1821.

NORBURY v. MEADE and others.

ENGLAND.

(ON APPEAL FROM THE COURT OF EXCHEQUER.)

CONINGSBY NORBURY, Esq. - - *Appellant*;

The Honourable and Reverend PEARCE MEADE, and ELIZABETH his Wife, and SAMUEL ISTED, Esquire - - - - - - *Respondents.*

A Plaintiff in equity must state his title in his bill, and, unless it is admitted by the Defendant, must prove it.

In suits for tithes, the jurisdiction of a Court of Equity is limited to discovery and account. The title to tithes, as of other real property, is a question of a legal right upon which a Court of Equity has no jurisdiction; and if the title is disputed and doubtful, the Court has no right to make a decree.

A person suing as lay impropriator, for the tithes of a parish in which there has been within living memory a parish church and a burial ground, in order to establish his title, must show that there has been an appropriation, and when it was made; because if it was not prior to the 15th Ric. II. c. 6. it is further necessary, according to that statute, that an endowment of a vicarage should be shown, and if the Plaintiff does not allege and prove either that the appropriation was before the 15th Ric. II. or that a vicar has been endowed, *primâ facie* the appropriation is invalid.

Lands which had belonged to one of the lesser monasteries were not exempted as such from the payment of tithes in the hands of the grantees of the Crown, under the stat. 27 H. VIII. c. 20. At common law it has been held, that if such lands were otherwise discharged of tithes, the discharge being terminated by the dissolution of the monastery, the right of the ecclesiastical rector revived: but as between two monasteries, the one holding an impropriate rectory, and the other lands within the rectory, whether the same doctrine is applicable—*Quære*. *Semb.* that the case is not similar to a claim of exemption, as derived from a religious order, nor from unity of possession, but both bodies being capable of making an alienation, the monastery

1821.

NORBURY v. MEADE and others.

having the impropriate rectory might convey the tithes to the other body holding the lands. It is the case of a right of exemption by conveyance, and *semble*. that it is a title which admits of proof by presumption. Upon a lease of tithes, by a lay impropriator, if the tithes of particular lands are excepted, it might admit of the construction that the lessor is entitled to that which he excepts. But if a former owner of the tithes upon a lease has made a parol declaration that he is not entitled to the tithes of those lands, that declaration is in itself important evidence, and gives a construction to the exception in the lease.

THE original Bill filed in this cause in Easter Term 1810 stated that the then Complainant, the Bishop of Dromore, in Ireland, was seised of the impropriate Rectory and Parsonage of the parish of St. Nicholas, in Droitwich (Worcestershire), and thereby entitled to the great and small tithes arising within the parish. That from the time of Plaintiff's seisin the Defendant held and occupied a certain farm in the parish, for which he had paid tithe by an annual composition till Michaelmas 1807, but that since that time he had refused to pay the Plaintiff such composition for the small tithes; and that besides the said lands, the Defendant occupied other lands, called the Lower Friars (about seven acres), on which he had reaped and mown grain, pulse, hay and clover, and had agisted barren cattle, the tithe of which he had not paid. Upon this statement the bill prayed an account and decree for the single value, &c.

The Defendant by his answer denied the title of the Plaintiff to all tithes as impropriate Rector; admitted his possession of the lands mentioned in the Bill; but contended, as to the farm before mentioned, that the composition which had hitherto

been paid was in satisfaction to Plaintiff, or his agents, for the great tithes only, and denied that he was entitled to small tithes; and he alleged, that in case any small tithes were payable, the Rector would be bound to contribute to the repair of the church, and to provide some ecclesiastical person to perform the duties within the parish, to whom such small tithes would have been payable if due at all; and that as no such person had been provided within memory, there must, therefore, at some former period have been an agreement between the then impropriate Rector and the parishioners, that in consideration of his foregoing the small tithes in the parish he should be relieved from the duty of serving and repairing the church; in proof of which, (the answer alleged) there had been no service performed in the church in the memory of any person living, except in two instances, within the last thirty years, of two persons having been buried in the churchyard; that the church itself was dilapidated; and that the tower, with a bell therein, and the outside walls of the old church, were standing till within a few years; but that the walls and bell had lately been pulled down by the orders of the Plaintiff for the purpose of disposing of them for his benefit; and that the parsonage-house had, till about ten years previously, been standing, and was inhabited, but that one of the late lessees of the tithes had since pulled it down, and disposed of the materials: and that in further evidence of such agreement there had never been any small tithes in kind, or any composition in lieu thereof, paid in the memory of any person living, except that two of the late lessees had demanded and received from some cottagers or

1821.

NORBURY
v.
MEADE
and others.

small householders a trifling composition in lieu of vegetables growing in their gardens; and submitted, that the Plaintiff was not, under the circumstances, entitled to any small tithes, or that if he were, it was his duty to procure the parish church to be served, and contribute to its repairs, and rebuild the parsonage house.

The Appellant also in his answer admitted his occupation, and having had titheable articles upon the lands called the Lower Friars, without paying or making any satisfaction for the tithes; and stated that he occupied those lands by virtue of a lease granted by the Marquis of Exeter, then deceased, and his wife, formerly Emma Vernon, the then owners of the land; and that he believed the lands called the Lower Friars were part of the possessions of the dissolved Priory of the Friars Augustines, in Droitwich, commonly called the Augustine Friars, and were granted by letters patent, bearing date the 24th of February, in the 34th year of the reign of King Henry VIII. to John Pye and Robert Were alias Browne, in fee; and the same were afterwards, by bargain and sale, bearing date the 2d of February, in the 2d year of the reign of King Edward VI. duly conveyed to Sir John Packington, knight, his heirs and assigns, who at that time, as the Appellant had been informed, was, or claimed to be, entitled to the tithes of the lands. The Appellant, by his answer, further stated, that he believed that the lands and the tithes thereof (*in case the said Sir John Packington were entitled thereto*), were afterwards duly conveyed and granted by divers mesne conveyances to several persons, and at length were conveyed and granted to, and had been vested in, an ancestor of Emma Vernon, one of the lessors

under whom the Appellant was in possession, and through which ancestor, the Marquis of Exeter, and his then wife, derived title. And further stating, that by such means, *or otherwise*, the tithes of the said lands had been duly granted, and legally passed to, and became vested in, the owners of the land, and had descended upon, and became vested in, Emma Vernon, and by means thereof, *or otherwise*, the lands *were exempt* from the payment of tithes in kind, or any satisfaction in lieu thereof, and that no tithes in kind, nor any satisfaction in lieu thereof, had ever, within the memory of any person living, or since the lands were, as before stated, conveyed to Sir John Packington, been paid for the lands in question. But on the contrary, such lands had always been deemed, and reputed to be, tithe-free, and no demand had ever been made upon any owner or occupier of such lands for any tithes in kind, or any satisfaction in lieu thereof, until the exhibiting of the Plaintiff's original Bill.

The cause being at issue, witnesses were examined on the part of the Plaintiff in the suit, but not on the part of the Appellant. The parol evidence on the part of the Plaintiff, who deduced his title to the impropriate Rectory by descent from Sir John Packington, tended principally to show that both the great and small tithes had been always considered as included in the composition which had been paid to the Plaintiff, and as due to him in quality of lay impropriator, and not as vicar, or to any other ecclesiastical person, there having been no such person within memory; and that no claim to any of the small tithes had ever been set up by any other person; and several old leases of the great and small tithes by Plaintiff's predecessors were produced.

The cause came on to be heard and was argued

1821.

NORBURY
v.
MEADE
and others.

upon the 29th January, 3d and 6th of May 1816. On the part of the Plaintiff, conveyances, leases, a will, and other assurances, commencing as far back as the year 1670, were read to show that the impropriate rectory, and all tithes within the parish of St. Nicholas, in Droitwich, had been conveyed, demised, and disposed of as lay property. In one of the leases, dated the 10th of August 1801, from the Plaintiff in the original Bill to one Richard Smith, the demise is of all tithes in the said parish, except the tithes of the Lower Friars; and the depositions of several witnesses were read to show that the Plaintiff in the original Bill, and those under whom he derived title, had been in perception of the tithes in the said parish; but none of them proved that any tithes had ever been paid, or satisfaction in lieu of tithes made for the *Lower Friars*; on the contrary, Richard Smith deposed on the part of the Plaintiff, that William Clieveland, a former proprietor of the tithes as lay-rector, under whom the Plaintiff in the original Bill derived title, was in possession of the tithes of the said parish, except of certain lands in the said parish, a part of which were called the Upper and Lower Friars. On the part of the Appellant, various grants, proceedings and written documents, were produced to show that the Lower Friars had been as early as the 34th Henry VIII., granted out by the Crown, and vested in grantees, some or one of whom (particularly Sir John Packington) was at the same time proprietor, not only of the land, but also of the rectory and tithes, and while he was proprietor of both, granted and conveyed away the land, (but no deed mentioning tithes was produced;) and that by mesne conveyances, descent, or otherwise, the Lower Friars came to the

present owners, under whom the Appellant held them as lessee. On the part of the Appellant, also were produced in evidence, three leases, dated the 10th January 1783, 21st March 1786, and 10th March 1788, from William Clieveland to George Bedford, of all the tithes in the parish. The deposition of Richard Smith, read for the Plaintiff, was likewise read for the Appellant, as was also the deposition of George Bedford, (the lessee in the leases before mentioned from William Clieveland,) a witness examined for the Plaintiff, in which he stated, that in the year 1780 William Clieveland, his lessor, set the tithes in the parish of St. Nicholas, which were then in the possession of witness, and which he continued to enjoy till the death of William Clieveland, except the tithes of lands in the said parish called the Upper and Lower Friars, and a meadow called the Vines, comprising, amongst others, the lands in question, which William Clieveland informed the witness were tithe-free.

The cause stood adjourned from the 6th to the 20th day of May 1816, on which latter day the Court * below delivered their opinions, *seriatim*, and ordered and decreed, that an account should be taken of the tithes demanded by the original Bill against the Appellant, with costs.

The Appellants, at the hearing, proposed to read a conveyance from Sir John to Thomas Packington, and the will of Thomas, devising the rectory to Mary Packington, through whom the Respondents claimed †; but the Court intimated that such evidence

* Dissentiente, Wood, B. See 2 Price, p. 338.

† It appears that these documents were entered as read. See the addit. Appx.

1821.

NORBURY v. MEADE and others.

would be useless without showing an express grant of the tithes of the Lower Friars; and as to the other land occupied by the Appellant, it was admitted they had no defence; if the Court were of opinion that the plaintiff had proved his title, which appearing to be the opinion of the Court, the defence was confined to the claim of the tithes of the Lower Friars.

The Respondents became entitled, and were made parties to the suit by a supplemental bill, as the devisees and representatives of the Bishop of Dromore, who died pending the original suit.

The Appellant in the session 1817 presented a petition against this decree, in so far, as an account was thereby directed of the tithes of the Lower Friars, praying that so much of the decree might be altogether reversed, or that a trial at law might be directed upon the legal right before any account should be decreed.

7 August and 14 February 1821.

For the Appellant, it was argued that tithes in the hands of laymen are now of a different nature from what they were at common law while they constituted the revenues of ecclesiastics; for by the several statutes respecting the dissolution of monasteries and religious houses, they were made and declared, in the hands of laymen, as temporal inheritances and lay-fees; and more particularly by the statute of 32d Henry VIII. c. 7, that lay persons shall have the like remedies for recovery of tithes in temporal Courts, and, consequently, subject to the like limitations and restrictions as are applicable for lands and other hereditaments. Tithes are thereby also declared to be the subject of, and pass by, the like conveyances and assurances as other temporal possessions; and at this day tithes have all

other incidents belonging to temporal inheritances. Since grants of tithes are now capable of being made, and liable to be lost, the same evidence ought to be allowed from whence they are to be presumed, and the want of them supplied, as would suffice in regard to lands and other hereditaments; and the like bar, by adverse possession and length of time, by analogy, ought to be interposed against the remedy for recovery of tithes.

In favour of Holy Church, the policy of the law was that laymen should not prescribe in *non decimando*, thereby spoiling spiritual persons of their revenues. When tithes were converted into lay-fees the maxims referrible to presumed grants, descents, discontinuances, non-claims, &c. necessarily follow, which were nothing more than the wise arts and inventions of the law to protect and quiet the possession, and strengthen the right of purchasers. The fact of long and uninterrupted retention of the tithes in question creates a legal right, which ought to be tried at law; a Court of Equity has no right to decree upon depositions against it. The adverse claim is against long and quiet possession and enjoyment, and to overturn property in which the owners have thought themselves secure, now beyond all memory of writing, or man. A Court of Equity cannot set aside or decide against the consequences of this legal right; it would be determining a right against constant possession, and constant usage and enjoyment. There is nothing a Court of Equity can not presume in favour of possession. Possession is every thing; estates are bought by it, and held upon the faith of it; a claim against long possession is always repro-

1821.

NORBURY
v.
MEADE
and others.

bated; and here a Court of Equity, on a question arising on a legal right, ought not, at least in the first instance, and without a previous trial at law, to have determined and made a decree.

The circumstances of this case amount to a long and uniform non-payment and retention of the tithes by the owners and occupiers of the land in question; and not merely a non-claim, but positive disclaimer on the part of one or more of the impropriators, particularly William Clieveland, under whom the Respondents derive title, making several leases of the tithes, with an exception of the tithes from the lands in question, accompanied at the same time by a declaration from the lessor to the tenants that such exception was inserted because the lands were tithe-free.

It is true the property in question is small, but the principle to be established by this decision confessedly great. Prescription has no place here; presumed grant is the basis upon which the Appellant rests his defence; arguments of inconvenience deserve attention; tithes of great value in this kingdom are enjoyed under titles similar. The consequence of removing land-marks is dangerous; and why, in the legal code, are tithes to present an anomaly? Why are ingredients which strengthen the title and secure the possession, with reference to other property, to weaken and destroy in this? Why furnish a precedent to shake and render doubtful those rights which length of time and quiet enjoyment had taught the possessors to believe irrevocably fixed in them? A precedent which will encourage innovating speculators to set up new tithe-claims, disturbing the peace of their neighbours in many

parishes, and possibly spoil the ancient possessors of their acknowledged rights.

1821.

NORBURY v. MEADE and others.

For the Respondents, the case was put upon the ground of the maxim, supported by a long series of uniform decisions, that there can be no prescription in *non decimando*.

An objection * being suggested for want of proof of the appropriation before the 15 Ric. II. or the endowment of a vicarage, an observation, said to have been made by Lord Chief Baron Thomson (and not noticed in the report of the case,) "that as there was "a place of worship there might have been a vicarage "endowed," was cited for the Respondents, to which Lord Redesdale replied, that there could be no parish without a church, and that there might be a chapel also; that the original appropriation of tithes was to the incumbent of the church of the parish, and *primâ facie* belonged to him; but that this had been modified, and certain portions of the tithes might be vested in other persons; but it was an exception to the general law.

Upon the objection as to the deficiency of proof of title * in the Plaintiffs, it was urged that the property was conveyed as a rectory in 1642, and devised as such in 1663; that the documents showing title in the Plaintiffs were produced and relied upon by the Defendants; that a grant from the Crown was the best but not the only mode of proof, and the fact being admitted by the Defendants, that there was no need of proof.

It was further urged on behalf of the Respondents

* See *post*. the observations of Lord Redesdale, pp. 224 and 233, *et seq*.

1821.

NORBURY v. MEADE and others.

that the defence raised by the answer, consisting of title and exemption, was double, uncertain, and inconsistent, which had been held not to be allowable; *Ward* v. *Shepherd* *. That the lands and the rectory being in the same person furnished no ground to presume a release of tithes; that in the cases † where the Courts of Equity had refused to interfere on behalf of a lay-impropriator against the occupier of lands, to enforce tithes, they did so on the ground of long adverse possession and colour of title, supported by documentary proof: that the tithes in question in those cases had been from time to time, for a long series of years, conveyed and dealt with as matter of property. In this case no such proof existed, and as the lands in question belonged to one of the lesser monasteries that furnished no ground to presume an exemption.

On behalf of the Appellants, in reply, upon the objection as to the double pleading of the answer, it was urged that such pleading was allowed in the case of *Jennings* v. *Lettice* ‡; that the words "or otherwise," which seemed indefinite, might refer to conveyances under the statute of Henry VIII. or other modes of conveyance which might be presumed in favour of the Defendant.

For the Appellants, *The Attorney-General*, and *Mr. H. Martin*.

For the Respondents, *Mr. Wetherell*, and *Mr. Roupell*.

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* 3 Price, 528.

† *Scott* v. *Airey*, 3 Gwill. 1174, citing *Rotheram* v. *Fanshaw*, which has since been reported by Mr. Eden, vol. i. p. 276.

‡ 3 Gwill. 952.

1821.

NORBURY v. MEADE and others.

Lord Redesdale *:—It may be important to consider how unity of possession may affect the right to tithes. Suppose I had a rectory impropriate, and lands within the rectory which I had leased exempt from tithes, and then conveyed the reversion of the lands as I held them, that would be exempt from tithes. The rectory and the lands having been both in the Crown it is important to inquire whether the rectory or the land were first conveyed. Suppose the grant, and the record of the rectory and of the lands, to have been lost, would not the actual state of things, the enjoyment, furnish a presumption of title?

The *Lord Chancellor* :—In *Scott* v. *Airey* † it was decided that a Court of Equity in such a case would not interfere. In one of the cases Baron Eyre said if these doctrines were to be maintained the Courts had gone presumption-mad.

The question is, whether in the face of enjoyment we can interfere; whether we must not leave it to law? The Court of Exchequer, in those cases in which they refused to act did not intend to determine whether there was or was not a title to the tithes, but merely that there was not sufficient ground to warrant a Court of Equity in disturbing the possession.

Lord *Redesdale* :—The real question in *Scott* v. *Airey* was, whether there was not evidence of

* The following observations were interlocutory, and occurred in the course of the argument.

† 3 Gwill. *quà suprà*.

1821.

NORBURY v. MEADE and others.

a portion of tithes within the rectory. A portion could not be in lay hands unless it had come through the Crown by grant.

The *Lord Chancellor*:—In the case of a spiritual rector it has been held that there can be no prescription in *non decimando*. If non-payment of tithes is a different thing, and sufficient to ground a presumption, a title may always be made out; for you may presume first a portion of tithes, and then the loss of a grant *.

Two preliminary questions may be raised in this case, the first, whether the title of the Plaintiff is sufficiently set out in the bill, and supported by proof in the cause? Secondly, whether the points of defence raised by the answer are sustainable?

Lord *Redesdale*:—According to ancient practice, in suits by lay impropriators, the production of the original grant, and a regular deduction of the title by the necessary documents, was required. That practice was altered in consideration of the frequent loss of the instruments of title; but it is still necessary to produce the original grant, and to prove a possession corresponding with the title. If the impropriation has taken place since the 15 R. II. an endowment of a vicarage by tithes, salary, glebe, or otherwise, must also be proved.

* See in *Rose* v. *Calland*, 5 Ves. 186, the remarks of Loughborough, C. on the case of *Nagle* v. *Edwards*; 4 Gwill. 1442. See also *Lord Petre* v. *Blencoe*, 3 Anst. 745.; *Crawthorn* v. *Taylor*, 2 B. C. C. 112; *Gurnley* v. *Burt*, Bunb. 169; *Penny* v. *Hope*, Bunb. 115; *Barwell* v. *Coates*, Id. 129.

1821.

NORBURY v. MEADE and others.

The *Lord Chancellor* :—A lay impropriator must claim under his deeds. If he shows uniform exclusive possession, that may raise a presumption in the absence of deeds; but here, neither the title by deed, nor the perception of the tithes, is shown; and yet it is required of the Defendants, if they claim by title, that they should give that strict proof which the Plaintiffs fail to give. The question is, whether they have evidence equivalent to the production of deeds? They claim contrary to the common law. They must show a legal commencement of their title. They must show an impropriation before the 15 Richard II. or the 4 Henry IV., or they must show the endowment of a vicarage. The first of those statutes enacts, that there shall be no impropriation without such an endowment. The second requires that a vicar should be canonically instituted. There is no such vicar in this parish; and the title of the Plaintiff by deed or possession is not clearly made out; the deduction of title in the Plaintiff may be material to the defence. The decision of this case has proceeded on the single ground, that a prescription in *non decimando* is illegal; but if that is alleged as matter of title it may raise a different question.

At the conclusion of the argument, The *Lord Chancellor* made the following observations:—

This being the first case involving the particular point, which is of great consequence, and a noble and learned Lord*, who has given particular attention to the subject, being absent, the House ought not to

* Lord Redesdale, who had left the House before the conclusion of the argument.

1821.

NORBURY v. MEADE and others.

proceed to judgment at present. There is also another circumstance requiring great consideration, provided the case ought to be decided upon the evidence which has been adduced at the bar, attending to the special circumstances under which it is represented this case has come before us. I am sure the House will feel the importance of considering, with great diligence and attention, what they will or will not do after there has been, as represented, a long course of uniform decision in the Courts below; for it will be impossible to give a judgment on the general ground without affecting many decisions which have been made in the Courts below, and probably disturbing considerable property which is at present held under those decisions. If this case, on the one hand, is to proceed on the special evidence to which I have alluded, it ought to be understood that it does proceed on that specialty which occurs in this case; or, on the other hand, if the judgment of the House is intended to reverse all the decisions to which I have alluded, it is fit that question should not be left in the same state of doubt in which it has been represented to exist. It seems necessary, therefore, that you should have some further time for consideration; I wish also to see a copy of the answer, for all the rules of pleading which used to be adopted when I practised in the Court of Exchequer seem to have been lost sight of. In making this observation I do not mean to reflect upon the memory of that respectable gentleman *, whom I well knew when living, and who drew the answer; but I take it from the answer itself, that he found he had a very difficult case to

* Mr. Hall.

1821.

NORBURY v. MEADE and others.

deal with, and that he felt he must deal with it in the best way he could.

It appears to me that this is a case extremely simple, for the words stand thus *: "That the "Appellant, soon after filing the same original bill, "put in his answer thereto, declaring his ignorance "of the Plaintiff's alleged title, but admitting the "Appellant's occupation, and having had titheable "articles upon the lands in question, without pay-"ing any satisfaction for or in respect of the tithes; "and stating that he was in the occupation of the "lands in question by virtue of a lease granted "thereof by the late Marquis of Exeter, then de-"ceased, and his wife, formerly Emma Vernon, the "then owners of the land, and that he believed the "lands," (not the lands and the tithes, but "the "lands) called the Lower Friars, were part of the "possessions of the dissolved priory of the Friars "Augustines in Droitwich, commonly called the "Augustine Friars, and were granted by letters "patent, bearing date the 24th February, in the "34th year of the reign of King Henry VIII, to "John Pye, and Robert Were *alias* Browne, in fee, "and the same" (that is, the lands) "were after-"wards, by bargain and sale, bearing date the 2d "of February, in the second year of the reign of "King Edward VI, duly conveyed to Sir John "Packington, knight, his heirs and assigns," (and then, with respect to the title to the tithes, all he says is this,) "who at that time, as he had been in-"formed, was, or claimed to be, entitled to the tithes "of the lands;" under what sort of claim, or how

* In the Appellant's printed case.

1821.

NORBURY v. MEADE and others.

entitled, this pleading does not in any manner point out. The words in which it is set forth merely state some unspecified claim to the tithes; then it goes on to say, "that he believed that the "said lands and the tithes thereof (in case the said "Sir John Packington were entitled thereto)." Now if the declaration of Clieveland, that these estates were tithe-free, is a declaration of any importance, I think we may say this qualifying parenthesis brings down a little the value of the assertion, "he believed "that the said lands and the tithes thereof (in case "Sir John Packington were entitled thereto) were "afterwards duly conveyed and granted, by divers "mesne conveyances, to several persons, and at "length were conveyed and granted to, and had "been vested in, an ancestor of the said Emma "Vernon, one of the lessors, under whom he was "in possession, and through which ancestor the "said late marquis and his then wife derived title "thereto; and further stating, that by such means, "or otherwise," (and here it occurs to me, which it did not at first, that these words "or otherwise" are put in with great caution and with great propriety, considering there was the parenthesis going before, "in case Sir John Packington were entitled "thereto;") "and further stating, that by such "means, or otherwise, the tithes of the said lands "had been duly granted and legally passed to and "became vested in the owners of the land, and had "descended upon and become vested in the same "Emma Vernon, and by means thereof, or other-"wise, the said lands were exempt from the pay-"ment of tithes in kind, or any satisfaction in lieu

" thereof, and that no tithes in kind, nor any " satisfaction in lieu thereof, had ever within the " memory of any person living, or since the said " lands were, as before stated, conveyed to the said " Sir John Packington, been paid for the lands in " question, but on the contrary such lands had " always been deemed and reputed to be tithe-free." This pleading, therefore, simply brings the title down to Sir John Packington. This lessee does not pretend to be the lessee of the tithes, but only the lessee of the lands, which shows the distinction between enjoyment and possession of tithes as a separate inheritance, and leads to the understanding of that principle, whether good or bad, on which the courts have hitherto proceeded; for if Sir John Packington let him the lands, he cannot say he let him the tithes; if he pays a rent for the lands, he enjoys the lands for the payment of the rent; and Sir John Packington has the use and enjoyment of the lands by the payment to him of the rent, but neither he nor the other is in the enjoyment of the tithes; that principle being felt, they found it necessary to go on and lay hold of another defence, and say the lands were exempt from the payment of tithes; that they had always been deemed and reputed to be tithe-free. I do not know in what way at the present day the Court of Exchequer call upon parties to plead; but I think it would not be deemed sufficient simply to aver that the lands were exempt from the payment of tithes, and had always been deemed and reputed to be tithe-free; or on the other hand, if the plea be good as to the exemption from the payment of the tithes, then the question will

1821.

NORBURY v. MEADE and others.

be, whether there is not a double plea under the title of freedom from the payment of tithes; if you could not make out the freedom from the payment of tithes simply by the party talking with the owner, the Court would never apply that as positive evidence to warrant the taking of tithes in pernancy: it appears to me that this raises very great difficulty in the case, if we are to get at the great point of the case without evidence. I address myself without prejudice, speaking according to my impression of the law, being bound so to state it under the sanction of the cases (*a*); and according to (unless I greatly misunderstand it) the doctrine which has been laid down by men of talents and knowledge, to which, whether taken collectively or singly, I cannot pretend. The principle they have gone upon is this, that there is a very considerable difference (the grounds of which you may have hereafter to explain) between a mere detainer of tithes, and where tithes have been detained under what is called a colourable title; and it will be found, when you come to discuss that matter, that it is not quite so clear that evidence may be so fabricated at the back of the rector as not to shut it out from being received. Supposing the Court to be bound by that, still you have a long course of decisions which must be considered with all that attention which belongs to principles involving the security of property, and which decisions have been acquiesced in for a long period of time.

This is certainly an important case, and for these

(*a*) *Charlton* v. *Charlton*, Gwill. 705; *Ald. &c. of Bury* v. *Evans*, id. 757; *Fanshaw* v. *Moore*, id. 780; *Jennings* v. *Lettis*, id. 954.

reasons, and others which might be stated, I should feel more satisfied in having some time to review my present opinion, and to see whether my recollection is right as to the doctrines of law which I have now stated. It will afford me an opportunity to rectify and correct any errors I may have fallen into, by consulting with a noble and learned person not now present, who has paid great attention to this subject.

1821.

NORBURY *v.* MEADE and others.

21st Feb. 1821.

The *Lord Chancellor*:—Upon looking to the pleadings and proofs of this cause, I mean to propose that one counsel on each side should be heard upon two points; the first is, *the title of the Plaintiff not being admitted by the answer, whether it is sufficiently proved by the evidence*; and the other is, supposing the title to be sufficiently proved, whether the pleading, on the part of the Defendants, is the proper pleading to bring forward the points on which the Defendant relies. I propose this course because it is highly expedient that when you are deciding a question of so much importance as the principal point in this cause, care should be taken that the proceeding of the House should not be represented hereafter as a proceeding not quite clear in point of pleading.

It was thereupon ordered, on the motion of the Lord Chancellor, that one counsel on each side be heard upon the question whether the title of the Plaintiff is sufficiently set out and proved; and supposing it to be so, whether the points insisted upon by the Defendant at the hearing are properly pleaded.

1821.

NORBURY v. MEADE and others.

Mr. Martin and *Mr. Wetherell* accordingly argued these points before the House, and the cause then stood over for judgment.

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26 March 1821.

The *Lord Chancellor*:—In the case of *Norbury* v. *Meade*, if it should appear to those who are to advise the House, that it is necessary to make any alteration in the judgment, it cannot be proposed without addressing your Lordships at very considerable length upon the doctrines with reference to cases of that nature. It is, therefore, necessary to ask of your Lordships for some further time to consider the proposed judgment.

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6 April 1821.

Lord Redesdale:—The question in this cause was considered as principally depending upon this, whether a grant of tithes, from a lay impropriator to the owner of certain lands in the parish of St. Nicholas in Droitwich, ought to be presumed or not; and the arguments principally went originally upon that ground. A doubt was then stated whether the Plaintiffs in the suit, who are the Respondents in this Appeal, had or had not sufficiently shown their *title*, so as to give them a right to demand of the Court a decree in their favour. The Court of Exchequer have, upon the hearing of the cause, made a general decree with respect to certain lands, as to all tithes, great or small, with respect to which the defence was of a different description. As to the lands which are the subject of this Appeal, they have also made a similar decree, being founded upon the supposition that the defence set up by the Defendants was insufficient, who insisted

that under the circumstances of the case those lands ought, in some manner or other, to be presumed to be discharged from the payment of tithes. The defence was not very precise; but upon looking into the case, the title set out by the Plaintiffs was certainly greatly deficient; because the Plaintiffs in that suit claimed as being entitled to an impropriate rectory; but they did not show how they were entitled; and they did not state, in their bill, or produce in evidence before the Court, any thing clearly to show that title.

The Plaintiff in this suit must recover by force of his title; and supposing the defence to be ever so defective, if the Plaintiff does not show a title the Court has no right to make a decree in his favour unless that title is clearly admitted by the Defendant; but here the Defendant unquestionably disputed the title. The consequence was, therefore, that the Plaintiff was bound to prove his title.

The claim was of all tithes, great and small, within this parish; and it appears from the evidence that there was a parish church, and a burial ground appertaining to that church, and therefore that there had been at some time a rector of that church, in whom all the rights of that church were vested. Undoubtedly there might have been an appropriation of that church, but it was very material to ascertain when that appropriation was made, because if the appropriation was made subsequent to the 15th of Rich. II. it could be no lawful appropriation without the endowment of a vicar; and if there was no vicar endowed the appropriation was

1821.

NORBURY v. MEADE and others.

not good; therefore it was important to make out the title of the Plaintiffs in that suit, that they should have shown, or given some species of evidence to show, that it was an appropriation prior to the 15th of Rich. II., or to show that there was an endowed vicar. They have shown neither, and therefore, *primâ facie*, the appropriation under which they claim is not a good appropriation, because if it was not prior to the 15th of Richard II., and therefore an appropriation capable of being made without the endowment of a vicar, the consequence was, that being subsequent to the 15th of Richard II. it was not a good appropriation, because the law has expressly forbidden such an appropriation without the endowment of a vicar.

By some means, however, this appropriation was in the hands of one of the monasteries which were dissolved in the reign of Henry VIII.; and there was also in the hands of another monastery a property of land, including the lands which are the subject of this Appeal. The claim set up by the Plaintiffs in this suit was to the whole of the tithes, great and small, of these lands. It is clear from the evidence that the Plaintiffs were not in possession of these tithes, and that the persons, the owners of these lands, and these tenants have constantly insisted that these lands were not liable to pay tithes to the persons who claimed the impropriation.

It appeared that the claim to the impropriation was at one time in the same family in which the lands, now the subject of litigation, were also vested, under the statute of Henry VIII., which had trans-

ferred the right both of the impropriation and the lands, if properly vested in the respective monasteries. They are both by grants of the Crown, as it as to be presumed, in one case shown, in the other case not; but they were to be presumed to be vested in the person who set up these different claims. If the Plaintiffs in the suit could not show a distinct title to demand all the tithes, great and small, the Defendants ought not to have been called upon for their defence. The Court, however, seems to have proceeded upon this ground: they assume the right of the impropriation, and then assuming that right, they seem to have conceived that the Defendant must make out his title to hold these lands exempt from the payment of tithes. He could not claim that exemption in right of the monastery from which he derived his title under the statute of Henry VIII., because it was one of the smaller monasteries, with respect to which the exemptions to which they had been entitled were not preserved by the statute. But even here, as I apprehend, the Court made a mistake, because all that has been decided upon that subject amounts only to this: if the monastery which claimed to hold discharged from the payment of tithes, claimed to hold so discharged against an ecclesiastical rector, there the common law said, that the discharge being put an end to, the right of the ecclesiastical rector remained. It may have been, but I cannot find that it has been decided, that the same thing holds between two monasteries, one claiming an impropriation, and the other claiming land, because both those bodies were capable of making a complete

1821.

NORBURY v. MEADE and others.

alienation. The monastery which held the impropriation could make an alienation to another monastery of the tithes which were due from the lands of that monastery; and it was not an exemption claimed by a religious order, but a title derived from persons capable of making a title; exemption by the unity of possession is a totally different thing; but this is a case in which their right may be an exemption from the payment of tithes by actual conveyance from one monastery to the other. That such things exist, I know. The conveyance of tithes is capable at least of a species of proof. One monastery having lands, and another monastery having an impropriate rectory, they came to an agreement, the monastery who had the impropriation discharging the other monastery from the payment of tithes on those particular lands. I do not conceive that there was any thing illegal in that, and therefore that is a species of title that was capable of being shown even by presumption.*

But the Plaintiffs in the suit, according to what has been offered in the Court below, must found their claims upon presumption. They show no title directly; it can only be raised upon a presumption derived from their receipt of some species of tithes that they claim a right to, the receipt of all the tithes within the parish. The evidence of title on the part of the Respondents is only the evidence of a qualified possession; and being so, it raises clearly a presumption of title, but it does not show how it commenced. The title, so far as they do show a title, or that from which a title may be presumed, does not include the lands in question,

for they show no possession of the tithes of those lands. On the contrary, it appears there was a constant denial of their title to the tithes of those particular lands, together with something very like a disclaimer on the part of the person who claimed the impropriation, of a right to the tithes of those particular lands.

The Court below seem to have proceeded upon the general ground, which is applicable, unquestionably, to the case of an ecclesiastical rector, that a prescription *in non decimando* is purely illegal; that there can be no such prescription. There might, it was admitted, be a right by grant, but then that grant must be shown: There might be a right under a reservation by the statute of Henry VIII. dissolving the greater monasteries, but that circumstance does not apply to this case; and the Court proceeded to take it for granted that the Plaintiffs in this case had the rectory, and having the rectory, that a prescription *in non decimando* was a thing purely illegal against an impropriator as well as against an ecclesiastical rector.

Now what is the ground of that doctrine in respect to tithes? Before the Reformation, if land was within a parish, the incumbent, the rector of that parish, must be entitled to the tithes of that land, or to some compensation for those tithes, by modus or composition real, which comes to the same thing, unless the lands for which the exemption was claimed were lands that were vested in a monastery claiming an exemption, under certain circumstances, from the payment of tithes. The ground of this was, that though the rector, under certain circum-

1821.

NORBURY v. MEADE and others.

stances, or the vicar, if there was an endowed vicar, might take a compensation; he could not alienate the tithes without compensation.

After the Reformation a number of rectories and lands vested in monasteries were vested in the Crown by the two Acts of Parliament of the 27th and 31st of Henry VIII., the latter reserving to the lands of a monastery discharged from tithes at the time of the Dissolution the same discharge in the hands of the Crown, or the grantee of the Crown, the former statute not containing that provision But no title to discharge could be set up under the monastery through which the lands in question were taken, against a person clearly entitled to the rectory of that parish, neither before nor subsequent to the Dissolution, because if there had existed such a right prior to the Dissolution, as to the lesser monasteries not being reserved, that right could not prevail.

The lands and the rectory were united in the Crown by different titles; this appears clearly with respect to the land, and it must be to a certain degree presumed with respect to the rectory, because the persons who claim the rectory as a rectory impropriate cannot claim that but by a grant of the Crown; and though there is no evidence whatsoever with respect to the grant of the rectory, yet as they must claim under a grant of the Crown, they cannot pretend to say that their title may not be affected by that circumstance, because the lands, when they were in the hands of the Crown, might be occupied by the lessee of the Crown, discharged of tithes by the unity of possession in the Crown;

and if discharged of tithes by unity of possession in the Crown, and the Crown made a grant of those lands, having itself the rectory, and made the grant in such terms as would convey the lands to the grantee, precisely as the lessee of those lands held them, the consequence seems to me to be that the grant of the Crown would convey the tithes of those lands. The Crown was capable by its grant of discharging these lands from the payment of tithes, that is, by conveying a right to the tithes, and consequently of discharging the lands. I cannot see why a presumption of that kind is incapable of being maintained. It seems to me to be a title capable of a legal beginning; and the ground upon which it is held, that there can be no presumption against an ecclesiastical rector or vicar of this description is, that there can be no legal beginning of such a title.

If the Respondent in this case had shown that the King demised the lands separately, and the rectory, including the tithes of the land in question, had also been demised separately, so that there was a separate grantee of the tithes at the time of the grant of the lands by the Crown, that would tend to rebut such a presumption; but there is not the slightest evidence of that description. The Respondents have not done what they ought to have done, and what the Court ought to have called upon them to do before they proceeded farther in the cause; they ought to have called upon them in the first instance to have shown the grant of the Crown under which they claim, for they could have no title except under a grant of the Crown; and therefore, unless the Defendant fully admitted the right of the Plaintiff,

1821.

NORBURY v. MEADE and others.

and so dispensed with the production of his title, in all cases of this description the person claiming an impropriate rectory must produce the grant of the Crown. I admit, that it is now held that it is not necessary for an impropriate rector, in such case, to deduce his title from one person to another, after a grant from the Crown has been shown. Why? because the Courts are aware that deeds of that description may be lost; and therefore, if the grant of the Crown is shown, and if a recent title, or possession according to that title, is shown, then the Court will admit a presumption that the title has been properly deduced.

But why is there to be a presumption on one side, and no presumption on the other? It seems to me extraordinary that a Court of Equity should hold that there may be a presumption in favour of a rectory impropriate, but that there can be no presumption against a rectory impropriate. What difference is there between the title of a lay rector impropriate to the tithes of land, and the title of the other person who holds the lands from which the tithes are claimed? They are both equally fees; both equally capable of alienation; and why there should be a presumption in favour of a lay rector, and no presumption in favour of the occupier of the lands, I must confess I cannot conceive. In both cases it must be founded upon the very probable supposition of the loss of instruments. I believe it will be found that the titles to half the estates in the kingdom would be held to be bad if there was no presumption of the loss of instruments. In the case of rectories impropriate very few persons would be

able to to deduce their titles correctly from the grant of the Crown; they must deduce their titles from circumstances arising in past times. In this case it appears to me that there is such ground of presumption; and I cannot conceive how a Court of Equity should imagine that, upon the ground upon which a Court of Equity is to deal with such a case, they could make the decree they have made.

It appeared from the evidence that both the rectory and the lands came to Sir John Packington, and that Sir John Packington having the rectory granted the lands. When he conveyed the lands, could he not convey them as he held them? Is it probable that he conveyed them subject to tithes, holding them himself not subject to tithes, though he might, if he thought fit, have made a separate demise of the tithes and of the land. That circumstance alone seems to afford ground of presumption, and a very strong ground of presumption, especially coupled with this, that there is no evidence of the persons, who afterwards derived title from Sir John Packington to the rectory impropriate, having ever received or ever claimed tithes of these lands; but on the contrary, that the person under whom Mrs. Meade now claims had in effect said that he was not entitled to the tithes of these lands; that these lands were discharged from tithes. That disclaimer on the part of an ecclesiastical rector would not operate much, but a disclaimer on the part of a lay rector ought to operate in the same way as if a man seised of lands at this day had a right of way or any easement over the lands of another; I cannot distinguish between them. In the case of a right of way over

1821.

NORBURY v. MEADE and others.

the lands of other persons, being an easement belonging to lands, if the owner chooses to say I have no right of way over those lands, that is disclaiming that right of way; and though the previous title might be shown, a subsequent release of the right might be presumed. What is the difference between that case and this? I conceive that a lay rector may release the tithes, and the consequence would be, that the lands would be discharged; but the Court of Exchequer has said, unless you can produce the deed by which that release is made, the tithes, though not paid for a hundred years, must now be paid, because you cannot produce that deed. Then the Court of Exchequer will presume a loss of deeds in favour of an impropriate rector, but not in favour of the owner of the land: that seems so unlike equal justice that I cannot conceive how it could ever have been adopted.

All the circumstances of this case afford strong grounds for presuming that if the lands were subject to the payment of tithes after the Dissolution of the Monasteries, and if the title to the rectory and the title to the lands had passed to distinct owners, and never had been united in one person, that the person who had the impropriate rectory had, in some way or other, discharged those lands from the payment of tithes, that is, conveyed the right to the tithes, that is the nature of a discharge. If a deed were executed which said no more than "I discharge these lands of tithes," it would operate, because no person claiming under the party discharging could claim in opposition to his deed, he having a right to discharge them; and although

he had not used the proper form of release, yet if he used words of release it would be the same thing as in a right of way, or any other right; but where the fact is, that the lands and the tithes, as in this case, were at the same time in the same person, and that the lands were conveyed by that person, and conveyed before the rectory was conveyed, there is the strongest ground for presuming that the lands were so conveyed as dischargad from tithes.

Either Sir John Packington must, after he conveyed the lands, have continued to receive the tithes, notwithstanding his grant of the lands, or he did not continue to receive the tithes; if he continued to receive the tithes, then that must, in some way, have been capable of proof by evidence, that is, if the same receipt of tithes (which probably would have been the case) had been continued down to a late period; whereas the evidence is the other way, that never, at any time, were tithes of these lands demanded by the person claiming the impropriate rectory under Sir John Packington. This is a circumstance very strong to show that either the lands were considered by Sir John Packington as discharged from the payment of tithes by some prior deed, and therefore conveyed by him as so discharged; or, that if they were not so discharged prior, yet when he conveyed the lands he conveyed them as he held them, not subject to the payment of tithes.

If he made such a conveyance his subsequent conveyance of the rectory would not carry these tithes, because he had abandoned his title to them; he had no right to convey them; and this makes it

1821.

NORBURY
v.
MEADE
and others.

extremely important in this case to call on the Respondents for the production of their own title, that it may appear whether Sir John Packington, after he had conveyed the lands, did or did not convey the tithes of those lands: the presumption must be, that he did not convey the tithes, unless the contrary is clearly proved; the production of that conveyance might not indeed decide the question, because it might be conceived, in general words; it might convey the property to another part of his family, and possibly without exception of incumbrances, &c.

The Court of Exchequer seems to have proceeded upon the ground that they were only to look at the defence, that they had no occasion to look at the title of the Plaintiffs, and looking at the defence alone, on that they proceeded; and they held that that defence was not good, and why? because it would not be good against an ecclesiastical rector. Now I apprehend that there is such a clear distinction between an ecclesiastical rector and a lay impropriator, that reasoning applicable to the case of an ecclesiastical rector is not applicable to the case of a lay impropriator, unless it can be shown that it is so applicable. The ecclesiastical rector is incapable of alienating; the lay impropriator is capable of alienating; and from the time of the dissolution of the monasteries the lay impropriations, as vested in the Crown, became as much lay-fees as the lands out of which the tithes issue, and therefore I cannot conceive upon what ground there can be a distinction between the case of a person claiming a lay impropriation, and the case of a person

claiming lands; the title is one and the same; of the same description; and particularly in the case of a person claiming any thing to be received out of the lands, or profit of any kind to be taken out of the lands. If a profit of any kind that is to be taken out of lands has not been taken for a vast number of years, and the lands have been enjoyed without yielding that profit to a third person, the consequence is, that the title to that profit shall be presumed to be discharged whatever is the nature of that profit. And what is the distinction between that case and the case of an impropriate rector claiming tithes? I can perceive none; and it seems, therefore, to me, that in this case, when all the circumstances are considered, even upon the defence, it would be impossible to hold that a Court of Equity had a right to make the decree which the Court of Exchequer has made.

The decision of the Court of Exchequer in this case is upon a legal right; they have said that the Plaintiffs in the suit in the Exchequer have a legal right to these tithes, unless the Defendant can show that they have it not. Now in what case is a Court of Equity authorized to decide on a legal right? There is no equity in the case of tithes; it is merely an incident to a right to an account. The person who claims in a Court of Equity a right to a decree for tithes, generally speaking, claims it merely as incident to a right to have an account of what the tithes are, or discovery from the Defendant of the tithes that have arisen from his lands, and then to an account of the tithes which have so arisen; and the equitable remedy is merely an

1821.

NORBURY v. MEADE and others.

incident to a right of discovery and account. In tithes there is no equitable right to sue for, any more than in any other species of real property. It is merely incidental, and arising from the nature of the particular thing that is demanded. It is not an original jurisdiction to decide a question of right; the Court of Exchequer had no right to decide the question; it is a legal question, which ought to be decided in a Court of Law, if there really is a question of right.

The Court of Exchequer, in this case, assumed the legal right, and entered simply into the question whether the Defendant has shown a ground to controvert that legal right. Now in this case the Plaintiffs not having shown a clear legal right, the Court of Exchequer had no right, as a Court of Equity, to decree the account as incident to a discovery of the quantity of tithes subtracted, which is the ground of the decree of a Court of Equity on this subject.

The equity in a case of tithes arising therefore only, as I conceive, incidentally from a clear legal title, where a clear legal defence is made in opposition to that title, the Court had no right upon the title shown to pronounce the decree they have pronounced. The Court ought not to have pronounced any decree in this, case in respect to the tithes of these lands; and with respect to the decree actually made in this case, I do not see how the Court could have decreed an account of all tithes, both great and small, there being nothing in this case to show that the Plaintiffs have a good title to all tithes, great and small.

1821.

NORBURY
v.
MEADE
and others.

In the first place, I apprehend there never was a time when an impropriation could be made without providing, in some way, for the service of the church. After the 15th of Richard II. there must be an endowment of a vicar. Before the 15th of Richard II. there ought to have been either a vicar endowed, or the service of the church performed by a curate. Now what is the case here? There is no service; the church itself has fallen totally to decay; a great part of it has tumbled down, and the remainder of it was removed by the late impropriator. There must be, therefore, something with respect to this title which does not appear to the Court. There must have been, at some time, service performed at that church; even within memory burials have been performed; even within these twenty years persons have been buried in the churchyard in a parish, where, the Court say, the Plaintiffs in this case are entitled to all tithes, great and small. If there was an endowed vicar he must have something out of the rectory; and it is incumbent on the rector to show what that endowment was, and how it was limited. It is true that the vicar might not be endowed with tithes; he might be endowed with land, or with an annual payment; but the endowment, whatever it might be, ought to have been shown, in order to entitle the impropriate rector to all the tithes. If the impropriation was before the statute of endowments it was not absolutely imperative by law to endow a vicar, yet there ought to have been some evidence given of the impropriation, because all, except, perhaps, very ancient impropriations, at least, I believe all the impropriations in the

1821.

NORBURY
v.
MEADE
and others.

time of Edward the first had a vicar endowed. A great many of the Pope's bulls for the purpose of impropriation expressly required that there should be a vicar endowed; because it was a subject of great clamour in the church that tithes were appropriated to monasteries, and no provision made for the due service of the church; and therefore it was frequently in bulls provided that there should be a vicar endowed. It is therefore extremely important that the actual impropriation should be shown, or that it should be shown that that impropriation took place before the time of legal memory. Before the Court decreed the payment of tithes, both great and small, some such proof of title ought to have been given. It is important with a view to the church itself. By proceeding without such proof of title in the case of a rectory impropriate, the protection which ought to be afforded to the church is disregarded. Some evidence should be shown to the Court that the rector impropriate is entitled to all the tithes, both great and small. The grant of the rectory impropriate is not conclusive as to the right, since there may be a vicar endowed; and unless the impropriation was prior to the 15th of Richard II. there must be a vicar endowed; and as prior to that time there generally was a vicar endowed, or some provision made for the service of the church, the Court of Exchequer has proceeded against what we may call common right on this subject, or common law, in making a decree, directing an account of all tithes, both great and small, arising on the lands in question.

With respect to that part of the case which is not

before the House on appeal nothing can be done. With respect to that which is before the House the Plaintiffs have not shown their title, and it is not admitted. They produce no evidence whatsoever of the fact of their title. They produce no evidence of possession according to their claim; on the contrary, the evidence is directly against them upon the fact of possession. The evidence is also strongly against their right; on the point of presumption they show no title by possession; and upon a circumstance, which is considered slight, but which I hold to be important, a disclaimer by the impropriate rector of these tithes, the presumption is against the title.

Under these circumstances, therefore, the Court of Exchequer ought to have dismissed this Bill with respect to these lands, and directed that the Plaintiffs, the Respondents here, should file a new Bill, if they thought fit, stating their title, and proving it by the production of those documents which the Court ought to have required to be produced, and by showing how it has happened that there is not in this parish a vicar endowed, or a person acting as curate, or in a capacity of that description, for the service of the church, so that the church itself is now gone into decay, and this parish is loaded with the payment of tithes, having no church-duty performed in it, for which tithes were given: under these circumstances the claim of the Respondents requires to be supported by the strongest and clearest evidence; and here there is an absence of all evidence, and the title is denied on the part of the Defendant. I think the proper way to dispose of

1821.

NORBURY v. MEADE and others.

this case will be to reverse the decree pronounced, so far as relates to these lands, and to dismiss the Bill so far as relates to these lands, leaving it to the Respondents to file a new Bill, with a direction that this decision shall not be pleaded in bar of the Plaintiff's title.

The *Lord Chancellor* :—In this case I withhold my final opinion till Monday morning, because I look upon it as a case of great importance, though it relates to a property of small value; yet in my view it may not be of so much consequence as it appeared to be when the learned Counsel first addressed your Lordships. It had escaped me, till I looked over the papers this morning, that the appeal was not against the whole of the decree; that the Defendant's appeal is only against so much of this decree as relates to the tithes of the lands called Great Friars. The appeal is brought here for the purpose of controverting a doctrine (which has been understood as hitherto unsanctioned,) by arguments not affecting any decision of the House of Lords, but the doctrine of the Courts of Exchequer and Chancery, both acting as Courts of Equity, affecting the practice of those Courts in matters of tithes, where the title of a lay impropriator is in question.

The points principally argued at the Bar were, that in this case the Court of Exchequer ought not to have decreed as they have, because it should have been presumed that there was a title in the Defendant. Now if I understand the decisions that have been made in the Courts below, they authorize me to say, that in the cases to which I have been

alluding they did not mean to decide the point whether there was or was not a title in the Defendants, where they have refused to make a decree at the instance of the Plaintiff; and the principle applies not only to suits by lay impropriators, but also to suits by clerical persons. What they have said, as I understand them, in the case of *Scott* v. *Airey*, and other cases referred to at the bar, is this, that if a person shows that he has had a permanency or enjoyment of tithes; that he had not paid them to the rector, whether the lay rector, or the ecclesiastical rector; and can show by his title deeds that the tithes of his land have been made the subject of conveyances, to which, neither the lay rector nor the ecclesiastical rector, was (the latter could not, be) a party; the circumstance of the rector not demanding, whether a lay rector or an ecclesiastical rector, and the land owner asserting in his deeds a title to that which he was not only withholding, but enjoying, in cases attended with these circumstances, as I understand them, it has been determined by the Courts of Equity that it is not fit that they, being Courts of Equity, should make a decree, or interfere, but leave the party claiming to make out a title at law. On the other hand, with respect to a lay rector, where, unquestionably, it must be admitted that the claim is of what may be called a temporal inheritance, altogether different from the claim of an ecclesiastical rector; and when tithes in his hands having become lay property generally, are to be looked at as governed by the same principles as

1821.

NORBURY v. MEADE. and others.

other property; it has been decided, that if the occupier of land can do no more than show that he has not paid tithes to the lay rector, the doctrine, that he shall not prescribe in *non decimando*, applies equally as in the case of an ecclesiastical rector. If he cannot show some title, or some enjoyment of the tithes, which connect the title in him to tithes with that enjoyment, in that case he shall account for the tithes to a lay as well as to an ecclesiastical rector. This is the doctrine which was chiefly discussed and assailed at the Bar; and I believe that this appeal was brought with a view to overturn it; but it seems to me, that in looking at that great point they have overlooked the true point of the case; because, whether Courts of Equity have been right or wrong in the establishment of these doctrines, I apprehend that we are bound to suppose that in all cases in which they have applied them the Plaintiff has made out his title. The Plaintiff can only recover by force of his own title; and I agree with what has been stated by my noble friend on the other side of the House, that the Court ought not to call on the Defendant to enter on his defence at all till the Plaintiff has shown his title.

In the present case the Bill is brought for the payment of tithes of all the lands occupied by the Defendant, including the lands called the Lower Friars, which formerly belonged to a monastery, the rectory at the same time belonging to another monastery. The Defendant not admitting the Plaintiff's title he must show, by evidence, that he has a title; and upon

reading the evidence it does not appear to me that he has made out his title by proof.

But here we have an embarrassment, for the Defendant does not appeal against that part of the decree which directs an account of the small tithes, generally, which according to the whole evidence the rector never enjoyed; but submitting to account for the tithes of other lands, which is, *pro tanto*, admitting the rector's title, he does not submit to account for the tithes of the Lower Friars, which form the subject of the present dispute. I was startled when I first found that, because it struck me, as raising the question, whether he had not admitted the rector's title, but that opinion is much too strong if the justice of the case does not require me to give it.

The question then is, Has the Respondent shown a title so as to bring himself within the cases, and to make it necessary to discuss, for the first time, a case of this kind which has come to the House of Lords? Has he so proved a title as to make it necessary for us to discuss whether the species of decisions to which I have been alluding have been right or wrong? Now I apprehend the nature of the title he has proved is neither more nor less than this; the proof applies to enjoyment, and it applies also to the contents of certain instruments which are produced. With respect to enjoyment, he never enjoyed the tithes of this parcel of land which, as as well as the rectory, belonged to a monastery. I take that to be material; and it is likewise in evidence that he did not enjoy the small tithes.

There is a statement in the answer which is not

1821.

NORBURY v. MEADE. and others.

proved, but for which we cannot not help conjecturing there must have been some foundation. It is supposed that this impropriate rector, (who was the impropriate rector of a parish in which there was a church; in which, to this hour, there are the remains of a church; in which, to this hour, there is a burial place, and where, though the inhabitants can have no spiritual food in their lives, they may have rest when they are dead,) made a bargain with the parishioners, that if they would free him from the necessity of procuring service to be done at the church, he would make them a present of their small tithes. I do not know that there is distinct evidence of the fact, but there has been no service; and what the noble Lord has said is extremely important, with respect to the duty which attaches on the impropriator to provide for the religious service of the parish, both before and after that statute of the 15th of Richard II. Something, therefore, may be conjectured upon that ground, there having been no such enjoyment.

But it is said, although there has been no such enjoyment, here is the character of impropriate rector vested in the plaintiff. Now it must depend upon the evidence whether the character of impropriate rector is vested in this plaintiff so as to bring him within those decisions, be they right or wrong, to which I have been alluding. How does that stand? He does not produce any grant from the Crown; he does not account for the circumstance that no grant is produced; he does not advert to the fact that the property both of the one nature and of

the other were vested in ecclesiastical bodies, who might deal with each other in the manner which the learned Lord has pointed out; he gives no account whatever what became of this property from the time of the dissolution of the monastery till that deed, which, if I recollect rightly, is in the year 1642, a conveyance from Sir John to Thomas Packington; wherein it is described as the Rectory of St. Nicholas in Droitwich. But in the will of Thomas Packington how is that property described, which was taken under the deed? He devises it to his wife, together with all the tithes of corn, grain, and hay; why then, if previous to the dissolution of the monasteries these monasteries might have so dealt with each other as that tithes should not be demandable out of the estate, that might be so, but if that were not so, if the rectory was conveyed to Thomas Packington by Sir John Packington, and if Thomas Packington devises to his wife the rectory, that is, tithes of corn, grain and hay, and if from that day to this day the tithes of corn, grain and hay, that is, the great tithes, upon the whole of the evidence taken together were the tithes that were collected, I say, the person who claims under her must take as she claimed under her husband, and that the enjoyment is an enjoyment showing that she was entitled to the tithes of corn, grain and hay, but to nothing else.

I concur with the noble Lord in his statement, that after it has been shown that the Crown has granted the rectory, if there is possession and enjoyment on the one side, and on the other hand nothing to qualify or limit that possession

1821.

NORBURY v. MEADE. and others.

and enjoyment, a presumption arises that deeds have been lost, and that the connection cannot be made out. But here, looking to the first written evidence of title, it is an instrument between the Packingtons, which shows that the rectory, with all profits that would belong to the rectory, great tithes and small tithes, and so on, were not the subjects to be taken under that deed.

After this conveyance I do not recollect a conventional deed of any kind being proved, and then you come to the enjoyment of Mr. Clieveland, who appears to have been the impropriator. Leases granted by him are in evidence, expressed in terms equivocal and ambiguous; but it is proved that he made a declaration, which has been treated as a matter of little importance, not only in the argument here, but in the judgment of the Court below. But to me it appears a declaration of very considerable consequence, because, if both as against an ecclesiastical rector and a lay rector, by asserting a title to tithes, in title-deeds and otherwise, the relief in equity for those tithes is prevented, what is that but a declaration made behind the back of the rector, and received behind his back? Is that much stronger than the express declaration of a man who would be entitled to all the tithes, that he is not entitled to the tithes of such particular land? It seems to me an extremely strong thing; but it does not rest there, because this bill, being filed in 1810 by a lay person for an ecclesiastical right, in the last lease made in 1801 the tithes of these lands are excepted. I am aware that where a person makes a demise, and excepts something, it may be

1821.

NORBURY v. MEADE. and others.

taken as evidence that he had that which he excepts; but you must look at the circumstances of each case to know whether that was the meaning of it, and if you find he succeeded a person who declared he had not these tithes, you account for the exception, and remove the matter of doubt.

The inclination of my opinion is, that as this case stands before us, we have enough, without entering into the great questions that have been argued at the bar, to enable us to say that the Plaintiff has not made out a case to recover; that he has not gone far enough to raise the necessity of agitating the questions discussed at the bar, but that you may safely say his bill ought to be dismissed, without prejudice to any other bill being filed; and that notwithstanding the embarrassment arising from the Defendant's submitting to another part of the decree. I cannot at present foresee, even with the anxiety I have and profess to have not to disturb other cases, that I am likely, by reconsideration, to alter the opinion which I have now expressed.

9 April 1821.

The *Lord Chancellor*:—In this case I propose to adopt the following judgment, because it appears to me that the circumstances of the case make it altogether unnecessary to examine, either by way of confirming or by way of weakening the doctrine of any of the cases that have been cited at the bar; I mean as to what is to be done in cases either of lay impropriators or ecclesiastical rectors, with respect to tithes of particular lands which have not been retained or enjoyed in pernancy under colour of title. In this case the Plaintiff's title

1821.

NORBURY v. MEADE. and others.

was not admitted by the defendant; and the question is, Has the Plaintiff's case in this cause been so proved, not being admitted, as clearly to raise the question upon a colour of title in the cases to which I have been alluding? It appears to me, by examination of the evidence, that it certainly has not, and consequently it will be sufficient to reverse the decree, taking care, nevertheless, in the terms in which you give the judgment that the reversal of the decree shall not operate to the prejudice or the affirmance of any of the decisions which have been mentioned in the course of the argument at the bar.

The manner, therefore, in which you should proceed should be, "to reverse the decree of the "Court of Exchequer, so far as the same is "complained of by the petition of appeal." You will recollect that the Appellant submits to the decree as far as the tithes of other lands, including the small tithes, are concerned; and I mention the circumstance in order that it may be observed that we have not overlooked it, because it would be very difficult to account for this reversal of ours without affecting the decree for the small tithes, as well as the decree for the lands in question, if it had not been that the Appeal is confined to the latter, and therefore cannot touch the former. "The House may further order, that the original "bill in the Court of Exchequer, so far as the tithes "of the lands called the Lower Friars, in the occu-"pation of the Appellant, are claimed thereby, be "dismissed." If the reversal stopped here it might be understood to have an effect with respect to for-

mer decisions, against which I am extremely anxious this judgment should not operate at all; it ought therefore to be added, "but without prejudice to "the Respondents demanding the said tithes in "any other suit;" and therefore, if in any other suit, either by the admission of the defendant, or by the proofs in the suit, he shall so establish his title as to authorize him to insist, as far as he can insist, on a decree of the same nature, and on the same principles which have been adopted in the cases to which I allude, this reversal will not prevent his doing so; and of consequence this reversal so qualified will not prejudice those cases at all, at least it is not intended by this judgment either to prejudice or to give more effect to those decisions than they ought to have.

Die Lunæ, 9° Aprilis 1821.

After hearing counsel as well on Friday the 9th and Wednesday the 14th days of February, as Friday the 16th day of March last, upon the Petition and Appeal of Coningsby Norbury, Esq., complaining of a decree of the Court of Exchequer, of the 20th day of May 1816, made in two certain causes, in the first of which the Right Reverend Thomas Percy, Doctor in Divinity, deceased, was Plaintiff, and Coningsby Norbury, Esq. Defendant, by original Bill, and in the other the Right Honourable and Reverend Pierce Meade and Elizabeth his wife, and Samuel Isted, Esq., were Plaintiffs, and the said Coningsby Norbury was Defendant, by Bill of revivor, and praying that the said decree might be reversed, in so far as the same directs an account to be taken of the tithes which arose upon and from the lands called the Lower Friars, or that the Appellant might have such other relief in the premises as to this House,

1821.

NORBURY
v.
MEADE
and others.

in their Lordships great wisdom, should seem meet; as also upon the Answer of the Honourable and Reverend Pierce Meade and Elizabeth his wife, and Samuel Isted, Esq., put in to the said Appeal; and due consideration being had on Wednesday the 21st day of February last, and on Friday last, and this day, of what was offered on either side in this cause, It is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, That the said decree, so far as the same is complained of in the said Appeal, be and the same is hereby reversed. And it is further ordered and adjudged, That the original Bill in the said Court of Exchequer, so far as the tithes of the lands called the Lower Friars, in the occupation of the Appellant, are claimed thereby, be dismissed, but without prejudice to the Respondents demanding the same tithes in any other suit.