and I do not very well see what the legislature meant when they substituted the proviso in s. 14 of the act of 1855 for that in s. 51 of the former act. Having enacted that the charge created under the act shall have priority generally, they go on to provide for the case of a part only of the lands improved being subject to a mortgage or other incumbrance, and to declare that the newly created charge shall have priority only to the extent of a due proportion of such charge, to be ascertained and apportioned by the commissioners. I think the meaning of the proviso, as it originally stood, is, that the priority of the statutory charge is to be limited to a proportion to be ascertained,—contemplating a step to be taken in future, and leaving it doubtful whether it was to commence then or not. Then, the 14th section of the second act was inserted for the purpose of explaining the former act, and expressly enacts that the statutory charge is not to be confined to a proportion until a given event, viz. the ascertainment by the commissioners under s. 70 of the former act.

CROWDER, J. I am of the same opinion. The early **[160]** part of s. 51 clearly shews that the charge under the act has priority over all mortgages affecting the lands improved. Then comes the proviso at the end of that section, which certainly is not free from difficulty. On the one hand, it might have been contended that the object of the proviso was to limit the extent of the priority in the former part of the clause: and, on the other hand, it might have been said that the priority of the charge created by the act was to be limited only when an apportionment by the commissioners should have taken place. Then comes the 14th section of the act of 1855, which makes a difference in the form of words. The words of that proviso are,—"that, in case a part only of the land charged is subject to a mortgage or other incumbrance, the charge created under this or the recited act shall have priority over the mortgage or other incumbrance only to the extent of a due proportion of such charge, when and so soon as the same shall be ascertained under and pursuant to the 70th section of the recited act." There being no other conceivable motive for thus changing the language, I think the intention of the legislature must have been to make the former provision clear and definite. So looking at the clause, it seems to me, that, in the case provided for, the charge was to operate as a prior charge to a limited extent only when and so soon as the apportionment should be made by the commissioners under s. 70 of the former act.

WILLES, J. I am of the same opinion. The earlier part of s. 51 makes all the land liable to the charge in priority. Then comes the proviso in favour of the mortgagee, where part of the estate was in mortgage. That left it somewhat ambiguous whether the proportion was to be ascertained at once by the commissioners, or, if not, whether it is to be relative. There is strong reason, as it seems to me, for saying, upon the first act **[161]** that the limitation was only to take place when the mortgagee put in force the provision contained in s. 70. The company could not have an apportionment without first obtaining the consent of all parties: whereas, the mortgagee might do so without obtaining the consent of any person at all. Then comes the 14th section of the act of 1855, which appears to me to make the matter plain. "When and so soon as" the apportionment is made by the commissioners, a certain result is to take place, viz. that the portion of the land which is in mortgage shall become liable to the proportion of the charge only as a first charge. That seems to me to reconcile both sections.

Judgment for the plaintiffs.

RAPHAEL AND ANOTHER *v.* THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND. Nov. 5, 1855.

[S. C. 25 L. J. C. P. 33. See *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 219; *Venables* v. *Baring*, [1892] 3 Ch. 542.]

One who takes a bank-note or other negotiable security bonâ fide,—that is, giving value for it, and having no notice at the time that the party from whom he takes it has no title,—is entitled to recover upon it, even although he may at the time have had the means of knowledge of that fact, of which means he neglected to avail himself.—A money-changer at Paris, twelve months after he had received notice of a robbery of bank-notes at Liverpool, took one of the stolen notes (for 500l.) at Paris,—giving cash for it, less the current rate of exchange,—from a stranger,

whom he merely required to produce his passport and write his name on the back of the note:—Held, that the circumstance of his forgetting or omitting to look for the notice was no evidence of mala fides.—Affidavits of jurymen, to the effect that they did not understand the answers given by their foreman to certain questions put to them, to amount to a finding for the plaintiff:—Held, inadmissible.

This was an action brought by Messrs. Raphael, bullion and money dealers in London, suing upon the title of Victor St. Paul & Co., money-changers of Paris, to recover the amount of a bank-note for 500l. which had been stolen.

The declaration stated that the defendants, on the **[162]** 29th of May, 1852, by their promissory note promised to pay one Mr. Matthew Marshall, or bearer, 500l. on demand; that the said note was then transferred and delivered to the plaintiffs, who thereby became and still were the lawful bearers thereof; and the defendants did not pay the same. There was a count for interest.

The defendants pleaded,—first (to the first count), that, after the making and issuing of the note, and before the plaintiffs became the bearers thereof, the same was feloniously stolen from certain persons using the name, style, and firm of Messrs. Brown, Shipley, & Co., and that the said note was then, and still is, the property of the said Messrs. Brown, Shipley, & Co.; that the plaintiffs were not nor are bonâ fide holders for value or consideration of the said note, and without notice or knowledge of the premises, and that the said plaintiffs were not nor are entitled to the said note, or to sue upon or enforce payment of the same; and that the defendants refused and still did refuse to pay the said note, at the request of the said Messrs. Brown, Shipley, & Co.

Secondly (to the first count), that the plaintiffs were the bearers of the note in the first count mentioned, and suing thereon as agents only and for and on behalf of one Victor St. Paul, and not otherwise, and that, after the making and issuing of the note, and before the said Victor St. Paul became the bearer thereof, the same was feloniously stolen from certain persons using the name, style, and firm of Messrs. Brown, Shipley, & Co., and that the said note was then, and still remained, the property of the said Messrs. Brown, Shipley, & Co.; that the said Victor St. Paul was not nor is a bonâ fide holder for value or consideration of the said note, and without notice or knowledge of the premises, and that the said Victor St. Paul was not nor is entitled to the said note, or to sue upon or enforce payment of the same; and that the defendants refused and still refuse to pay the **[163]** said note, at the request of Messrs. Brown, Shipley, & Co.

Thirdly (to the residue of the declaration), never indebted. Issue thereon.

The cause was tried before Jervis, C. J., at the sittings in London after the last term. The facts which appeared in evidence, or were admitted by the plaintiffs, were as follows:—

On the 13th of November, 1852, the bank-note in question, with four others of the like amount, and five notes for 100l. each, was stolen from a clerk in the employ of Messrs. Brown, Shipley, & Co., of Liverpool. Payment of the stolen notes was immediately stopped, and the loss advertised by means of hand-bills circulated in Liverpool, and also at Paris, and in London. There was some evidence to shew that one of these notices came to the hands of St. Paul in April, 1853.

St. Paul, who was called as a witness, stated, that he was a partner in the firm of St. Paul & Co., money-changers at Paris: that the house was in the habit of changing English bank-notes every day, frequently for very large sums; that the plaintiffs were their correspondents in London; that he recollected taking the 500l. note the subject of this action on the 25th or 26th of June 1854, from a person who presented himself at their shop; that he asked him for his passport, which he produced, and required him to write his name and address on the note, and then gave him the value according to the course of exchange of the day, which was 24f. 95c.; that it was the practice of the house to file all notices of stolen or lost notes served upon them, and to look to them if the amount was important; but that, on this occasion, he did not look at the file, and had no recollection of the notice, or he would not have taken the note.

The learned judge left it to the jury to say,—first, **[164]** whether St. Paul & Co. paid the value for the note,—secondly, whether the notice of the loss was served upon them,—thirdly, whether at the time of taking the note they had the means of knowing that it had been stolen,—fourthly, whether they took it bonâ fide.

The jury retired for about half an hour, and, on their return, the foreman, in answer to the above questions, said they found that St. Paul & Co. did give value for the note,—that they had notice of the robbery,—that they had no knowledge of the loss at the time they took the note, but that they had the means of knowledge if they had properly taken care of it,—and that they took the note bonâ fide.

His Lordship thereupon directed a verdict to be entered for the plaintiffs for 534l.

Bovill now moved for a new trial on the grounds of misdirection, that the verdict was against the weight of evidence, that on the finding of the jury the plaintiffs were not entitled to the verdict, and also upon affidavits by six of the jury denying their concurrence in the verdict as entered. [Jervis, C. J. Can we receive the affidavits of jurymen? *Straker* v. *Graham*, 4 M. & W. 721, 7 Dowl. 223; *Burgess* v. *Langley*, 6 Scott, N. R. 518.] Affidavits of jurymen cannot be received to shew what passes amongst themselves when out of court: but the court of Exchequer lay it down in *Roberts* v. *Hughes*, 7 M. & W. 399, that, "the rule does not exclude jurymen from swearing to what took place in open court, but only as to what took place in their private room, or the grounds on which they found their verdict." [Jervis, C. J. What do the jurymen say?] The first (and they are all in substance the same) states, that, after the evidence had been taken, and after the Lord Chief Justice had finished his summing up, the deponent and the other members of the jury retired to consider the verdict they **[165]** should give; that they had not arrived at a decision upon the verdict when himself and the other members of the jury returned into court for the purpose, as he understood and believed, of answering the following questions which had been put to them by the Lord Chief Justice, viz. first, was the money paid for the bank-note by Victor St. Paul? Secondly, was the notice of the robbery served? Thirdly, had Victor St. Paul at the time of the discount the means of knowing that the note was stolen? That no other answers to the questions proposed had been agreed upon by the jury, or considered by them; that they did not return into court for the purpose of delivering a verdict, but the verdict was, as the deponent understood, to be the subject of subsequent discussion and deliberation; that the deponent had not, nor had as he believed a very large majority of the jury, the intention of, nor did they concur in, finding a verdict for the plaintiffs; that the deponent was under the impression and belief during the whole of the time after the return of the jury into court, and during the time the foreman was being spoken to by the Lord Chief Justice, that he was answering the questions put by the Lord Chief Justice as they had agreed, and that, upon such questions being answered, they should be further instructed as to finding the verdict; that such his (deponent's) impression and belief continued until the Lord Chief Justice declared the verdict to be for the plaintiffs, at which the deponent audibly expressed his dissent while in the jury box; that the deponent's conviction, and, as he believed, the conviction of the large majority of his brother jurors was, that the conduct of Victor St. Paul & Co. had not been such as to entitle them to the property in the said bank-note; that, if he had believed or suspected that the foreman of the jury, by answering any question of the Lord Chief Justice after the return of the jury into court, as to bonâ fide conduct of Victor **[166]** St. Paul & Co. with regard to cashing the said bank-note after notice,—and which question of bona fides had not been determined upon by the jury,—was expressing the opinion of the jury, or was to be considered in that light, and thereby giving in effect the verdict for the plaintiffs, he would at once have refused his concurrence in any such answer, because he was not, nor, as the deponent believed, were a considerable majority of the jury, prepared to concur in an opinion that Victor St. Paul & Co.'s conduct in cashing the note after notice of the robbery, was such as to entitle the plaintiffs to the property in the note; and that, in consequence of his finding that the verdict had been entered for the plaintiffs, against his own view of the case, and his conviction of what was right, and what was intended by himself and a large proportion of the jury, he thought it right the day after the trial to put himself in communication with the deputy-alderman of the ward in which he carried on his business of a merchant in the city of London, with the hope that some measures would be taken to rectify the wrong which he considered had been done by the entry of the verdict for the plaintiffs. [Jervis, C. J. A man who could make out such an affidavit as that, is utterly unfit to be a juryman. It shews that the jury thought St. Paul had acted bonâ fide; but that they would have proceeded upon Lord Tenterden's long since exploded doctrine. Suppose a man serves me with a notice that a certain bank-note for 500l. has been stolen, and afterwards I,

bonâ fide and in course of business, change the note, giving the full value for it in money,—what is there to disentitle me to recover on the note?] Giving value and being ignorant of the loss alone will not constitute bona fides. Here is a man—an utter stranger,—who comes to ask for change of a 500l. note in June, 1854, bearing an old date, and the money-changer, without looking at his file of notices, or **[167]** making any inquiry beyond asking for the man's passport, and requiring him to write his name on the note, gives him the money. Are these notices to be totally disregarded by the money-changers of Paris, and facilities thus to be afforded for the disposal of stolen notes? [Cresswell, J. What is the obligation that is cast upon the money-changer from the receipt of a notice of this sort a year ago? Is his want of recollection of the notice evidence of mala fides?] No particular legal obligation is cast upon the party by the receipt of the notice: but it is an ingredient for the consideration of the jury. The plaintiff is bound to satisfy them that St Paul took the note bonâ fide. [Crowder, J. Suppose, in going over the file, the notice had escaped St. Paul's attention,—would that have negatived his right to recover?] The question of bona fides was essentially a question for the jury; the onus of proving it lay on the plaintiff; and the circumstances under which the note was taken were very suspicious. [Jervis, C. J. Were those circumstances of suspicion to outweigh the fact of St. Paul's having given full value, and his want of knowledge of the loss at the time he took the note?] The moment the robbery is proved, the note is tainted: the presumption is, that the want of title extends to the person who presents it; and the burthen of proving bona fides rests upon the plaintiff. [Cresswell, J. The burthen of proof as to value, where it is shewn that the bill or note has been lost or stolen.] Where the title of the holder is impeached on the ground of fraud, duress, or that the bill has been lost or stolen, the onus lies upon the holder to prove, not only that he gave value for it, but also that he took it bonâ fide: *Mills* v. *Barber*, 1 M. & W. 425. In *Bailey* v. *Bidwell*, 13 M. & W. 73, 2 D. & L. 245, Parke, B., says: "It certainly has been, since the later cases, the universal understanding, that, if the note were proved to have been obtained **[168]** by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it: and that such proof casts upon the plaintiff the burthen of shewing that he was a bonâ fide indorsee for value. That has been considered in later times as settled." [Cresswell, J. My Brother Parke in that case seems to intimate that proof of giving value is to be taken as evidence of bona fides. He goes on,—"That being so, it was perfectly right in this case to cast upon the plaintiff the burden of proving that he gave value for the note."] *Smith* v. *Braine*, 16 Q. B. 244, is an authority to the same effect. Lord Campbell there says: "Mr. Knowles, in his able argument, did not contend that under such a plea the defendant is always bound to give direct evidence of want of consideration, but freely admitted, that, where it is proved that the person who indorsed the bill to the plaintiff got possession of it fraudulently, the onus of proving consideration is cast upon the plaintiff. This doctrine must be considered as now fully established." And the same view is presented by the cases collected in the notes to *Miller* v. *Race*, 1 Smith's Leading Cases, 261, et seq., which shew that bona fides and value are both necessary. Lord Mansfield and Wilmot, J., lay down the same doctrine in *Grant* v. *Vaughan*, 3 Burr. 1523, 1527. So, in *Wookey* v. *Pole*, 4 B. & Ald. 1, 15, Bayley, J., says: "The holder bonâ fide and for a valuable consideration of a bank-note or bill of exchange, has a good title against all the world; because, in the case of bank-notes, they are considered as money, and pass as such, and it is essential for the purposes of trade that delivery should give a perfect title, and because, in the case of bills of exchange, this is the law and custom of merchants." In *Snow* v. *Leatham*, 2 C. & P. 316, Abbott, C. J., in his summing up, **[169]** says,—"If a person take a Bank of England note under circumstances which might awaken suspicion in the mind of a reasonable man acquainted with business, and which ought to cause him to make inquiries, and he forbear to do so, he cannot hold the proceeds of such note from the person who has lost it. On the approach of the Doncaster races of 1824, notice of the robbery was sent to the defendants, on a supposition that was likely that the notes would be attempted to be passed there. Now, it is contended as matter of law, that notice once given is notice for all time. I do not go all that way; and I think it is for you to consider whether as men of

business the defendants would fairly advert to a notice of this kind given a year before, or whether they might not suppose, as they heard nothing more about the matter, that the notes had been got back. It is proved for the defendants, that they do not ask who brings the notes, nor enter numbers or dates. But the question for you to consider is, whether the defendants conducted their business in the race week in such a manner as to hold out temptation to persons unlawfully possessed of property to pass it to them, the defendants knowing that at such a time all sorts of persons, some being of the highest, and some of the most depraved classes, were then at that place. If you think that was so, you ought to find for the plaintiffs; but, if you think that there was nothing incorrect in the manner in which the defendants' bank was carried on, and that the defendants took the notes in the regular and proper course of business, you will find a verdict in their favour." The jury found for the plaintiffs. In Roscoe on Bills, after referring, amongst others, to that case, and to *Snow* v. *Sadler*, 3 Bingh. 610, 11 J. B. Moore, 506, the learned author says,—"From the above cases it will be seen, that, when the title of a party who has received a lost or stolen bill or note, comes in ques-**[170]**-tion between him and the true owner, there are three points to be decided,—1. Whether he took it bonâ fide, that is, whether he took it under such circumstances as may induce a jury to believe that he received it without any notice of the loss or the larceny. It seems that the question whether the bill or note was taken in the usual course of trade is parcel of the question of bona fides; for, if it was taken out of the usual course of trade, it is evidence from which the jury may presume that the party taking it was aware of the badness of the title. 2. The second point is, whether the party taking the bill or note used due caution and diligence in making inquiries respecting the title; for, it is possible he may have acted quite bonâ fide, and yet have been guilty of great want of caution and diligence, as in several of the cases above cited. The degree of caution and diligence requisite must always depend on the particular circumstances of the case; but it may be laid down as a general rule, that a person cannot safely take a bill or note from a stranger, without inquiring into the truth of the representations made by him, even though the party taking the bill or note be acquainted with the handwriting of the parties to it. The earlier cases do not seem to carry the rule to this extent, but it appears to be firmly established by the late decisions. 3. The third point (which has only arisen in the cases determined in the Common Pleas) is, whether the loser of the bill or note has used sufficient diligence in making known his loss." That, it is submitted, is the way in which cases of this sort should always be left to the jury. In *May* v. *Chapman*, 16 M. & W. 355, Parke, B., says: "I agree that 'notice and knowledge' means not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes." The mode in which this case was presented to the jury shifts the burthen of proof, or rather the presumption, which is, that the **[171]** infirmity of title in a stolen note attaches on it in the hands of a holder even for value. Even upon the finding of the jury as it stands, the verdict ought to have been entered for the defendants. The jury found that St. Paul had the means of knowing that the note in question was stolen, at the time he took it, and ought to have known it. [Jervis, C. J. Does not that amount to want of notice?] Clearly not. The finding upon that point, at all events, is defective. Then, upon the question of bona fides, the affidavits shew that the jury were not unanimous. Upon the whole, therefore, it is submitted there ought to be a new trial.

CRESSWELL, J. I am of opinion that there ought to be no rule in this case. Mr. Bovill has contended that there should be a rule, on the ground that the verdict has not properly dealt with the matters which were submitted to the jury. It seems to me, however, that the omission of St. Paul, who is substantially the plaintiff here, to avail himself of the means of knowledge of the alleged felony that were at his disposal, was not the point on which the decision of the case could properly be rested. A person who takes a negotiable instrument bonâ fide for value, has undoubtedly a good title, and is not affected by the want of title of the party from whom he takes it. His having the means of knowing that the security had been lost or stolen, and neglecting to avail himself thereof, may amount to negligence: and Lord Tenterden at one time thought negligence was an answer to the action. But the doctrine of *Gill* v. *Cubitt*, 3 B. & C. 466, 5 D. & R. 324, is not now approved of. I think, therefore, there is no reason to find fault with the verdict on that ground. Then, the jury have found, in substance, that the note in question was taken by St. Paul bonâ fide and for value.

He could not have taken it bonâ fide, if at the time he took it he **[172]** had notice or knowledge that the note was a stolen note. "Bonâ fide" means "really and truly, for value." I admit that the note might have been taken dishonestly, although full value were given for it. The Lord Chief Justice put that as one of the questions which the jury were to decide. They retired with three questions for their consideration; and they returned with the answers,—to the first, that the full value was paid by St. Paul,—to the second, that he had had notice of the felony,—and to the third, that he had no knowledge at the time he took the note, that it had been stolen, but that he had the means of knowledge if he had properly taken care of it. The Lord Chief Justice then put to them the question of bona fides, and the jury found that St. Paul had taken the note bonâ fide. Then, as to the affidavits of the jurymen,—without stopping to inquire whether affidavits of that sort are generally receivable, I apprehend it to be clear that a juryman cannot be permitted to make an affidavit as to something which is passing in his own mind, contrary to what is passing in court as to the verdict, uncontradicted by him at the time. It does not appear that the jurymen who now make affidavits did not hear what was passing on the subject of bona fides, or that they objected to the answer of their foreman. But each of them says, that, if he had believed that the foreman of the jury, by answering any question of the Lord Chief Justice after their return into court, as to bonâ fide conduct of St. Paul & Co. with regard to cashing the said bank-note after notice, and which question of bona fides had not been determined upon by the jury, was expressing the opinion of the jury, and thereby giving in effect the verdict for the plaintiffs, he would have at once refused his concurrence in any such answer, because he was not, nor, as he believed, were a considerable majority of the jury, prepared to concur in an opinion that St. Paul & Co.'s **[173]** conduct in cashing the note after notice of the robbery was such as to entitle them to the property in the note. If that be so, I think the juryman would have been acting in defiance of his duty; for, to say, that, under the circumstances supposed, he would not have concurred in finding for the plaintiffs, is simply saying in so many words that he would not have done his duty. I think there is no ground whatever for a new trial.

CROWDER, J. I am of the same opinion. The first ground upon which we are asked to grant a rule for a new trial is, that the question of bona fides was not properly submitted to the jury by the Lord Chief Justice. It seems to me, however, that that question was properly brought before them. The jury retired to consider in what way they should answer three questions which had been presented for their consideration, and when they returned into court, and by the foreman gave their answers, a further question was put to them, viz. whether they thought that St. Paul took the note bonâ fide; to which the foreman answered, that he did. I can see no objection to the way in which the case was left. No doubt, the Lord Chief Justice in the course of his summing up used some strong observations. But it seems to me that the circumstance of the full value having been given for the note, was almost conclusive to shew that the note was taken bonâ fide. That question was put to the jury in terms; and they so decided. Then it is said that the jury having found that St. Paul at the time he took the note had the means of knowledge of the robbery if he had taken proper care, there ought to have been a verdict for the defendants. I do not, however, see that that ought to have the slightest effect. It might have been a circumstance very fit to be taken into consideration in coming to a conclusion as to bona fides: but, coupled with the finding of the jury that **[174]** St. Paul had no knowledge of the robbery at the time he paid the money, I do not think it any ground for invalidating the verdict. As to the affidavits, I do not think it necessary to determine one way or the other whether such affidavits ought to be admitted. But I agree with my Brother Cresswell that the affidavits, if looked at, merely shew that some of the jury strongly inclined not to find for the plaintiffs, even though they were satisfied that St. Paul's conduct had been bonâ fide. They say they should not have concurred in the verdict if they had understood that their finding bona fides would have led to a verdict for the plaintiffs. Taking all the circumstances together, I do not see how they could possibly resist finding a verdict for the plaintiffs.

WILLES, J. I am of the same opinion. The phrase "bonâ fide" of itself would be likely to mislead the jury. They should be told what bona fides means, viz. taking the note for value, and without knowledge of the robbery. Not to tell them that, would be just ground of complaint. It is in truth a compendious way of expressing

what the jury have found. That appears distinctly from the case of *May* v. *Chapman*, 16 M. & W. 355, where it is laid down by Parke, B., that "notice and knowledge" means not merely express notice, but knowledge, or the means of knowledge to which the party wilfully shuts his eyes,—a suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded. The jury here, in finding that St. Paul had no notice of the robbery at the time he took the note, do in truth find all that is necessary to constitute bona fides. Mr. Bovill, however, relies upon the affidavits of the jurymen, as shewing that the jury,—or at least some of them,—meant something very different from the legal import of the words. If the affidavits are to be taken as a statement of something **[175]** which passed in the jury-room, they clearly are not admissible; and, if they are taken as referring to something which passed in court, shewing that, in the opinion of certain of the jury, the absence of notice meant something different from the ordinary legal meaning of the words, it does not lie in the mouth of a juryman who hears what passes and says nothing, to come afterwards and say that he understood and meant something altogether different. But, even if those gentlemen had at the time the verdict was being delivered audibly expressed what they now say, it would have made no difference; for, all they say amounts only to this,—that, notwithstanding St. Paul paid the full value for the note, and was ignorant at the time that it had been stolen, he was not entitled to be considered as a bonâ fide holder; that is, that his negligent mode of conducting his business disables him from being the bonâ fide holder in the particular case. That is in truth an attempt to revive the exploded doctrine of *Gill* v. *Cubitt*. Speaking of that case, Lord Brougham, in *The Bank of Bengal* v. *Fagan*, 7 Moore's P. C. Cases, 72, says: "It may be taken as established, that, whatever may have been the law laid down in *Gill* v. *Cubitt*, 3 B. & C. 466, 5 D. & R. 324, 1 C. & P. 463, 487, and *Down* v. *Halling*, 4 B. & C. 330, 6 D. & R. 455, 2 C. & P. 11, and one or two other cases, and not abandoned, at least as far as the language went which the court used in some subsequent cases, is now law no longer; and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him." And at the close of his judgment, he again says: "I cited the cases of *Gill* v. *Cubitt* and *Down* v. *Halling*, as having gone far to overrule *Lawson* v. *Weston*, 4 Esp. N. P. C. 56. These cases are no longer law, and Lord Kenyon's opinion is set up, and supported by all the lawyers." I think the affidavits were inadmissible; and that, assuming them to be admissible, they shew **[176]** merely that the deponents dissent from the law as now fully settled on this subject. For these reasons, I am of opinion there should be no rule.

JERVIS, C. J., concurred.

Rule refused (*a*).

IN THE MATTER OF EMMA, THE WIFE OF WILLIAM SQUIRES. Nov. 22, 1855.

[S. C. 25 L. J. C. P. 55.]

To warrant the court in making an order, under the 3 & 4 W. 4, c. 74, s. 91, to dispense with the concurrence of the husband in a conveyance of the wife's property, on the ground of his being beyond seas,—it must be shewn that he has absented himself under such circumstances as to induce the court to infer that he has no intention to return to this country.—An order will not be granted where it appears that the husband is in correspondence with his wife, and remitting sums of money for her support, however small.

Phipson moved for an order to enable Mrs. Squires to convey certain property to which she was separately entitled, without the concurrence of her husband, under the 3 & 4 W. 4, c. 74, s. 91. It appeared from the affidavit that the parties were married in 1849, and that the husband went to Australia in June, 1852, and the applicant had no means of knowing whether or not he would ever return to this country. But it also appeared that she had received letters from him from time to time, the last dated the 12th of August, 1855 (from which it appeared certain that he had no intention

(*a*) See *Backhouse* v. *Harrison*, 5 B. & Ad. 1098; *Goodman* v. *Harvey*, 4 Ad. & E. 870; *Uther* v. *Rich*, 10 Ad. & E. 734; *Arboin* v. *Anderson*, 1 Q. B. 498.