Bligh, N. S. 502. (1831) *Becquet* v. *MacCarthy*, 2 B. & Ad. 951. (1834) *Trimbey* v. *Vignier*, 1 Bing. N. C. 151, 4 M. & Scott, 704. (1834) *Alivon* v. *Furnival*, 1 Cr. Mee. & Ros. 282. (1837) *Breadalbane* v. *Chandos*, 2 Myl. & Cr. 727. (1840) *Devaux* v. *Steele*, 8 Scott, 637, 6 Bing. N. C. 358. (1844) *The Baron de Bode's case* (unpublished). (1844) Sussex Peerage, 11 Cl. & Fin. 114. Story's Confl. s. 637.

[547] EARL NELSON *v.* LORD BRIDPORT. *Dec.* 6, 8, 10, 11, 12, 13, 15, 17, 20, 1845; *Jan.* , *Nov.* 13, 1846.

[S. C. 10 Jur. 1043.]

The incidents to real estate, the right of alienating or limiting it, and the course of succession to it, depend entirely on the law of the country where the estate is situated.

An estate in Sicily was granted to an English subject, which he disposed of by his will upon certain trusts. Held, that as he could not subject his successor to a course of succession different from that which accorded with the grant and the law of Sicily, so neither could he subject the successor, as such, to any duties or obligations different from the duties and obligations which by the grant and the law of Sicily were annexed to his holding.

The law of a foreign country is to be proved as a matter of fact by the testimony of witnesses. The Judge is not supposed to know all the authorities applicable to the case, or whether any older laws or authorities, which may be cited, have been repealed or altered by subsequent laws or authorities, or what are the rules of construction properly applicable to the authorities when ascertained.

Ferdinand the IVth, King of the Two Sicilies, granted to Horatio Viscount Nelson for himself and the heirs of his body, the estate and Duchy of Bronte in Sicily, with power to appoint a successor, to whom solemn investiture should be granted according to the law of Sicily, &c. By a will in the English form, Lord Nelson appointed William, afterwards Earl Nelson, and W. Haslewood to succeed to the Bronte estate, and he devised the same to them; upon trust to settle it upon the said William, afterwards Earl Nelson, for life, with remainder to his male issue in strict settlement, with remainder to Mrs. Bolton for life, with remainder to her male issue in strict settlement, &c., &c., if the law of Sicily and the Duchy admitted, or if not, in such manner as, in their opinion and discretion, would be consistent with the laws of the said kingdom and Duchy, and best or nearest correspond with the trusts declared; and if his intention might be more effectually accomplished through the medium of a trust than by an actual settlement, he empowered his trustees to retain the legal estate. And he authorized his trustees, at their will or pleasure, to sell the Bronte estate, and lay out the purchase-money in England to be held upon like uses. After the testator's death, William Earl Nelson memorialized the King of the Two Sicilies, setting forth the devise of the Bronte estate, and praying a confirmation of the gift and disposition made by the will, and investiture was thereupon granted to him. During the life of William Earl Nelson, a law was made in Sicily, whereby entails were abolished, and the persons lawfully in possession of estates became absolute owners. William Earl Nelson died without male issue, having devised the Bronte estate to his daughter Lady Bridport. Upon his death the Bronte estate was claimed by Thomas Lord Nelson, as the male issue of Mrs. Bolton. The Court upon the evidence held, first, That in the hands of Horatio Viscount Nelson, the fief, though alienable in a particular manner, was not *feudum degenerans* or *in formâ largâ*; and that, although it was *feudum novum*, it had not the incident of alienability which might have attended *feudum novum* not granted on the same conditions; secondly, that, upon the death of Viscount Nelson, his successor, either under the appointment or the limitations, became entitled, not to a *feudum novum* or *feudum degenerans*, but to a *feudum nobile et antiquum* to be held *in formâ strictâ*; thirdly, that Earl William had been, by the will, duly appointed successor to the estate, and was, as such, entitled to claim investiture, and as successor became entitled to the estates with

all the rights and restrictions incident thereto by the Sicilian law; that, as the law then stood, the estate was inalienable by himself, and was descendible from him to his male issue, and in default of male issue to his female issue; and that no operation or effect could be given to the testator's expressed wish and intention as to the succession of the estate beyond that which the law of Sicily allowed; fourthly, that the trustees could not have made a valid sale, and, being unable to execute the trust, by procuring a settlement or by a sale, they were compelled to submit to the law of Sicily, and by so doing, secured the execution of so much of the trusts as could by the law of Sicily be carried into effect; fifthly, that Earl Nelson, being one of the trustees of the will, was bound to do all that he could to perform the trusts according to the testator's intention, so far as the law enabled him to do, and that he and his estate were answerable in this Court for any wilful neglect or violation of his duty; but that the will as to the Bronte estate had been executed, so far as it could be; sixthly, that the subsequent alteration in the law of Sicily could not be deemed to have revived the executory nature of the trusts, but that Earl Nelson, as lawful successor of the estate, with all the legal incidents annexed thereto by the law of Sicily, became entitled to the absolute ownership of the estate, which did not continue to be, or then become, liable to the trusts of the will; and, lastly, the Court abstained from deciding whether Earl William did or omitted to do anything which, by the law of England, made him answerable, or his assets liable in this country, under the law of election or otherwise, the point not being then properly under consideration.

The exceptions as to evidence having been determined, the case now came on to be argued on the remaining exceptions, namely, the 8th, 9th, 10th, 11th, 12th, 13th, and 14th. The facts and arguments are fully stated in the judgment of the Court.

[548] Mr. Tinney, Mr. Gardner, and Mr. R. Palmer, for the Plaintiff, and

Mr. Turner, Mr. Hodgson, and Mr. Bowyer, for the Defendants, Lord and Lady Bridport.

Mr. Kindersley, Mr. Teed, Mr. Piggott, and Mr. Lewin, for the other parties.

THE MASTER OF THE ROLLS reserved his judgment.

Nov. 13. THE MASTER OF THE ROLLS [Lord Langdale]. Horatio Viscount Nelson was, at the time of his death, possessed of and entitled to the Duchy and estate of Bronte, in Sicily. His will purported to appoint his brother William, afterwards Earl Nelson, and Wil-**[549]**-liam Haslewood, his successors on trust, giving the first beneficial interest in the estate to his brother, with remainders over, which (if the limitations could have been secured), would, in the events which have happened, have given the estate to the Plaintiff, now Earl Nelson. The will also purported to give to the trustees a power to sell the estate; and it is under the trusts of this will that the Plaintiff now claims to be entitled, either to the estate itself, or to some equivalent or compensation in lieu of it. William Earl Nelson obtained possession and investiture of the estate as the legal successor of Horatio, and is alleged to have become the absolute owner thereof, for his own use; his daughter, the Defendant, Lady Bridport, claims to be entitled to it, as devisee thereof under his will.

For the purpose of determining the rights of the parties, it became necessary to ascertain, as well as might be, what, according to the laws of Sicily, as affecting the estate of Bronte, was the operation and effect of the will of Horatio Viscount Nelson:—what were the powers and duties of the trustees thereby appointed, and what were the rights, interests, and duties of William Earl Nelson, as one of the trustees of the will, and as first beneficial devisee.

Such enquiries as were thought proper were referred to the Master, who reported thereon. Many exceptions were taken to his report. Some of them related only to the reception or rejection of evidence, and have been already disposed of; the others related to the Master's findings respecting the law of Sicily, or the effect of it, and these are the subject of our present consideration.

The facts necessary to be noticed are as follows:—

[550] On the 10th of October 1799, Ferdinand the IVth, King of the Two Sicilies, erected certain estates, at or near Bronte in Sicily, into a duchy, and granted the

same and the dignity or title of Duke of Bronte to Horatio, Baron Nelson, of the Nile and of Burnham Thorpe in the county of Norfolk.

The charter or instrument, by which the grant was made, was written in the Latin language, and contained a proviso, in which the grantor is made to express himself to the effect following:—The said territory or town, thus by us made a duchy, we grant to Horatio Nelson, for an honorary fief, so that, as well he as the heirs lawfully descending of his body, or from the person whom he shall have nominated, as after mentioned, may be, for ever, styled or named, and be treated and held by all as dukes of the town or territory of Bronte, and as well in the councils of this kingdom, as in any other assemblies whatsoever, take their station as dukes of the town of Bronte, so that his heirs may live in the same duchy, town, or territory, thus by us granted according to the laws of the Franks; that is to say, that in the succession, the elder be preferred to the younger brothers, and the male to the females. And we grant to and bestow on him (as well if there exist, as if there be a failing of heirs of his body descending), to have power and authority to nominate whom he pleases (even out of both the direct and collateral line of his relations or kindred), as a person to whom an equally solemn investiture shall be granted by us, according to the laws and capitularies of the kingdom of Sicily, and preserving, as to the succession, the same law of the Franks.

Moreover, we will, and expressly command, that the Duke Horatio himself, and his heirs and successors, as **[551]** aforesaid, recognise the Duchy of Bronte as a fief held *in capite* of our Royal Court, and be held subject and bound to the military service which is due to us, according to the rents and profits of the same duchy, according to the usage and custom of this our kingdom of Sicily.

Lord Nelson received the licence of King George III. to accept and bear the title of Duke of Bronte, and he took possession of and received the rents of the Sicilian estate thus granted to him.

The title of "Baron Nelson of the Nile and of Burnham Thorpe in the county of Norfolk," was limited to him and the heirs male of his body; but, in May 1801, he was created a viscount, and in August following, King George III. granted to him, as Horatio Viscount Nelson, the dignity of "Baron Nelson of the Nile, and of Hilborough in the county of Norfolk," to hold to him and the heirs male of his body, with remainder to his father, the Reverend Edward Nelson, and the heirs male of his body, with remainder to the heirs male of the body of Susannah Bolton, one of the sisters of the viscount, with remainder to the heirs male of Catherine Matcham, another of his sisters.

The Plaintiff in this cause is the grandson and heir male of the body of Susannah Bolton; the Defendant, Lady Bridport, is the daughter of William, who, after the death of Horatio, became the only surviving son and the heir male of Edward, the father.

Horatio Viscount Nelson, being entitled to the title and estate of Bronte under the grant of October 1799, and being seized of and entitled to some real estate in England, and possessed of personal estate, made his **[552]** will, dated the 1st day of May 1803. The will is made in the English form, and the technical terms, properly applicable to devises and limitations of English lands, are applied to the disposition and limitations intended to be made of the Bronte estate. After giving certain pecuniary and specific legacies, he gave to his brother William Nelson and William Haslewood, all the residue of his personal estate (except as therein mentioned), to hold to them, on trust to convert the same into money, and invest the same for the purpose of securing an annuity of £1000 to his wife, to be taken by her in satisfaction of her dower. And he directed, that if the annual income to arise from his residuary personal estate, when invested, should be insufficient to answer the annuity of £1000, then the deficiency was to be answered to his wife out of the rents, issues, and profits of his barony, town and feud lands and hereditaments in Farther Sicily, thereinafter devised, and he charged the rents, issues and profits thereof with the payment of the said yearly sum of £1000, or such part thereof, as the investment of the residue of his personal estate should be insufficient to pay, so that, in all events, his wife should be entitled to receive a clear annual income of £1000 during her life, provided that his will should not be construed to subject his real estate

in England to the payment of the same annuity. Subject to the annuity, the testator gave his residuary personal estate to be divided amongst his brother and sisters and their issue, in the manner in his will directed. The testator then proceeded as follows:—"And in pursuance, and in exercise and execution of all and every power and powers, authority and authorities enabling me in this behalf, I nominate and appoint the said William Nelson and William Haslewood and their heirs and assigns to succeed, on my death, to the Duchy of Bronte in the kingdom of Farther Sicily and the **[553]** town and estate of Bronte, in the same kingdom, and all and singular the messuages, lands, tenements, jurisdiction, and immunities, franchises and hereditaments, situate in the kingdom of Farther Sicily, which were granted to me by His present Majesty, Ferdinand King of both Sicilies, &c., &c., &c., by letters patent or other instrument, bearing date on or about the 10th day of the month of October in the year 1799, and all other the duchies, towns, estates, messuages, lands, tenements, jurisdictions, immunities, franchises and hereditaments, situate in the said kingdom of Farther Sicily, of which I am seized, or over which I have any power of nomination or appointment, nevertheless, upon, under and subject to the trusts, and for the ends, intents and purposes hereinafter expressed, declared and contained of and concerning the same; and I give and devise the same duchies, towns, estates, messuages, lands, tenements and hereditaments, unto and to the use of the said William Nelson and William Haslewood, their heirs and assigns for ever; nevertheless, upon the trusts and to and for the ends, intents and purposes, and under and subject to the powers, provisoes and limitations, hereinafter limited, expressed, declared and contained of and concerning the same, viz.:—Upon trust that they my said trustees, &c., do and shall, immediately after my decease, or as soon after as circumstances will admit, at the costs and charges of my trust estate, or the rents, issues and profits thereof, *settle, convey and assure the said duchies*, &c., and appurtenances to the uses, upon the trusts, and for the ends, intents and purposes, and under and subject to the powers, provisoes and limitations hereby directed to be limited, expressed and declared concerning the same, if the laws and customs of the said kingdom of Farther Sicily, or of the said Duchy of Bronte will admit, and if the same cannot, in all respects, be effected by the laws and **[554]** customs of the same kingdom or duchy, then, in such manner and form, *as in the opinion and discretion of my trustee* or trustees for the time being, will be consistent with the laws and customs of the said kingdom or duchy, and best or nearest correspond with the same uses, trusts, ends, intents and purposes, powers, provisoes and limitations, that is to say:—To the use of the said William Nelson and his assigns for and during the term of his natural life, without impeachment of waste; with a remainder to the trustees to support the contingent uses after mentioned, and from and after the decease of the said William Nelson, then to the use of the first, second, third, fourth, fifth and all and every other son and sons of the body of the said William Nelson, lawfully begotten and to be begotten," in strict settlement; "and in default of such issue, to the use of Susannah Bolton and her assigns, for and during the term of her life, without impeachment of waste: with remainder to the trustees to preserve contingent remainders, with remainder to the male issue of Susannah Bolton, in strict settlement; with like remainder to Catherine Matcham for life, and to the male issue of her body, in strict settlement, with remainder to the testator's own right heirs." And the testator then proceeded as follows:—"And I hereby authorise and empower my trustees, at any time after my decease, *at their will and pleasure*, to sell and dispose of all or any part of my real estate in the kingdom of Farther Sicily, for such prices in money, or for such equivalent or recompense in lands, &c., as to my trustees shall seem reasonable; and upon receipt of any money to arise from such sale, &c., to lay out the same in the purchase of any freehold estates held in fee-simple, and situate *in* England, Ireland, or Wales." The lands so to be purchased with money arising from the sale of lands in Sicily, &c., were to be held on the same or the like uses, and upon **[555]** and for the same or the like ends, intents and purposes, and charged and chargeable in such manner, as is before expressed concerning his real estates in Sicily, or as near as might be, and the change of circumstances would admit. And, after directing that persons in possession of his devised estate should

have a power of leasing, he directed, that powers to the same or like effect should be contained in the settlement to be made as directed; and that if his intention and the provisions of his will might be more effectually accomplished through the medium of a trust than by an actual settlement, he gave power to the trustees to retain the legal estate of his real estates in Sicily, until all the trusts should have been fully performed, but, in the meantime, the rents were to be paid to the persons, who would be entitled thereto, in case a settlement were made. And he gave certain decorations and jewels, in his will described, to his trustees, to be held as heirlooms, to be enjoyed by the persons, who, under the limitation in his will, might be entitled in possession to his estates in Sicily, or the lands to be purchased or taken in exchange in lieu thereof. And of his will he appointed William Nelson his brother, and William Haslewood executors.

The testator made several codicils to his will, and by one of them, which was dated the 19th of February 1804, he gave to Lady Hamilton the net yearly sum of £500, to be paid and considered as a tax upon the rental of his estate at Bronte, in Sicily, to be paid every six months, the first to be paid in advance, and so continued, for and during the term of her natural life, and, however he might in his will have disposed of Bronte, he declared that writing a codicil to it, and it was his intent, notwithstanding any want of legal forms (of **[556]** *which he was ignorant*), that the above net sum should be paid Lady Hamilton as he had before wrote.

The testator died without issue on the 21st of October 1805; his will and codicils were proved by the executors, his brother William, who succeeded to his title, and William Haslewood.

The trusts of the will, so far as they regarded the English property, were executed, The questions in this cause arise upon what was or ought to have been done with Bronte, the estate in Sicily.

By the grant to the testator, he was empowered to nominate whom he pleased, as a person to whom solemn investiture was to be granted by the King of the Two Sicilies, according to the laws and capitularies of the kingdom of Sicily, and preserving, as to the succession, the law of the Franks.

He intended, by his will, to appoint successors in trust, and if we regard the will with reference to the interpretation which the law of England would put upon it, the duty of the trustees would seem to have been, in the first place to procure a settlement of the Bronte estate, with the limitations stated in the will, if the laws of Sicily would permit.

If the laws of Sicily would not permit of limitations in all respects the same, the trustees had a discretionary power, to procure a settlement consistent with the laws of Sicily, such as might best or nearest correspond with the limitations.

And there is a general power of sale, which is not expressed to be conferred with reference to the possible **[557]** case, that the laws of Sicily would not admit of any settlement, which the trustees, in the exercise of their discretion, could consider to be nearly corresponding with the limitations described in the will. The power may, perhaps, be not unreasonably considered to have been given, with reference to some such contingency, but nothing of that sort is expressed.

In January 1806 William, the first beneficial taker under the will, who had become Earl Nelson, presented a memorial to the King of the Two Sicilies, in which, after stating, amongst other things, so much of the will of the testator, as contained the devise of Bronte, the memorialist expressed his hopes, that His Majesty would be pleased to confirm and sanction the gift and disposition made by the will, and to direct and allow such proceedings to be had, as should be requisite for giving effect to His Majesty's intentions.

A power of attorney, dated the 15th of March 1806, and executed by William Earl Nelson and William Haslewood, was sent to Sicily, and thereby they authorised Abraham Gibbs and Antonio Forcella, and each of them to enter on the Bronte estate, and thereupon, in the name of Earl Nelson, or in the joint names of the trustees, to hold and exercise and enjoy all rights to the duchy and estate belonging, or comprised in the grant to the testator; and to recover and receive rents, and grant leases, and do all acts for the ordering, managing, and improving the duchy and estate.

On the 20th of June 1806 investiture of the lands and estate of Bronte was granted

to William Earl Nelson by the King of the Two Sicilies; and by a notarial instrument, after reciting the power of attorney, and that to the town or territory of Bronte, with the title of [558] Duke, Earl Nelson succeeded, as being appointed and nominated heir by his brother Horatio, with the obligation of a perpetual trust, as appeared from the translation of three clauses in the will of Horatio, and further reciting, as therein mentioned, a note of the investiture was made, and was drawn up and registered, according to the form of the ordinances of the kingdom.

By virtue of these proceedings, William Earl Nelson became entitled to the Bronte estate, for such interest and with such powers, restrictions, and duties, as, by the laws of Sicily then in force, were, under the circumstances, incident to it. He had, at that time, an only son, who, however, died without issue in January 1808, leaving the Defendant, now Lady Bridport, his only sister, and the only surviving child of Earl William; Mrs. Bolton was then living. During the lifetime of Earl William, a general law was made in Sicily, whereby the intails and strict forms of succession, which had rendered certain estates inalienable, were abolished, and the persons lawfully in possession of such estates, became absolute owners, and, as such, enabled freely to dispose of them, and Earl William, being conceived by this to have become absolute owner of Bronte, made a will, attested, as required by the law of Sicily, by six witnesses, and thereby, after reciting that he had, by the law of Sicily, become the absolute proprietor of the Bronte estate, he appointed and nominated as his absolute heiress and free successor, in and to all his hereditary estates in Sicily, and particularly in and to the Duchy of Bronte with all and every its rights, members, and appurtenances, his daughter the Lady Charlotte Mary Baroness Bridport, wife of Samuel Baron Bridport, in such manner, that his said absolute heiress and successor might have free and entire power and authority to take and enjoy the said duchy, for herself [559] and her heirs, and to dispose of the same, as well by acts and deeds in her lifetime, as by her last will and testament.

William Earl Nelson died on the 28th of February 1835, without having revoked or altered his will, and under the will, Lady Bridport now claims to be absolutely entitled to the Bronte estate.

Upon the death of Earl William, the English titles and estates devolved upon Thomas, the son of Susannah Bolton, who thereupon became Thomas Earl Nelson; and upon his death, which took place soon afterwards, viz., on the 1st of November 1835, the same titles and estates devolved upon his son, the Plaintiff Horatio, now Earl Nelson, who claims to be entitled, either specifically to the Bronte estate, which in that case ought to be procured for him, or if that cannot be, then to the value of the Bronte estate, to be made good out of the personal estate of Earl William, and invested in the purchase of English lands, to be settled pursuant to the will of Viscount Horatio.

In considering the Master's report and the exceptions thereto which remain to be considered, it appears to me, that it will be most convenient, first, to state, as distinctly as I can, the several propositions which are expressly stated or clearly involved in the Master's findings; and, secondly, the several propositions which are expressly stated, or clearly involved in the several grounds and reasons on which the Plaintiff has founded his exceptions. I shall then state the conclusions to which I have arrived, after the best and most careful consideration which I have been able to give to the evidence.

[560] The law of a foreign country is to be proved as a matter of fact by the testimony of witnesses. The Judge is not supposed to know all the authorities applicable to the case, or whether any older laws or authorities which may be cited, have been repealed or altered by subsequent laws or authorities, or what are the rules of construction properly applicable to the authorities when ascertained.

In the case of conflicting evidence (which unfortunately exists here), and in the absence of all adequate means of ascertaining what is the amount or degree of confidence which ought to be justly reposed in the testimony of the respective witnesses, the difficulties of coming to a satisfactory conclusion are, perhaps, insuperable. I have endeavoured, in the consideration of this case, to apply the principles, to which I adverted in giving my opinion upon the exceptions which related to the admissibility of evidence;—where the testimony itself has appeared to

require it, I have cautiously referred to those authorities to which I was distinctly led by the testimony; I have not gone further in reading authorities and text writers; and I have certainly omitted no trouble, in the effort to come to right conclusions; but it would be fruitless to attempt any minute detail of the reasons, by which, after the best investigation I could give to the subject, my opinion has been formed.

The conclusions to which the Master has been led, by his consideration of the evidence, are substantially to this effect.

1. Horatio Viscount Nelson was, under the grant to him of the Bronte estate, entitled to hold the same to him and the heirs of his body, according to the law of **[561]** the Franks, with power to appoint a successor, who should receive, from the Crown of Sicily, investiture thereof, to be held by him and the heirs of his body, according to the law of the Franks.

2. He had no power to alienate the estate, except by exercising his power to nominate a successor, who was to hold according to the terms of the grant, and by nominating a successor, his power of alienating was exhausted.

3. He held the estate as a noble fief *in capite, ex pacto et providentiâ principis.*

4. The proper and only effect of his will, as to Bronte, was to appoint his brother William his successor, and thereby entitle him to receive investiture under the original grant.

5. No estate or interest in the land passed by the will alone to the trustees, to the successor, or to any other person.

6. The trustees, as such, and William Earl Nelson had not, either together or separately, any power to procure the estate to be settled or conveyed to the uses or upon the trust contained in the will, or any power to sell the estate, or give to the purchaser a right to claim investiture under the grant.

7. But William Earl Nelson, as feudal nominee, took and became seized of the estate under the original grant, to be held to him and the heirs of his body, according to the law of the Franks, as a noble fief *in capite, ex pacto et providentiâ principis, in formâ strictâ.*

[562] 8. And upon the abolition of feudal tenures in Sicily, and the changes thereby made in the general law of Sicily, William Earl Nelson became the absolute owner of the estate in fee-simple.

The Master's findings expressing or involving these propositions are excepted to by the Plaintiff, who alleges that the Master ought to have come to conclusions in conformity with the following propositions:—

1. Horatio Viscount Nelson held the estate as tenant *in capite* of the Crown, as a *feudum novum* and as a *feudum nobile*, and as a *feudum improprium* or *degenerans*, or *in formâ largâ.*

2. Holding the estate under the three *formulæ* described in the eighth exception, he had power, by his will, to authorise and empower any one or more trustee, or trustees, to sell and dispose of the estate to any person, for a price in money, to receive the money on the trusts of the will, and to cause or procure investigation of the *fief* to be granted to the purchaser.

3. Such estate in the lands, and such right to claim investiture thereof, passed or was given by the will to the trustees, or to Earl Nelson, as enabled them, or one of them, to sell the estate, for a price in money to be received and invested on the trusts of the will, and to cause or procure investiture thereof to be granted to the purchaser.

4. The trustees or one of them having the power to sell the estate, it was obligatory upon them to exercise that power, in order thereby to perform the trusts by the will declared in the event of a sale.

[563] 5. Notwithstanding the investiture of Earl William, he took an estate which permitted him or the trustees to sell the estate, which ought accordingly to have been sold.

6. And as well before as during, and after the period between 1812 and 1818 (when the changes in the Sicilian law were completed), the estate of Bronte, or the estate of William Earl Nelson and William Haslewood, in respect thereof, continued subject and liable to the trusts of the will, so far as they regard the sale of the estate and the obligation to sell it.

The fundamental difference between the two sets of propositions, which I have thus stated, seems to consist in this; that the propositions on which the Defendants rely, rest on the opinion, that the power of nominating a successor did not alter the nature of the *fief* given by the other clauses of the grant, further than was distinctly expressed; whereas, the propositions on which the Plaintiff relies rest on the opinion, that the estate in the hands of Lord Nelson was alienable, either because it was *feudum novum*, or because the power of nominating a successor converted it into *feudum improprium* or *degenerans* or *in formâ largâ*.

By the charter of Ferdinand the IVth, the estate of Bronte was constituted a duchy, and was granted to Horatio Lord Nelson, to be held by him and the heirs of his body, according to the laws of the Franks, by which, in the succession to the estates, the elder was preferred to the younger brothers, and males were preferred to females.

According to the laws of Sicily then in force, it is, I think, admitted, that an estate thus granted, without any **[564]** additional formula, was a noble and pactionated fief, which was to be held *in formâ strictâ*.

But the Plaintiff contends, that the clause in the grant, whereby the grantee, in failure of heirs male of his body descending, was empowered to nominate whom he pleased to be his successor, had the effect of making the estate, in the hands of Lord Nelson, a *feudum degenerans*, with all the incidents attached to that species of fief, and that, with respect to the power of alienating, the effect of a power to appoint a successor was equivalent to, or even greater than, a clause of "*cui dederit*" introduced into the grant.

On the part of the Defendants this is denied; they admit that Lord Nelson had, indeed, an absolute power to appoint a successor, and, by such appointment, to depart from the *formâ strictâ*, which, in the absence of such appointment, would have governed the succession from himself personally; but that by the very terms of the grant, the successor was to hold *in formâ strictâ*, and in the hands of the appointed successor, the *fief* was to be noble, pactionated, and held according to the law of the Franks.

Supposing that the power might have been exercised by act *inter vivos*, it may have been, that Lord Nelson personally, might have sold or contracted to sell the estate, and have thereupon nominated the purchaser (being a proper person) to be his successor. But the power of alienating is to be determined with reference to the terms of the grant, and although Lord Nelson was, by peculiar bounty and as a special favour, empowered to nominate a successor, who was not one of his own kindred, and might, personally, have availed himself of such power to effect a sale, it does not thence **[565]** follow, that the *fief* was to be considered as a *feudum degenerans*, or that the *formâ strictâ* was to be departed from, any further than was warranted by the express words of the grant. The successor was to receive a noble and pactionated fief, the succession to which was subjected to the law of the Franks, and must have been a person proper to receive investiture of and to enjoy such an estate.

The Plaintiff, alleging that the clause for nominating a successor, did (notwithstanding the other clauses in the grant), make the fief *feudum degenerans*, alleges also, that the fief was alienable as *feudum novum;* and it seems, that in ordinary cases, a *feudum novum* was alienable by the grantee, but not universally. I think the evidence shews, that the grant might be made on such terms and conditions as to prevent alienation even of *feudum novum*, either altogether or otherwise than in a particular manner; and it appears to me that the conditions of the grant now in question are of that kind. If this fief was known or intended to be subject to the ordinary incidents of *feudum novum*, and as such to be capable of alienation at pleasure, it would have been superfluous to provide for alienation or departure from the *forma stricta*, by the special grant of a power to nominate a successor.

And I have therefore, and after comparing together the depositions of the witnesses on both sides, come to the conclusion, that in the hands of Lord Nelson, the fief, though alienable in a particular manner, was not *feudum degenerans* or *in formâ largâ*, and that, although it was *feudum novum*, it was not *feudum novum* with the incident of alienability, which might have attended *feudum novum* not granted on the same conditions.

[566] By his will, Horatio Viscount Nelson nominated and appointed William

Nelson (afterwards Earl Nelson) and William Haslewood to succeed on his death to the Duchy and estate of Bronte, upon the trusts of his will, and the first beneficial use was limited to William Earl Nelson for life.

The first question upon the will is, whether it operated as a nomination or appointment of a successor.

If it did, it should seem, that the successor so appointed would, as nominee of the grantee having the power, take the estate under the grant, with all the powers, restrictions, and incidents thereto annexed by the law of Sicily and the conditions of the grant.

If the will did not operate as the appointment of a successor, the successor entitled to investiture would have to be determined by the course of succession authorised by the law of Sicily, and, in default of issue of Lord Nelson, his brother William Earl Nelson would, as next heir male collateral, have been lawful successor.

No particular form appears to have been necessary to give validity to the nomination or appointment of a successor; but, for reasons given by some of the witnesses, two persons could not be legally appointed joint successors, and the witnesses for the Plaintiff do not seem to have considered that the will did operate as the nomination or appointment of a successor, but gave to the trustees an authority which, in their view, was a mandate to sell. Their opinion seems to be, that Lord Nelson himself might have sold, and that he had power to authorise his fiduciary heirs to do all that he might have done himself.

[567] Now the power which Lord Nelson had to sell, if it depended upon his power to appoint a successor, was not executed by him otherwise than by his will, and if his will did not operate as an execution of the power, the power was not at all exercised; and as it is distinctly stated by the witnesses, and particularly by the Plaintiff's witness Viola, that the power was granted to Horatio alone, and could not pass to his fiduciary heirs, it cannot be alleged, that, on this ground, he could authorise his fiduciary heirs to do all that he might have done himself.

The opinion rests, as I suppose, upon the notion that the estate or *fief* was held by Lord Nelson, either as *feudum degenerans* or as *feudum novum*, with an incidental power of free and unrestricted alienation. Assuming this notion, the witnesses consider (at least so it seems) that Lord Nelson had power freely to sell the estate, not only by his own personal act or nomination, but by his agents or trustees appointed by his will for that purpose; and if it appeared that Lord Nelson himself had a power so general and free, and if the power given, or meant to be given to his trustees by his will, was not discretionary, but mandatory, as the witnesses also suppose, it might have been right to say (as they do), that until the investiture of Earl William, the trustees might have sold the estate.

But the whole inference rests upon the correctness of placing the estate or fief, which Lord Nelson held, under the class of *feudum novum* or *feudum degenerans*, and then attributing to it the consequences usually attending fiefs properly within such classification or nomenclature. This does not seem to me a conclusive, or even safe mode of reasoning. The power of dealing with the fief must depend on the peculiar conditions of the grant **[568]** and on the general law applicable to such cases, and the evidence for the Defendants appears to me to shew, that upon the death of Lord Nelson, his successor, whether appointed by his will and so acquiring his right as nominee under the grant, or independently of the will, or of any nomination, and, in default of issue, acquiring his right under the general law affecting the estate granted, became entitled, not to a *feudum novum* or *feudum degenerans*, but to a *feudum nobile et antiquum*, to be held *in formâ strictâ*.

It seems to have been considered, on the part of the Plaintiff, that the nomination of two trustees or fiduciary heirs, and the subsequent limitation of the first beneficial interest to Earl William for life, did not, by the law of Sicily, amount to the appointment of a successor.

But no peculiar form of appointment being necessary, the beneficial interest and substance of the estate having been given to Earl William for his life, he being entitled to the *usufruct* or *dominium utile* of the property, and having actually received investiture, as successor nominated by the will, I consider myself bound, in conformity with the evidence for the Defendants, to conclude that Earl William was, by the will,

duly appointed successor to the estate, and was, as such, entitled to claim investiture.

The law of Sicily did not admit of a settlement or conveyance of the estate, with a rule of succession conformable, in all respects, to the limitations directed by the will.

If investiture were claimed by and granted to Earl William, he would, by the law of Sicily, have an inalienable estate, descendible to his son, who was then living [569] and to his male issue (if it should be continued), without limit. So far the succession by the law of Sicily would be substantially consistent with the limitations contained in the will of Viscount Nelson.

But if the male issue of Earl William should fail (which event happened), the succession would, by the effect of the grant and of the law of Sicily, pass to his daughter, now the Defendant, Lady Bridport, instead of passing, as was intended by the same will, to Susannah Bolton, the Plaintiff's grandmother; and if Earl William should die without issue (male or female), the succession would then, by the law of Sicily, devolve on Mrs. Bolton, if living, and thus bring the succession into substantial conformity with the limitations again.

The failure of the male issue of Earl Nelson was, no doubt, a possible event. The continuance of such issue was also possible, perhaps not improbable.

It was desirable to provide for a contingent failure; but it appears to me, upon the evidence, that the contingency, if it could be provided for at all, could only be provided for by selling the estate and investing the produce in English lands; and then arises the important question, whether the estate could have been sold upon the death of Lord Nelson. He intended to give a power of sale; and, from the statements made before the Master, it does not appear that the trustees at the time felt any doubt as to the validity of the power. It is said, indeed, that William Earl Nelson was desirous to sell it and to invest the produce in the purchase of lands in England, to be settled upon the trusts declared in the will; but that his sisters (who were consulted) being of a different opinion, no attempt to sell was made.

[570] On considering the circumstances under which the Bronte estate was granted, some participation in the feelings, which Mr. Haslewood says were expressed by Mrs. Bolton and Mrs. Matcham, might perhaps be excused. Few persons would probably have not been desirous to preserve, as long as it could be, the connection between the title of Nelson and the title and estate of Bronte; few would not have shrunk from the thought of severing them, immediately and for ever, by a sale of the Bronte estate.

But, independently of any feeling of this kind, the question now is, whether, under the grant, the trustees of Lord Nelson could have sold the estate, and, upon consideration of the evidence, and thinking that, upon the death of Lord Nelson, there was a lawful successor, I am of opinion, that he had not a valid power to alter the rights of that successor, by an authority to sell given by will; I think that Earl Nelson, as lawful successor, became entitled to the estates, with all the rights, and also with all the restrictions incident thereto by the Sicilian law, and that, as the law then stood, the estate was inalienable by himself, and was descendible from him to his male issue, and, in default of male issue, to his female issue.

The incidents to real estate, the right of alienating or limiting it, and the course of succession to it, depend entirely on the law of the country where the estate is situated. Lord Nelson having accepted this Sicilian estate, could deal with it only as the Sicilian law allowed: he had a right to appoint a successor, but no right to modify the estate, interest, or power of disposition to which the successor was entitled by the law of Sicily. The successor became the holder of the estate, [571] subject to the incidents annexed to it by the grant and the law of Sicily, and no others; amongst the incidents was, a particular course of succession, different from that which Lord Nelson had directed, or expressed his wish and intention to direct, and the necessary consequence appears to be, that no operation or effect could be given to the expressed wish and intention, as to the succession to the estate itself, beyond that which the law of Sicily allowed. Giving effect to the will, so far as the law of Sicily allowed, a successor was appointed, and Earl Nelson became entitled to investiture; but the investiture was to follow the conditions of the grant. The successor, though nominated by the will, took the estate under the grant; and the

course of succession thereby provided (though it coincided with the first limitations in the will) might lead, as, in fact, it did subsequently lead, to a departure from them; but the consequence appears to have been inevitable.

Moreover, as the testator could not subject his successor to a course of succession, different from that which accorded with the grant and the law of Sicily, so neither could he subject the successor, as such, to any duties or obligations, different from the duties and obligations which, by the grant and the law of Sicily, were annexed to his holding. The successor, holding by the law of Sicily, had, at that time, an inalienable estate, and any authority or direction to sell it was inoperative; and I am unable to find, on consideration of the evidence, any sufficient reason to think, that the case was different before or after the investiture of Earl William. When the will of Lord Nelson first spoke, *i.e.*, immediately upon his death, the nomination of his successor was complete, and no other person could have claimed investiture, and as connected with this estate, if he accepted it, he **[572]** had the right and duties which the law of Sicily annexed to it and no others.

I therefore think, that the trustees could not have made a valid sale, and could not have entitled the purchaser to investiture, and that they, being unable either to execute the trusts specifically, by procuring a settlement to be made according to the expressed wishes of the testator, or to execute the power of sale, and thereby acquire the means of purchasing English estates of which such a settlement might have been made, were under the necessity of submitting to the law of Sicily, and that by doing so, they secured and effected the execution of so much of the trusts of the testator's will as could, by the law of Sicily, be carried into effect.

Earl Nelson, being one of the trustees of the will, was bound to do all that he could to perform the trusts according to the testator's intention, so far as the law enabled him to do, and he or his estate would have been justly answerable in this Court for any wilful neglect or violation of his duty, but the will, as to the Bronte estate, appears to me to have been executed, so far as it could be. I think that the omission to provide for the contingent failure of the male issue of Earl William was unavoidable, and that the subsequent alteration of the general laws of Sicily cannot be deemed to have revived the executory nature of the trusts.

Earl Nelson, the duly nominated successor of Lord Nelson, the grantee, had obtained the only estate which the law of Sicily allowed him to have, an inalienable estate descendible in a particular manner. By an alteration in the general law of Sicily, that estate was afterwards enlarged, and Earl Nelson became the absolute **[573]** owner of it, with a free power of disposing of it as he pleased.

No complaint of this can, I think, be justly made by descendibles. By his will, the earl gave it to Lady Bridport, who would have taken it under the grant and the investiture, if the law had undergone no change (after the investiture) and, consequently, no question arises in that respect; but I apprehend, that she could not have complained, if he had given the estate to any stranger, any more than a remainder-man under an English or Scotch settlement could complain of, or claim remedy against, the effect of a general law, which might give to a prior tenant in tail, a greater power of alienation than he before possessed.

And regarding Earl Nelson as lawful successor in possession of the estate, with all the legal incidents annexed to it by the law of Sicily, I am of opinion, that upon the alteration of the law, he became entitled to the same property, with all the incidents annexed to it by the new law.

Being one of the trustees of the will, he was bound to do all that he could to perform the trusts, according to the expressed intention of the testator, and was answerable in this Court, for any neglect of his duty. But whether he did or omitted to do anything, which, by the law of England made him answerable or his assets liable in this Court, under the law of election or otherwise, is a question not now under consideration, and having regard to the law of Sicily, I am of opinion, that, according to the evidence, which is, unfortunately, contradictory in many important points, I am, on the whole, of opinion—

[574] 1. That the Bronte estate could not be conveyed or settled, with a succession conformable with the limitations intended to be secured by the settlement directed by the will, in all respects, or to any extent greater than was provided by the investiture.

2. That the trustees named in the will, or William Earl Nelson as successor, had, at the time of Lord Nelson's death, no power or authority to make a valid sale of the estate, or to cause investiture thereof to be granted to a nominee of their own, as purchaser or otherwise; and

3. That the alteration made in the law of Sicily gave the absolute ownership of the estate to William Earl Nelson, and that the estate did not continue to be, and did not then become, subject and liable to the trusts of the will, so far as they regarded the Bronte estate.

I think that the Master's findings on the several matters which are the subject of the several exceptions now under consideration, viz., the 8th, 9th, 10th, 11th, 12th, 13th and 14th are substantially correct, that the grounds on which the exceptions are supported, are not established by the evidence, and, therefore, that the exceptions must be overruled.

NOTE.—The exceptions having been disposed of, the case still remains to be heard on further directions.

[575] RIGBY v. PINNOCK. *Nov.* 3, 1845.

The Court will not prospectively dispense with the usual oath of the messenger to whose custody an answer is confided.

Mr. Kindersley and Mr. Hallett moved for a commission to take the Defendant's answer abroad, and that it might be received without the oath of the messenger. They cited *Cox* v. *Newman* (2 Ves. & B. 168), and referred to a recent case of *Reed* v. *O'Brien.* (Rolls, 4th Nov. 1844, in which the answer had been taken in Russia, and sent by post to the office of the Clerks of Records and Writs. No point was, however, decided in it.)

THE MASTER OF THE ROLLS. When by accident the answer has been unsealed, the Court has taken on itself to consider whether it fairly arrived at the office, in the same state in which it was delivered to the messenger; but I am not aware of any case in which the Court has prospectively dispensed with the security of the oath of the messenger.

I do not feel at liberty to dispense with the ordinary rule of the Court, and, unless some arrangement be made between the parties, take all that is asked by this motion, except the dispensing with the oath of the messenger.

Mr. Turner made a similar motion, which

Mr. Cairns opposed, and a similar result followed.

[576] HITCH v. WELLS. *Nov.* 14, 1845.

Notice of an application, under the 32d Order of May 1845, to appoint guardians *ad litem* to infants whose father was dead, was served at the house of the mother and her second husband with whom the infants were residing. Held, sufficient.

Mr. Bloxam applied for the appointment of guardians *ad litem* to infants under the 32d Order of May 1845. (Ord. Can. 297.) The father of the infants was shewn by evidence to be dead, and the infants were residing with their mother and her second husband.

The "notice of such application" was served at the house of the mother and second husband.

THE MASTER OF THE ROLLS held this sufficient, and made the order.