PINNOCK et UX. *verſus* DICKSON, *per* Guardian, *September* 16.

RULE *niſi* to quaſh proceedings in partition. There were four reaſons filed:

1*ſt*, That the works are not divided, but aſſigned in entirety.

2*d*, That a *groſs ſum* of L. 2500 has been awarded for *owelty* of the works and buildings, and charged on the *perſon* of *Mary Dickſon*, to be paid by her guardian.

3*d*, That the partition of the land hath not been equally made.

4*th*, That the Jury did not act impartially.

Many very long affidavits were read on both ſides. The ſum of them as to the eſſential point, was, that on the ſuggeſtion of Mr *Pinnock*, the Jury propoſed, as the works and other buildings could not be beneficially divided, that they ſhould be ſeparately valued; that one of the parties ſhould take them, the choice to be determined by toſſing up a dollar; that the party to whoſe lot the works fell, ſhould pay the other a moiety of the value in money, or give bonds agreeably to the terms ſtipulated. Mr *Dickſon* at firſt heſitated, but afterwards fully and expreſsly acquieſced; the choice turning up for Mr *Pinnock*, he declared the works to be Mr *Dickſon's*. Bonds were filled up according to the agreement, but Mr *Dickſon* went away without executing them, and refuſed to do it. The other point was, that more and better cane-land was given to the plaintiffs than to the defendant; but for the difference, compenſation was made in the partition of the paſture-land.

Mr ATTORNEY-GENERAL, for the defendant. He maintained, that a *ſum* in *groſs* cannot be awarded for *owelty* on partition; that if any caſes to the contrary be ſhown, it muſt be from caſes in the Court of Chancery, which ought not to be received as authority *here*, becauſe there the partition is by commiſſion, which is *not final*; and an *infant*, on coming of age, may reject it, and afterwards have a writ at law, *F. N. B.* 62 *H*; *Co. Lit.* 171. *b. Lit.* ſec. 248; 3 *Rep.* 22. *b.*; *Co. Lit.* 174. *a.* ſec. 262; *Ibid.* 169. *b. Lit.* ſec. 251. 252; *Vin. vol.* 16. 223. The quieting poſſeſſion law of *Jamaica* would make the infant's *perſon* liable if evicted after lapſe of ſeven years.

Mr FRASER, *contrà*, argued That ſeveral things are in their nature impartible; and that, though in ſuch caſes the uſe in *England* is alternate, yet that, in the inſtance of a ſugar-work, it is impracticable, *Co. Lit.* 164; that compenſation in land, the whole quantity being ſmall, would be very inconvenient; that the law is much

much changed and liberalized ſince *Coke* wrote; and the mode of partition in Chancery now differs from what it was anciently, 1 *Pere Wms* 446. *Bligh* and *Hornſby*; 2 *Ver.* 233; that in this country there are ſeveral precedents of money given for *owelty*, *Bonner* verſus *Cook*; *Cuſſans* and *Gregory*; *Bonynge*, per guardian, verſus *Hepburn*; *Tate* verſus *Creighton*.

Mr HARRISON, ſame ſide, ſaid that the defendant, having acquieſced, ought to be bound; at leaſt, that he himſelf ſhould pay coſts, not the infant; that a groſs ſum for *owelty*, is not forbidden by the law; and that the local circumſtances of the country make it expedient, which ſhould weigh a great deal. To ſhow that an enlarged ſpirit of determination now prevails at home, eſpecially as to appeals from this country and other colonies, he inſtanced the caſe of *Woolbridge* and *Balmer*, at the *Cockpit*; that an infant is bound by the acts of his guardian, for his benefit; that courts of law, and courts of equity, determine the ſame matters on the ſame principle, *Equitas ſequitur legem*. If a Chancellor admits a *pecuniary owelty*, why ſhould not a Judge do ſo likewiſe? In a marginal note in *F. N. B.* 62. it is ſaid, that a partition by commiſſion can be ſet aſide only by a *ſci. fa.* not by a *writ*; *Harg. Co. Lit. ſub voce*; that though the decree be *niſi* againſt an *infant* on partition by commiſſion, yet he would not be at liberty to call it in queſtion when of age; and if partition by *writ* were ſued out for that end, an injunction would be granted. Should the defendant be evicted, 3 *Rep.* 22. ſhe may, for *owelty*, come on the land contained in the ſame writ with the works.

Mr PINNOCK, ſame ſide, cited *Lit.* ſec. 257. to ſhow that partition binds a *feme couverte*. In the caſe of *Bonynge* and *Hepburn*, there was owelty in money; 16 *Vin.* 223. Lands are to be allotted, as moſt convenient to parties. It has been ſo done here. In caſe of eviction, the danger is to the plaintiff; for the defendant may enter on the plaintiff's land. He ſaid that judgment may be had againſt an *infant*-heir, on the father's bond, the execution being *in rem*, as well as *in perſonam*; therefore, if the partition be eſtabliſhed, an action may be brought for the owelty, to affect the ſlaves; and that failing, to extend the land.

Mr BROWNE, on the ſame ſide, laboured the point much. 16 *Vin.* 219. Partition may be had of a mill, but it cannot be *ſevered*; ~~al~~ alternate ~~though~~ uſe, for the proceſs of making ſugar, impoſſible. *Co. Lit.* 169. *b.* There may be rent for owelty out of other lands than thoſe deſcended. 1 *P. Wms* 146. A houſe and park ſhall not be divided, ſo as to leſſen their value. The Jury offered to give the works and a ſmall portion of the land to the other. It was *Dickſon's* agreement that prevented this, which would have been valid. 1 *Atk.* 542; 3 *Atk.* 13. *King* verſus *Williams*, To ſhow that law is accommodated to local circumſtances.

Mr BROWNE reſumed the argument on the 17th. In the caſe of *Gregory* and *Cuſſans*, owelty in money is recognized by the *Legiſlature*; 6 *Rep.* 46; *Hob.* 179. On eviction, he ſaid the infant would have an action for money had and received. He concluded by ſaying,

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to one of the greater part of the land

ſaying, That if this partition be not eſtabliſhed, *writs* of *error*, will be brought in all caſes where a *pecuniary owelty* has been allowed, and thereby many titles diſturbed; and that Jurors would be alarmed, and refuſe to attend on future partitions.

Mr ATTORNEY-GENERAL replied, That the partition of works is not impracticable, or unknown; it was done in *Lawrence* and *Lawrence, Harvey* and *Donaldſon*, and in ſome of the other caſes cited. The Jury were not authoriſed to ſay that a party ſhall *buy* the works at a certain price. *Sci. fa.* is on the law ſide of the Court of Chancery, and if it may ſet aſide a partition on that ſide, *a fortiori* a commiſſion on the Eq. ſide. A commiſſion operates only in the *perſon*; you may ſequeſter, but cannot *divide* the land, if the party ſtands out. To ſhow the hardſhip and injuſtice of what is ſought, he ſtated, That ſhould the *infant* die under age, the money for owelty, if now paid, would go, together with the inheritance, to the plaintiff Mrs *Pinnock*, who is her co-tenant and heir at law; and thereby the father, who is entitled to the money, as the perſonal eſtate of his child, would loſe it; that ſuch an order cannot be made by this COURT, or any other.

Mr BAKER, on the ſame ſide, That owelty can be only of things deſcendible, and that *money* cannot go to heirs.

*N. B.* I have omitted Mr RICKETT's argument for the plaintiffs, in its regular place, next to Mr FRASER's.

He urged, That there is no caſe which ſhows that a ſum *in groſs* may not be given ~~in~~ *for* owelty; that rent may be for owelty, though rent is not mentioned in 31 *H.* VIII. Where partition is *unequal*, an *infant* may defeat it; *Co. Lit.* 171. *Dower* relates to land as much as partition, yet, *Buller* 115. damages are given againſt an *infant-heir*, for non-aſſignment of dower; 1 *Black. Rep.* 356. where the aſſignment of a mortgage by a *minor* was held good. Awards againſt infants, in regard to their land, have been ſuſtained; 3 *Atk.* 614. 2 *Vern.* 233. A parole partition was ſupported, and that too in the caſe of an entail. *Cuſſans* and *Gregory*, *Bonynge* and *Hepburn*, are caſes where money was given for owelty.

The opinion of the COURT was given to the following effect: We are ſtrongly inclined to ſupport thoſe proceedings, as the conduct of the Jury was regulated by an impartial and laudable attention to the intereſt of the parties, and becauſe they are founded on the conſent and agreement of Mr *Dickſon*, who, it muſt be owned, receded from them with a very bad grace. We do not, however, ſit here to ſettle points of honour, but to determine according to law. No *legal* authority has been ſhown to warrant an owelty of partition, by a ſum of money in groſs. The caſes in this country are aſtoniſhingly contradictory among themſelves. There are two, *Bonynge*, per *Guardian*, verſus *Hepburn*, in which, though the *works* and plantation utenſils were *divided*, there was alſo an *owelty* of L. 100 on the *works*, and of L. 28 on the ſlaves,

both payable by the *guardian* of the *infant*. In that of *Bonner* verſus *Cook*, there was an *owelty* of L. 1415; in *Woolhead* and *Mathews*, an *owelty* (though rather a ſale of a boy) of L. 55; in the caſe of *Harvey* verſus *Donaldſon*, the works were divided even in ſixths. Indeed, in many inſtances, works have been *divided*, which no doubt is inconvenient; but, after this, it is in vain to talk of it as an *impoſſibility*. It might, and indeed it would have been done in the preſent caſe; or, which would likewiſe have been regular, the Jury would have given the works, and a ſmaller quantity of land to one, and a greater portion of the land to the other, had they not been prevented by the acquieſcence of the defendant's guardian to the mode propoſed.

With reſpect to the caſes from Chancery writers, there is *one* anſwer to them *all*, That partitions under commiſſion are not *final*, at leaſt as to *infants*; whereas, at *common law*, as laid down by Lord *Coke*, they certainly are; *Co. Lit.* 171. *b. et paſſim.* In the caſe of *Bligh* et al. verſus *Hornſby*, 1 *Pere Wms* 446. Lord PARKER only *recommends*, that ſuch a partition may be made as not to leſſen the value of an elegant houſe, and the improvements round it. 1 *Vern.* 133. Partition, and a ſum in groſs for owelty, was by conſent; indeed it was not properly a ſum in groſs, becauſe it accrued by a rent of L. 20 a-year, *iſſuing* out of the *land*, for arrears of which a bond had been given, and payment of it was decreed to the executor. 2 *Vern.* 233. A partition is only mentioned in the caſe of an entail; but in the principal caſe, poſſeſſion was only *quieted* till the *infant* ſhould attain *his age*. There is a caſe in 2 *Pere Wms* 518. Lord *Brook* verſus Lord and Lady *Hartford*, not cited at the bar, where, on partition by commiſſion, it was decreed, that the conveyance from the truſtees ſhould be reſpited till the *plaintiff be of age*. 1 *Atk.* 154. Partition by agreement, according to which one of the parties was to pay the annual taxes; but ſome diſpute ariſing, a bill was brought to confirm the diviſion, and to reſtrain partition at law. The Court of Chancery always compels the performance of juſt agreements. 13 *Atk.* 13. goes only as to what is realty and what is perſonalty between an executor and an heir, and is not to the preſent purpoſe. So much for the Chancery caſes. Mr RICKETTS cited *Buller* 115. where, in dower, damages were given againſt an *infant*; but that was for arrears between the death of the huſband, and the time when the dower was aſſigned; and, as Mr ATTORNEY-GENERAL ſaid in his reply, is, by the ſtatute of *Merton*. 1 *Blac. Rep.* 576. cited alſo by Mr RICKETTS, is a caſe in which the deed of an infant was held good; but it was an aſſignment of a *mortgage*, as executor, in which he was joined by the executrix, and the circumſtances were very ſpecial; beſides, an executor, though under age, may do many things; *Co. Lit.* 172.

We have been much preſſed on the ground of the liberal ſpirit that predominates in modern deciſions in *England*, but we muſt not ſuffer ourſelves to be flattered into a belief that it is expedient for us to entrench on the ſtrict rules of the common law, on principles

ciples of abſtract juſtice, like the great Judges in Weſtminſter-hall. We do not poſſeſs their opportunities, their learning, nor their pre-eminent genius. So far as they have liberalized the law, when we find it in good reports, we are inclined to receive their authority; but to extend the principle, would be wild work. On whom can we more depend for the law, than on Lord *Coke*, where he ſtands uncontradicted? *Co. Lit.* 171. *b.* 'An unequal 'partition in the Chancery ſhall not bind an *infant*; but a par-'tition made by the King's writ, *de partitione facienda*, by the 'Sheriff, on the oaths of 12 men, ſhall bind the *infant*, though 'his part be *unequal*;' and therefore it is, that *Lit.* gives the *caveat*, ſec. 259. to the party; and ſurely it is incumbent on the COURT to take heed, that in an act which binds an *infant*, he ſhall not be prejudiced. Mr BROWNE has dwelt much on *Coke's* comment on the words, 'Iſuant hors de meſme le meaſe,' *&c. Lit.* ſec. 251. where he ſays, that rent for owelty *may* be granted out of other lands than thoſe deſcended to the parceners; but how? by deed. This, however, can be only where the parties are *adult*; for certainly the infant cannot execute a valid bond, neither can the guardian for her. In rents iſſuing out of lands, there may doubtleſs be an inheritance; and it ſhould ſeem, on principles of reaſon, that as it may be equivalent to the land itſelf, in lieu of which it is granted, nothing but what is ſo, can be deemed a legal owelty. And indeed, where parceners are of *age*, they may ſell the whole, or a part of their moiety, the one to the other. Nay, they may even ſell it for a ſum in groſs, which is an anſwer to what has been ſaid of the caſes in this country; but though, on partition, it may be called owelty, it is in ſtrictneſs a ſale. So was the caſe of *Woolhead* and *Mathews*, already noticed. But then the parties muſt be *of age*, and it *muſt* be by AGREEMENT. In the preſent caſe, however, the Jury have erred; with a good intention, it is true, but they have exceeded their authority; they have gone beyond the *exigente of the writ*, which was to make partition 'in duas partes equales.' The guardian, indeed, made an agreement, but it is not binding. It would have been more to his credit, it muſt be ſaid, to have oppoſed the meaſure taken in regard to the works, than to forego his agreement. Perhaps he had ill adviſers. Certainly not the Counſel, who has ſo ably defended him on this argument.

*Rule made abſolute.*