This deed recited, that Jones [53] had agreed to convey the premises to Pritchard the intestate, free from incumbrances; and, by the same deed, Jones afterwards conveyed the same to the intestate in fee simple. The second mortgage had since been paid off.

Lord Ellenborough.—If the first mortgage had not been paid, it would have been noticed in the deed: this is so conclusive, that, without the strongest evidence to rebut it, by proving enormous fraud, the inference is unanswerable.

Plaintiff nonsuited.

Garrow, A. G., and Chitty for the plaintiff.

Jervis for the defendant.

March 3, 1817.

KERR v. WILLAN.

(In order to affect one who sends goods by a carrier with notice of the terms on which he deals, it is not sufficient to shew that a printed notice was exhibited in the carrier's office, where the goods were delivered by a porter, although the porter could read, and had seen the notice, if in fact he had never read it.)

[Subsequent proceedings, 6 M. & S. 150.]

This was an action of special assumpsit against the defendant, as a carrier, for negligence in losing a truss of goods committed to his care.

It was proved that a truss of goods, weighing 56 pounds, had been delivered at the office of the defendant, who was a carrier, at the Bull and Mouth Inn, in London, to be carried to the plaintiff, who resided at Dumfries.

The defendant had paid £10 into Court, and he relied upon a notice put up in his office, intimat-[54]-ing, that he would not be liable for more than at the rate of £20 per hundredweight for any goods whose weight exceeded 28 pounds. In order to affect the plaintiff with knowledge of this notice, it was proved, that such a notice was painted on a board and hung up in the defendant's coach-office; and a witness was called, who stated that he was a porter to the waggon by which the goods had been conveyed to town, and that he had taken them to the defendant's office; that he had frequently been at the office before and had seen the board there, but that he did not suppose there was anything upon it; and although he could read, had never in fact read what was upon it until after the loss of the truss.

Lord Ellenborough.—You cannot make this notice to this non-supposing person: it is difficult to struggle with the common law; and it is incumbent upon a person who wishes to rid himself of his responsibility at common law, to give effectual notice.

Garrow, A. G., for the defendant, contended, that enough had been done to entitle the defendant to the benefit of his notice, since he had done everything which lay within his power to communicate the terms on which he intended to deal to the plaintiff. The public had an interest in the decision of this cause in favour of the defendant, for if what had been done was not enough, it would not be possible for anyone to carry on the [55] business of a carrier with safety to himself, care would always be taken to send the goods to the warehouse by a person who could not read.

On the other side, it was suggested, that all difficulty on the part of the carrier might be avoided, by his delivering a printed receipt to the person who brought the goods, specifying the terms of the contract.

Lord Ellenborough.—The hardship of the case cannot alter the liablity of the party. By the common law, the carrier is responsible for the loss of goods, unless he enter into a special contract by which he limits that responsibility. This he may do, by giving notice in the public papers, or by any other medium by which the party with whom he deals is effectually apprised of the terms upon which he proposes to deal. If the person who carried the goods to the office in this case had read the notice, the plaintiff would have been bound by it; but he did not read it; and, consequently, the plaintiff was not bound by the limitations which it contained.

Verdict for the plaintiff, damages £40, 15s. 6d.

Topping and Walton for the plaintiff.

Garrow, A. G., and Barnewall for the defendant.

In the ensuing term Garrow, A. G., moved for a rule to shew cause why there should not be a [56] new trial, contending, that enough had been done by the carrier for the purpose of communicating notice to the plaintiff; it would be impossible to

prove actual knowledge, since the party could not be called as a witness, and that everything had been done which prudence could dictate.

But the Court refused the rule, observing, that it was by no means impossible to give notice to the party who sent goods of the manner in which the carrier meant to limit his responsibility. If the agent could not read, he might still be able to hear; or, at all events, a hand-bill might be delivered to him to be taken to his principal. No doubt, the necessity of giving effectual notice imposed considerable difficulty upon the carrier, but the difficulty arose from the attempt to depart from the old rule of common law which had prevailed for ages, and which could not be avoided without great exertion. No doubt the rule of law might be superseded in the particular case by a special contract, since *modus et conventio vincunt legem*; but then such special contract must be proved; and whether it exists or not, is always a question for the jury.

Rule refused.*[1]

[57] Same day.

PRIDEAUX v. COLLIER.

(The holder of a bill of exchange applies to the drawee on the day before the bill becomes due, who informs him that he has no effects of the drawer's in his hands, but that they will probably be supplied before the next day. On the next day the drawer informs the holder that he will endeavour to provide effects, and will call upon him again. This does not supersede the necessity of a presentment on that day.)

This was an action by the plaintiff, as the indorsee of a bill of exchange, dated March 20th 1816, drawn by the defendant upon Wood and Co., payable to his own order, and indorsed by him to the plaintiff.

Upon the 22d of May, the day before the bill became due, application was made by the plaintiff to Wood and Co., and the answer was, that Collier had then no effects in their hands; but the clerk of Wood and Co., remarked, that the bill would not be due until the next day, and that it was probable that Collier would be in before that time and provide effects. On the next day, the 23d, when the bill became due, the defendant said to the plaintiff, that he understood that he the plaintiff was the holder of the bill, which he hoped would be paid; that he would see what he could do, and would endeavour to provide effects, and would see him again. The bill was not presented to the drawees on the 23d, but was presented on the 24th, and the witness was about to state what passed between the drawees and himself upon that occasion; but—

Lord Ellenborough held, that what passed between the drawee and the holder after the bill had become due was not evidence, since he was no [58] longer to be considered as the agent of the indorser.

Scarlett contended that, under these circumstances, enough had been proved to entitle the plaintiff to recover; the defendant had said that he would endeavour to find effects, and would call again.

Lord Ellenborough.—The evidence shews that it was not likely that the drawees would accept the bill, but it was possible that they might change their minds. The drawer is liable upon the default of the drawee, of which he must have notice, that default is a condition precedent; and it does not appear in this case, that there was a default on the part of the drawee.

Plaintiff nonsuited.*[2]

Scarlett and Chitty for the plaintiff.

Garrow, A. G., and Williams for the defendant.

[59] PASMORE v. BIRNIE.

(It is no defence to an action by a solicitor against an assignee under a commission of bankrupt, that the commission was sued out under a misrepresentation by the plaintiff that the commission would be operative in the Isle of Man, and that

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*[1] See *Leeson* v. *Holt*, vol. i. 186.

*[2] See *Clegg* v. *Cotton*, 3 Bos. and Pull, 239, where the drawer had lodged funds in the hands of the indorsee to answer the bill upon the presumption that the drawee would make default; and it was held that the drawer was discharged for want of notice of the dishonour.