it appears, that in all cases of contracts, unless a special damage was stated, the primitive action was debt, and that the action of *indebitatus assumpsit* succeeded, principally, I presume, to avoid the wager of law, which, in Slade's case, was one of the main arguments urged by the defendant's counsel against allowing the introduction of the action of *assumpsit*, as it thereby deprived the defendant of his privilege of wagering his law. Buller seems, therefore, to have been well warranted, in the case of Walker v. Witter, in saying, that all the old cases show, that where *indebitatus assumpsit* will lie, debt will lie. The same doctrine is supported by the case of Emery v. Fell,[2] which was an action of debt, in which all the counts of *indebitatus assumpsit* are stated, where the objection to the doctrine was made and overruled. So, in the case of Harris v. Jameson,[3] Ashurst refers, with approbation, to the opinion delivered in the case of Walker v. Witter. That debt may be brought for foreign money, the value of which the jury are to find, had been decided before the case of Walker v. Witter, as appears by the case of Rands v. Peck;[4] and in Draper v. Rastal, the same action was brought, though in different ways, for current money, being the value of the foreign.

Comyns, in his *Digest*, tit. *Debt*, p. 366. where he enumerates the cases in which debt will not lie, states no exception to the rule, that where *indebitatus assumpsit* will lie, debt will lie, but one, for the interest of money due upon a loan. But the reason of that is explained by Lord Loughborough, in the case of Rudder v. Price, who states, that until the case of Cook v. Whorwood, upon a covenant to pay a stipulated sum by instal-

(1) *T.* 44 *Eliz.* 4 *Co.* 92 *b.*
(2) 2 *Term Rep.* 30.
(3) 5 *Term Rep.* 557.
(4) *Cro. Jac.* 618.

ments, if the plaintiff brought *assumpsit*, after the first failure, he was entitled to recover the whole sum in damages, because he could not, in that form of action, any more than in the action of debt, support two actions on an entire contract. Until that decision, the only difference between debt and *assumpsit*, in such a case, was, that the former could not be brought until after the last instalment was due; and, in the latter, though it might be brought after the first failure, yet the plaintiff might recover the whole, because he could not maintain a second action on the same contract.

I proceed with the doctrine of Judge Blackstone, before stated. After stating what constitutes debt, he observes, "that the remedy is an action of debt, to recover the special sum *due*." It is observable, that he does not say that the plaintiff is to recover the sum *demanded* by his declaration, and no person will deny but that he is to recover the special sum due.

After stating what constitutes a debt, and prescribing the remedy, Judge Blackstone proceeds to the evidence and recovery, and says, "the plaintiff must prove the whole debt he claims, or he can recover nothing." On this account he adds, "the action of *assumpsit* is most commonly brought; because, in that, it is sufficient if the plaintiff prove any debt to be due, to enable him to recover the sum, so proved, in damages." If this writer merely means to say, that where a special contract is laid in the declaration, it must be proved as laid, the doctrine will not be controverted. If debt be brought on a written agreement, the contract produced in evidence must correspond, in all respects, with that stated in the declaration, and any variance will be fatal to the plaintiff's recovery. Such, too, is the law in all special actions in the case; but if Judge Blackstone meant to say, that in every case where debt is brought on a simple contract, the plaintiff must prove the whole debt as claimed by the declaration, or that he can recover nothing, he is opposed by every decision, ancient and modern. The old cases, before mentioned, in which debt was brought and sustained, are all cases where it is impossible to suppose that the sum stated in the declaration was or could in every instance be proved, any more than it is or can be proved in actions of *indebitatus assumpsit*. They are, in fact, actions substantially like to actions of *indebitatus assumpsit* in the form of action for debt. The action of debt for foreign money, is and can be for no determinate sum; because the value must be found by the jury, either upon the trial of the issue, or upon a writ of inquiry, where there is judgment by default.[1]

(1) *Randall's Peake.*

The case of Sanders v. Mark, is debt for an uncertain sum, in which the debt claimed was for fifteen pounds eighteen shillings and sixpence, and the defendant's proportion of the whole sum was averred to be fifteen pounds eighteen shillings and eightpence; yet the action was supported. This is plainly a case, where the sum due could not be certainly averred; because the yearly value of the defendant's property might not be known to the plaintiff, and could only be ascertained, with certainty, by the jury. In the case of Walker v. Witter, Lord Mansfield is express upon this point. He says, that debt may be brought for a sum capable of being ascertained, though not ascertained at the time of bringing the action; and he adds, that it is not necessary that the plaintiff should recover the exact sum demanded. In the case of Rudder v. Price, Lord Loughborough, who has shed more light upon this subject than any other Judge, says: "that long before Slade's case, the demand in an action of debt must have been for a thing certain in its nature; yet, it was by no means necessary, that the amount should be set out so precisely, that less could not be recovered."

In short, if, before Slade's case, debt was the common action for goods sold, and work done; it is more obvious, that it was not thought necessary to state the amount due, with such precision, as that less could not be recovered; for, in those cases, as the same Judge observes, "the sum due was to be ascertained by a jury, and was given in the form of damages." But yet the demand was for a thing certain in its nature; that is, it was capable of being ascertained, though not ascertained, or perhaps capable of being so, when the action was brought. Whence the opinion arose, that in an action of debt on a *simple contract*, the whole sum must be proved, I cannot ascertain. It certainly was not, and could not be the doctrine prior to Slade's case; and it is clear, that it was not countenanced by that case. However, let the opinion have originated how it might, Lord Loughborough, in the above case, denominates it an erroneous opinion, and says, that it has been some time since corrected.

In the case of M'Quillen v. Coxe, the sum demanded was five thousand pounds; which was fifty more than appeared to be due by the different sums. The objection was made on a special *demurrer*, that the declaration demanded more than appeared by the plaintiff's own showing to be due. The Court did not notice the alleged variance between the writ and declaration, or the misrecital of the writ; but overruled the *demurrer*, because the plaintiff might, in an action of debt on a simple contract, prove and recover a less sum than he demanded in the writ.

From this last expression it might be supposed, that the Court meant

to distinguish between the sum demanded by the writ, and that demanded by the declaration; but this could not have been the case, because the sum demanded by the writ, and that demanded by the declaration, was the same, viz. five thousand pounds. There was, in fact, no variance; for, though the declaration recites the writ, yet the sum demanded, and which the declaration declared to be the sum which the defendant owed and detained, was the same sum as that mentioned in the writ; and the objection stated in the special *demurrer*, was made to the variance, between the sum demanded by the declaration, and the sum alleged to be due.

The distinction taken in the case of Ingledon v. Cripps,[1] runs through all the above cases, and appears to be perfectly rational; viz. that where debt is brought on a *covenant*, to pay a sum certain, any variance of the sum in the deed will vitiate. But, where the deed relates to matter of fact extrinsic, there, though the plaintiff demanded more than is due, he may enter a *remitter* for the balance. This shows, that debt may be brought for more than is due, and that the jury may give less; or, if they give more than is due, the error may be corrected by a *remitter*.

Thus stands the doctrine in relation to the action of debt on contracts; and if debt will lie on a contract, where the sum demanded is uncertain, it would seem to follow, that it would lie for a penalty given by statute, which is uncertain, and dependent upon the amount to be assessed by a jury; for, when they have assessed it, the sum so fixed becomes the amount of the penalty given. This, however, stands upon stronger ground than mere analogy. The point is expressly decided in the case of Pemberton v. Shelton.[2] That was an action of debt, brought upon the first section of the statute, 2 Ed. VI. ch. 13., which gives the treble value of the tithes due, for not setting them out. The declaration claimed thirty-three pounds, as the treble value; and, in setting forth the value of the tithes, the whole amount appeared to be more than one third of the sum demanded; so that the plaintiff claimed less than the penalty given by the statute. Upon *nil debet* pleaded, the jury found for the plaintiff twenty pounds, and a motion was made in arrest of judgment, for the reason above mentioned. The Court overruled the motion, upon the ground afterwards laid down in the case of Ingledon *v.* Cripps. They held, that there was a difference when the action of debt is grounded on a specialty, or contract, which is a sum uncertain: or upon a statute, which gives a certain sum for the penalty; and where it is grounded on a demand, when the sum is uncertain, being such

(1) 2 *Lord Raym.* 815. *Salk.* 659. (2) *Crooke James*, 498.

as shall be given by the jury. In the former, it was agreed, that the plaintiff cannot demand less than the sum agreed to be paid or given by the statute; but in the latter, it is said, that if the declaration varies from the real sum, it is not material; for he shall not recover according to his *demand in the declaration*, but according to the verdict and judgment, which may be given for the plaintiff. It cannot be said, that this doctrine was laid down in consequence of the Court considering this as a statutory action, to which it was necessary to accommodate the recovery, by changing general principles of law applicable to other cases; for it will appear, by a reference to the statute, that it prescribes no remedy for enforcing the penalty; and that debt was brought upon the common law principle, that where a statute gives a penalty, debt may be brought to recover it. In this case, the statute gives the action of debt, and I cannot perceive in what other form, than this one which has been adopted, the declaration could have been drawn. Had it claimed the smallest sum, it might have been less than the jury might have thought the United States entitled to recover; and yet, judgment could not have been given for more. I know of no precedent for a declaration in debt, claiming no precise sum to be due and detained, nor any principle of law, which would sanction such a form. On the other hand, I find abundant authority for saying, that the demand of one sum does not prevent the recovery of a smaller sum, where it is diminished by extrinsic circumstances.