ENGLAND.

(COURT OF EXCHEQUER.)

1825. *

NORBURY - - - - - - - - *Appellant;*
MEADE and others - - - - *Respondents.*

NORBURY v. MEADE.

A DECREE having been made upon a bill in Equity by a lay-impropriator for an account of tithes, the Defendant in the suit appeals against so much of the decree as relates to part of the lands made subject to the account. The decree is reversed, upon the ground that the Plaintiff in the suit has not proved his title; whereupon the Defendant in the suit presents a new appeal against the remainder of the decree: held that a second appeal in such a suit cannot be maintained. Whether such an appeal would be entertained in a suit where the question of title is in issue. *Quære.*

A party having appealed against one part of a decree, in a suit where the title is not in issue, thereby virtually submits *to rest* of it, and cannot afterwards present a new appeal against other parts of the same decree. When such an appeal is presented the party served with it ought not to answer, but to present a counter petition to have it dismissed. If he treats it as an effective appeal by answering, and suffering it to proceed before he presents a counter petition, he will not be entitled to costs.

IN consequence of the opinion expressed in moving the judgment in the case last reported, the Appellant, on the 31st May 1821, petitioned the House of Peers for permission to present, during the then session of Parliament, a petition of appeal against so much of the decree as was not appealed against by the former appeal. The House, on the report of the committee, rejected that petition, but without prejudice to the Appellant presenting a petition in due time in the next session of Parliament.

* This case is introduced here out of the order of time on account of its connexion with the preceding case.

1825.

NORBURY v. MEADE.

On the 21st January 1822, the Appellant served notice on the Respondent's solicitors, of his intention to present a petition of appeal in the current session against so much of the decree as directs an account and payment by the Appellant of the small tithes in the decree mentioned, and of the costs ofthe suit.

A petition of appeal was accordingly presented, and, on the 15th February 1822, the House made an order that the Respondents should have a copy of the appeal, and put in their answer.

The Appellant entered into the usual recognizance for prosecuting his appeal, and on the 10th May 1822 the Respondents put in their answer to the appeal.

The Appellant then printed and delivered copies of his case, as required by the order of the House, and also delivered copies to the agents for the Respondents, and set his appeal down in the paper for hearing.

In the mean time the Court of Exchequer had virtually suspended proceedings under the decree, so far as related to the account thereby directed to be taken, and the payment of the costs taxed, until the House should have decided the second appeal: for the Respondents, on the 28th of December 1820, before the House had decided on the first appeal, applied by motion to the Court that it might be referred back to the deputy remembrancer, to apportion the costs taxed in respect of so much of the suit as was not the subject of appeal, which motion was opposed by the Appellant, and refused, with costs; and on the 28th of July 1821, after the judgment on the first appeal, the Respondents having again moved for a similar order, it was again refused.

After these proceedings the Respondents presented

a petition to the House, praying that the second appeal might be dismissed, with costs, on the ground, that the Appellant having by his former petition appealed against a part of the decree only, he had thereby submitted to the other part of such decree, and ought not therefore to be permitted now to appeal against the same. The Appellant insisted that he had not by his former appeal submitted in any respect to the decree, and that the Respondents had not taken this objection by proper averments in their answer to the Appellants second petition of appeal, as they ought to have done if they meant to rest their case upon any such alleged submission.

The Appellant further insisted, that if he had in any respect submitted to the decree, that upon discovery of any error in the judgment of the Court, he was at any time at liberty to appeal against the same, provided he presented such appeal within the time limited by the general order of the House, which had been done in the present appeal.

On these grounds the Appellant presented a counter-petition, praying that the petition of the Respondents might be dismissed, and that he might be heard at the bar by his counsel upon the matter of the second appeal.

The petitions in the usual course were referred to the appeal Committee, but the question of practice arising upon them being new, and of great importance, the matter of the petitions was appointed to be heard before the House by counsel, and accordingly came on to be argued at the bar.

The *Solicitor General*, and *Mr. Roupell*, for the original petition.

1825.

NORBURY v. MEADE.

Mr. H. Martin, and *Mr. Simpkinson*, for the counter petition.

For the first petition.—There is no instance of a petition of appeal to the House of Peers against part of a decree at first, and afterwards against the remainder of the decree; if such a practice could be permitted, the principle would extend to the admission of any number of successive appeals against the same decree, as where a number of moduses are pleaded, which would be dangerous and inconvenient in practice, and oppressively injurious to parties litigant. The grounds of objection in the new appeal and the old are precisely similar. The ground of defence, the defect of proof of title as impropriator, was apparent on the record, and open to the cognizance of the defendant at the time of the original appeal: If the practice of splitting appeals has existed, instances might be produced, and the absence of precedent is proof against the existence of the practice. If such a doctrine were established by the decision in this case it would lead to great oppression, delay and vexation.

Against the petition.—There is no positive rule or standing order of the House to prevent appeals against decrees in parts; The Appellants were taken by surprise; as to the ground of objection to the decree, which had not been adverted to by the counsel or the Judges in the court below; viz. the defect of proof of title in the plaintiff, which distinguishes this from the case of splitting appeals upon a decree respecting distinct moduses; the object of the House is always to do substantial justice.

In one case * an appeal being against part of a

* *Roper* v. *Ratcliffe*, 5 B. P. C. 360.

decree, it was reversed; and the House gave leave to the Appellant to apply to the court below to vary the other part of the decree. So in another case† the House dismissed an appeal by consent of parties, declaring the order to be without prejudice to presenting a new appeal. If the House should reject the new appeal, there will be an inconsistency in the decree of the court below; as to one part, the account of tithes will be refused, because the plaintiff has no title; as to the other, it will be directed, although it will appear by the judgment of this House operating on the court below that he has no title. The whole ground of the Respondents claim is annulled by the judgment in the first appeal, and this proceeding is only a corollary from that judgment. There has been no acquiescence in any part of the decree; and if the Respondents had intended to take this ground of objection, it should have been taken earlier. They have answered the second petition of appeal, and suffered the Appellants to proceed upon it, to print their cases, and act upon it for two years without objection. It is now too late to object.

Mr. Simpkinson.

‡ There has been no submission, actual or virtual, to that part of the decree which was omitted in the first appeal. No case has been found in which two appeals, at different times, against different parts of a decree, have been brought before the House; but there are cases which furnish analogy and principle, which tend to show, that in the

† *Evelyn* v. *Evelyn*, 6 B. P. C. 114.

‡ The argument from this point is by Mr. Simpkinson. It is given distinctly, as well on account of the difference in the topics, as the novelty and importance of the case.

1825.

NORBURY v. MEADE.

opinion of this House an appeal against part of a decree is not an acquiescence in the rest of the decree: that appears by the case of *Roper* v. *Radcliffe*. The question in that case was, whether a devise, or bequest of money, to arise from the sale of land to a papist was a devise within the Acts relating to papists. Lord Harcourt held, that as the land was directed by the will to be sold out and out, it was not an interest in land within the meaning of these Acts; that it was a devise or bequest of the surplus of money. Against that part only of the decree, the bequest of the surplus, an appeal was presented to this house. Upon argument, the House being of opinion that it was a devise of an interest in land within the meaning of the Popery Laws, the decree, so far as the appeal complained of it, was reversed: But after the declaration reversing the decree, the order of the House proceeds thus—

"And as to the payment of any of the simple con-
"tract creditors out of the money arising by the
"sale of the trust-estate, in case the personal estate
"should not be sufficient for the payment thereof,
"no complaint thereof being made by the Appel-
"lant, the decree was to stand; but without pre-
"judice to the Appellant applying to the Court of
"Chancery, if he conceived himself aggrieved, there-
"by to vary the directions in the said decree
"touching the payment of the simple contract cre-
"ditors, as he should be advised; and the Court of
"Chancery is to give all such directions in pursuance
"of this order as may be just."

This permission to apply, and direction to the Court of Chancery, on a subject which formed no

part of the appeal, was in effect a direction to that Court to re-hear that part of the case which was not before the House on the appeal. Suppose the party to have availed himself of this liberty, and the cause had been accordingly re-heard on this unappealed portion of the decree, and an order thereupon made by the Court below, would it not have followed as a matter of course, that if the party had been dissatisfied with the order upon re-hearing, or any thing relating to the re-hearing, he might have applied to the House by way of appeal upon that subject? In such a case there would of necessity have been two successive appeals against different parts of the decree in the same cause.

The proceedings in this House in another case* lately pending, illustrates the position, that an appeal against part of a decree is not to all intents and purposes a submission to the rest of the decree. In that case a bill was filed by a vicar for tithes. There were four townships in the parish: one called Shafton. The claim was by the Plaintiff, as vicar, of all the tithes, except a moiety of corn and grain. Lord Westmoreland, who claimed a portion of tithes in Shafton, was made a defendant with persons who were occupiers of lands in that township. Lord Westmoreland, by his answer, insisted that he was entitled not to a moiety, but to the entirety of the tithes of corn and grain in Shafton. The other defendants admitted occupation, and that they had had titheable corn and grain on their lands.

Upon the hearing the bill was dismissed, with costs, as against Lord Westmoreland; and, as against the occupiers, an account was directed of the articles

* *Drake* v. *Smith*, D. P. 1823. MS.

1825.

NORBURY v. MEADE.

of titheable produce specifically; and the decree concluded with the general words, "all other titheable "matters and things demanded by the bill," which included the moiety of the tithes of corn. Against that part of the decree which directed an account of the tithes of hay, wool and lambs, and some other things, the defendants appealed to this House, but that part of the decree which directed a general account of all things demanded by the bill was left untouched by the appeal. When the case came before the House the discrepancy was discovered, and the House refused to hear the appeal until the decree was rectified. It therefore became necessary to apply to the Court of Exchequer to re-hear the case, and to have that part of the decree rectified, in order that the appeal might be brought before the House in a perfect state. But if appealing against part of a decree is an affirmance of the rest of the decree by the effect of acquiescence, no application could have been made to the Court below to rectify the decree; for according to the argument the party had bound himself by virtual submission to the decree.

The effect of the order upon the former appeal was to annul the title of the Respondent, and to take away all right to account in this cause. If he had submitted on the presentation of the second Appeal no costs would have been incurred, and if he had intended to raise the question of practice he ought to have taken the objection when the appeal was presented.

Mr. Wetherell, in Reply:—The cases cited are not in point. In *Roper* v. *Radcliffe* leave was

given to the party to raise the question, whether the simple contract debts were well charged on the estate. It is nothing unusual when a decree is reversed if collateral parts of it are affected by the reversal, to give directions as to what is to be done in the Court below. It is a declaration, explanatory of the judgment of the House, to prevent a consequence, flowing from the reversal of the decree, which might be injurious to the parties, if no declaration were made, or direction given on the subject. In the case of *Drake* v. *Smith* the title of Lord Westmoreland was not properly brought before the House when the case was first brought for hearing on the appeal; and the House directed that the cause should go before the Court of Exchequer to make his title apparent in the cause, and to enable him to appear at the bar as a party in the appeal.

As to the supposed discrepancy between the order of the House on appeal and the judgment in the Exchequer, if there had been any decision upon the title in the appeal; the point might deserve consideration; but in this judgment of the House no question of title is decided; it is expressly reserved.

In the course of the argument the *Lord Chancellor* asked whether the decree was general, to which it was answered, that it was so as to the account.

Upon the argument, founded on the absence of any order of the House to exclude a second appeal in the same cause, he asked whether any instance of such an appeal could be produced. As to the effect of any acquiescence or

1825.

NORBURY v. MEADE.

agreement between the parties upon the subject; he said the objection must arise from the practice of the House, without regard to the arrangements or conduct of parties.

As to the argument, that after the judgment on the former appeal, if the decree for the small tithes should be suffered to stand, it might appear by the record that the Court of Exchequer had decreed the small tithes to a person having no title, *Lord Redesdale* observed, that the order on the former appeal was made without prejudice to any demand to be made by the Respondents in any other suit; that the House had expressed no opinion as to the parts of the case not then the subject of appeal, and that the cases were very different.

19th May 1825.

Lord *Redesdale*:—I think the petition of appeal should be dismissed. The case came originally before the House on an appeal, which applied to the tithes of certain abbey-lands called the Lower Friars. The decree against which the appeal was made was upon a bill in which the Plaintiff sued in the character of impropriator, for all tithes, great and small, of the whole parish. The defence set up by the Defendants in that case was with respect to the tithes of the lands called the Lower Friars; that they were abbey-lands, and exempt from tithes. The Court of Exchequer were of opinion that that exemption was not proved, and therefore decreed an account of those tithes of the lands called the Friars. The Court of Exchequer also decreed against the Defendant for the tithes of other lands, including the small tithes. The question before the House on the first appeal was,

whether these lands called the Friars were exempt from tithes, as the Defendants contended: it appeared that the Respondents in that case had not given sufficient evidence of their title to the tithes of these lands, for a part of the evidence which they produced, and which proved their being in possession of all the tithes of the rest of the parish, excepted the abbey-lands, particularly leases of the tithes of all the other lands except the abbey-lands. There was also evidence of the actual receipt, (that is, receipt by letting the tithes) of all the tithes of the rest of the parish except the abbey-lands. It appeared, by the evidence of a person who claimed to be impropriator, that he had said they were exempt from the payment of tithes. Upon this case, so appearing before the Court of Exchequer, they thought fit to make a decree with respect to the abbey-lands, as well as the other lands in the occupation of the Appellant, for tithes generally including the small tithes. Now the ground upon which this House reversed that decree with respect to the abbey-lands was this, that the Respondent had not sufficiently shown a title to the tithes of the abbey-lands, but they had shown a *primâ facie* title to the small tithes of the other lands, and therefore the House having really nothing before it with respect to these lands on which it could make any order whatever, did not touch that part of the decree. The House was also doubtful as to the tithes of the abbey-lands. They therefore, in the order which they pronounced, declared it to be without prejudice to the Respondents in that appeal claiming the tithes in any other suit. If

1825.

NORBURY v. MEADE.

the decree against part of which the Appellant now seeks to appeal with respect to other lands had been a decree establishing the title to the tithes, the question might be different; but it is a decree merely for an account, and therefore it is a decree without prejudice to the title. What was decided by the House on the former appeal was also without prejudice to the title; for the House, in the judgment which it thought fit to pronounce on that appeal, ordered that the decree, so far as the same was complained of, (that is, with respect to the abbey-land being exempt,) should be reversed; and it was ordered, that the original bill, so far as it regarded the tithes of the Lower Friars, or claims thereto, should be dismissed, but without prejudice to the Respondents demand in any other suit. The parties therefore are in this situation, that the dismissal of the bill in the Court of Exchequer by the order of the House, does not prejudice the title; it prejudices the demand that was made in that suit, and it puts an end to the title of the Plaintiff in that suit with respect to the tithes of the abbey lands, but it does not determine that he has no title to these tithes, and he might have instituted a suit for the purpose of ascertaining his title to these tithes. The decree of the Court of Exchequer which was pronounced at first does not at all prejudice the rights of the Appellants in that case, who have now presented a further petition of appeal; it does not prejudice their right to insist on the exemption from payment of small tithes to the Respondents; they set up no exemption from the payment of small tithes at all, with respect to

these lands; but their defence was; that the Plaintiff was not entitled to these small tithes. Now the evidence did prove a *primâ facie* title, and therefore was sufficient to ground the decree of the Court of Exchequer. Had they thought fit to present an appeal against the whole decree, the House might have determined the whole case. How it would be determined on the whole case I cannot now pretend to say, for the whole case has not been argued before the House. But as the party had the opportunity, if he thought fit, to have presented the appeal against the whole case, I think it would be extremely mischievous to permit a second appeal, in such a case as this, to be presented to the House. If it was a decree which concluded the title, that might be a question of separate consideration, but as it is a decree which does not conclude the title, but leaves both parties in the situation in which they would have been, except as to the account, I think there is no reason whatever for doing what does not appear ever to have been done before, permitting a second appeal to be presented by the same party, for the purpose of bringing the question again before the Court, with respect to the title which the Respondents in this case may have to the small tithes of the other land in the occupation of the Defendant, which is now the only subject of question.

Under these circumstances, therefore, it appears to me that this appeal ought to be considered as improperly presented, and therefore dismissed. It is not a case in which costs ought to be given, especially as the Respondents have thought fit to put in

1825.

NORBURY v. MEADE.

an answer to this appeal. They ought, immediately on the appeal being presented to have presented a petition to the House, praying that the appeal might not be heard: not having so done, it seems to me not a case in which there should be any costs given to the Respondents; I therefore move that the petition of appeal be dismissed without prejudice to any question of right, and without costs.

The Lord Chancellor:—I rise for the purpose of stating the question, whether this petition be or not received. I am quite satisfied that this second appeal ought not, under the circumstances, to be upheld. Whether, if the title had been brought into question, the appeal should have been received, I desire to withhold my opinion; that is a question of great importance, and I should be sorry to prejudge that question by any thing falling from me at present. I am satisfied that this petition of appeal should be dismissed. But the persons who complain of this petition of appeal have not done what they had an opportunity of doing. When the order was made for hearing the appeal they should have presented a petition to the House to put an end to that petition of appeal: under these circumstances I think the costs are properly refused.

Petition of Appeal dismissed.