

ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER.

BLAKE and another—*Appellants*.VEYSIE, Clerk—*Respondent*.

A PARTY can only succeed in his suit *secundum allegata et probata*, and, unless the case proved corresponds with the case laid, the suit cannot be supported, though the party makes out in evidence a case which might be a good one if it had been properly laid in the pleadings. And, therefore, where in the answer to a bill for tithes certain customary payments were alleged, and some payments, which from their smallness appeared to be customary, were shown in evidence, without making out the moduses as laid, the Court of Exchequer, without directing an issue to try the existence of any customary payments, decreed for the Plaintiff, and the decree was affirmed by the Lords.

July 27, 1814.

July 5, 1815.

TITHES.—
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VEYSIE, clerk, Rector of the parish of Plymtree, brought his bill for tithes in kind against Blake and Harris, two of the parishioners. In the answer certain moduses were alleged as to several of the tithable articles, viz. seven-pence for every milch cow depastured in the parish, in lieu of her milk; one penny for every colt in the parish; four-pence for every hogshead of cider, made from apples growing

Bill filed,

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in, the parish; two-pence for every acre of meadow land in the parish, in lieu of the grass made upon it; and one penny for every garden in the parish, in lieu of all tithable things therein produced: all payable on Easter-day in every year. The Plaintiff having taken issue upon the fact of the existence of the moduses, some evidence was given of payments which from their smallness appeared to be customary payments, but without making out the moduses as laid in the pleadings. The Court of Exchequer decreed for Plaintiff, and the Defendants appealed.

It was contended for the Appellants that an issue ought to have been directed to try the existence of the moduses. On the other hand it was insisted that even the evidence for the Appellants, taken by itself, had not made out their moduses as laid; and that from the whole of the evidence taken together it was clear that no modus existed, and that no issue ought to be directed. It was also contended on the authority of *Coggan v. Lonsdale*, 1404-5, Gwill. Tith. that the modus was badly laid, because it ought to have been stated to whom it was payable, and for what period, and what particular parts of the lands in the possession of Defendants were covered by it. (*Lord Redesdale*.—I doubt that objection would go to every parochial modus. In the case of *Coggan v. Lonsdale*, there were particular circumstances. If it is laid as a parochial modus, it will cover the whole parish.) They say two-pence for every acre of meadow land, but they don't state whether they mean ancient meadow, or what. They say it is payable at Easter, but for what period? (*Lord Redesdale*.—The true

way would have been to lay it as payable at Easter for a year from the preceding Easter. It is material, for in a case of modus, it must appear for what period it is paid.)

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Sir S. Romilly for the Appellants; *Mr. Dauncey* for the Respondent.

Lord Redesdale. A Court of Equity would sometimes direct an issue where all the circumstances were not alleged with the strictness necessary at law. There appeared to be conflicting cases on this subject, and he proposed that the consideration of the matter should be adjourned, in order to give an opportunity for further examination.

Lord Eldon (C.) He concurred in that, more especially as the case had come on so late in the session that it had been utterly impossible to make the proper inquiries into the doctrine and practice of the Court of Exchequer as to the granting of issues in these cases.

Lord Eldon (C.) The question in this case is whether a decree of the Court of Exchequer in England—by which it was referred to the Deputy Remembrancer to take an account of tithes due to the Respondent as Rector of the parish of Plymtree, in the county of Devon, and payment thereof was ordered to be made to the Respondent by the Appellants—is justified by the pleadings and evidence in the cause.

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Judgment.

The Respondent had filed his bill for payment of

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tithes in kind, to which the Appellants answered, alleging moduses or customary payments with respect to several of the tithable articles, viz. 7*d.* for every milch cow, 1*d.* for every colt, 4*d.* for every hogshead of cider, 2*d.* for every acre of meadow land, and 1*d.* for every garden, payable at Easter, &c.

The Plaintiff took issue on the fact as to the existence of the moduses, and the Court was of opinion that they were not proved in such a way as either to warrant a decree that they existed, or even to call for an issue to try whether they did or not. It was not contended here, nor could it well be, that the evidence was such as fully proved the existence of the moduses as laid, but it was insisted that the matter was left in so much doubt that it was more fit to direct an issue to try whether there were such moduses or not. In that view the person who had now the honour to address their Lordships had directed his attention to the case. Now the Defendants could succeed only *secundum allegata et probata*, according to what is alleged and proved. In this view it does not appear to me that the case as to the moduses is proved. But whether they might have sustained a defence, and established moduses, if laid in some other way, I do not undertake to say. But here there is no sufficient evidence to support the allegations, not even so much as according to the principles and practice of the Court called for an issue. It would give me satisfaction to hear whether my noble friend approves of the view which I have taken of the case.

Lord Redesdale. My view of the case is similar

to that which has been stated. The difficulty is to frame any issue upon the answer that accords with the evidence. The Defendants have not laid the moduses in the pleadings according to the case which appears upon the evidence. They may contest the Plaintiff's claim in another suit ; but here there could be no issue directed, because if it were it must be something new arising out of the evidence, and not out of the answer or pleadings. There is certainly some evidence of payments which from their smallness appear to have been customary payments. The Court, however, did right with respect to the present case. But the Defendants may in another suit put the proper modus in issue.

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Appeal dismissed, and decree *affirmed*.

Agent for Appellants, BLEASDALE, ALEXANDER, and
HOLME.

Agent for Respondent, EDMUNDS.