the admittances not to be held at the will of the lord.(1) The writ of partition is abolished by 3 & 4 Wm. 4, c. 27, sect. 36, and so also **[316]** is the proceeding by plaint in the lord's court, which, as appears by the earlier cases, was the only mode of effecting a partition of copyholds. The Legislature, however, when it passed that Act, meant not to abolish partition entirely, but to leave untouched the equitable jurisdiction in cases of partition, not considering it as dependent on the jurisdiction either at common law or by statute. [THE VICE-CHANCELLOR. The Act simply abolishes legal partition: there is no allusion in it to equitable partition.] On a writ of partition the judgment is for the parties to hold in severalty: therefore, a legal title would be given without the lord's concurrence: but a Court of Equity decrees a partition to be effected by surrenders in the lord's court. [THE VICE-CHANCELLOR. The lord, on the admittance of a copyholder, is entitled to the accustomed fine; but who can say what is the accustomed fine on admittance to a tenement which never before existed?] The jurisdiction of this Court with respect to partition is not only exercised in a different manner, but is more extensive than it is at common law. The Court deals with complicated interests in a manner that a Court of Common Law cannot. It can decree money to be paid for owelty of partition: and, if one of two coparceners aliens, the alienee cannot have partition at common law; but may have it in this Court. *Dodson* v. *Dodson* (Allnatt on Partit. 94; and 2 Watk. on Copyholds, p. 153, note, Coventry's edit.); *Swan* v. *Swan* (8 Pri. 518); *Baring* v. *Nash* (1 V. & B. 551; see 555); Vin. Ab. tit. Partit, pl. 36; *Gaskell* v. *Gaskell* (*ante*, vol. vi. p. 643).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have always considered the question that has been **[317]** raised by a demurrer in this case to be settled. I well remember that the question was decided by Sir William Grant in *Shewen* v. *Kirwan* in 1811 (not reported): since which time I have never met with a person who had a doubt about it. There formerly was a floating opinion that a partition of copyholds might be decreed, but it soon subsisted. Where freeholds and copyholds are held together in common, as in *Dodson* v. *Dodson*, there may be a partition, in one sense, by giving all the copyholds to one and all the freeholds and, if necessary, money for equality of partition to the other. But since that decision by Sir William Grant, to which I have referred, I have never heard it so much as hinted that this Court had jurisdiction to make a partition of copyholds alone.

This Court has never extended its jurisdiction to any new subject, but, when dealing with an old subject, has dealt with it in its own way: and if this Court, on a bill being filed for a petition, finds persons variously entitled in undivided shares to partial interests, it will take care that no injury shall be done by directing that, by the form of the conveyance, the parties shall have the same interests in the divided shares as they before had in the undivided shares. So that the jurisdiction exercised by this Court in cases of partition is, in effect, an improvement on the jurisdiction as it existed at law: but this Court has never assumed a jurisdiction over copyholds.

My opinion is that the filing of the bill in this case is a pure experiment: and, therefore, the demurrer must be allowed with costs.

[318] HERIZ *v.* RIERA. *Dec.* 15, 17, 1840.

[S. C. 10 L. J. Ch. 47; 5 Jur. 20.]

Plea. Pleading. Foreign Law.

A. and B. were Spanish subjects, resident in Spain. A. having entered into a mercantile contract with the Spanish Government, agreed with B. to allow him a share of the profits. Some years afterwards B. died, and A. went first to France, and afterwards came to England. After he had left Spain, he frequently wrote to the Plaintiffs (who were resident in France, but had taken out administration to B.

(1) It seems that customary freeholds are not within the Acts of Hen. 8; see *Burrell* v. *Dodd*, *ubi sup.*

in this country), promising to settle with them for B.'s share of the profits of the contract; but not having done so, they filed a bill against him to enforce the agreement. A. pleaded that the agreement was illegal and void by the laws of Spain, as, at the time it was entered into, B. held an office of trust and confidence under the Spanish Government: and the plea averred that the entering into the agreement was a crime against the laws of Spain, subjecting the parties to pains and penalties and a criminal prosecution. It was objected, first, that the plea was double, as the first part applied to the discovery and relief, and the latter part to the discovery only: secondly, that the particular law of Spain, by which the agreement was nullified, ought to have been set forth: thirdly, that B. was dead, and, therefore, no longer subject to pains and penalties; and, fourthly, that A., after he had left Spain, had recognised the agreement and promised to perform it. The Court, however, allowed the plea.

The bill stated that the Defendant (who was described as formerly of Madrid, but then of the Clarendon Hotel, Bond Street) on or about the 11th of June 1827 entered into a contract with the Spanish Government for providing tobacco for the Royal manufactories of Spain for five years, from June 1828, at the prices mentioned: that the capital intended to be employed in the execution of the contract was estimated at £60,000 sterling: that the Defendant, soon after he had entered into the contract, came to an agreement with Don Pio de Elizalde, late of Madrid, deceased, that Elizalde should participate in the profits of the contract, to the extent of one-fifteenth, with a nominal capital of £4000 sterling; but it was agreed between the parties that, although Elizalde was to participate in the profits of the contract to the extent of one-fifteenth, yet **[319]** that, in consideration of some important services which he had previously rendered to the Defendant, the Defendant would not call upon him for more than one-half of such nominal capital; and that, in the event of the contract not turning out profitable, the Defendant would not call upon Elizalde to contribute more than one-thirtieth of the loss that should be sustained thereby: that, accordingly, the Defendant wrote and sent to Elizalde a letter, dated the 20th of June 1828, which was set forth in the bill, and which contained the terms of the agreement. The bill then stated that Elizalde accepted the proposal contained in the letter, and signified to the Defendant his assent thereto: that the Defendant continued to supply the Royal manufactories of Spain with tobacco under the contract, from June 1828 until June 1833, by which he realized very large profits, to one-fifteenth of which Elizalde was entitled under the agreement; but the Defendant never paid, either to Elizalde or to his representatives, anything on account thereof; and all accounts in respect thereof, between the Defendant and Elizalde's estate, still remained open and unsettled, and several thousand pounds were due to Elizalde's estate in respect of the matters aforesaid: that Elizalde died in October 1836, intestate, and that, soon after his death, the Plaintiffs, his sisters (who were described as of St. Jean de Luz in the kingdom of France), procured letters of administration to his estate from the Prerogative Court of the Archbishop of Canterbury. The bill then set forth three letters written, in the years 1836, 1837 and 1838, by the Defendant (who was then in Paris, and shortly afterwards came to reside in England), to the Plaintiffs, in which the Defendant promised to account for and pay to them, as soon as he should be able, the share of the profits of the contract to which Elizalde's estate **[320]** was entitled. The charging part of the bill contained two letters from the Defendant to Elizalde, one dated in 1831 and the other in 1832: in the former the Defendant stated that he had made a partition of funds in the tobacco undertaking, and had credited Elizalde with his share, and that, as soon as he should have realized some credits, which he expected to obtain without delay, he would advise Elizalde of another partition: and, in the latter, he stated that Elizalde might dispose of 200,000 reals, in lieu of 180,000, as per first advice, and that he trusted he should be able to give Elizalde, without great delay, another advice of a similar nature. The bill then charged that the Defendant had invested part of his profits in the funds of this country, and various other matters, with a view to obtain a discovery of them: and it prayed for an account and payment of what was due from the Defendant to Elizalde's estate, in respect of the profits of the contract.

The Defendant put in the following plea: "This Defendant, by protestation, &c., doth plead in bar to the said bill, and for plea saith that, at and prior to the date and making of the alleged agreement in the said bill alleged to have been come to, by this Defendant, with Don Pio de Elizalde in the said bill mentioned, he, the said Don Pio de Elizalde, was a public officer and agent of the Spanish Government in the said bill mentioned, and then holding, as such public officer and agent, an office or offices of trust and confidence under the said Government, to wit, the office of Tresuero General del Rieno, which, being translated into the English language, means Chief Treasurer of the Kingdom, and likewise the office of Consegero de Estado, which, being translated into the English language, means Councillor of State: and that, by reason thereof, by the laws then, **[321]** and at that time, and still in force, in the kingdom of Spain, the said alleged agreement was and is null and void, and the parties to any such agreement as the said alleged agreement in the said bill mentioned would have been and were and still would be and are, by reason of the premises aforesaid, by the laws of the said kingdom of Spain, liable to pains and penalties and criminal prosecutions for making and entering into such alleged agreement: And this Defendant doth aver that the said alleged agreement, if any, was made and entered into in the said kingdom of Spain, and that, at and prior to the date and making of the said alleged agreement, this Defendant and the said Don Pio de Elizalde were respectively subjects of and residing and domiciled in the said kingdom of Spain, and under the allegiance of the said Spanish Government; and the said Don Pio de Elizalde being, as aforesaid, a public officer and agent of the said Spanish Government, and holding, as such, an office or offices of trust and confidence under the same Government as aforesaid, the said alleged agreement was and is, by reason thereof, by the said laws then and still in force in the said kingdom of Spain, *ipso facto* null and void, and the making and entering into such alleged agreement was and is, by reason of the premises aforesaid, a crime against the laws of the said kingdom of Spain, subjecting the parties thereto to pains and penalties, and a criminal prosecution for the same: and, therefore, this Defendant humbly demands the judgment of this honourable Court, whether," &c.

Mr. Wakefield, Mr. Jacob and Mr. Rogers, in support of the plea, said that the Courts of this kingdom would not enforce an agreement between parties who were subjects of and resident in a foreign country, **[322]** which, as the plea averred, was null and void by the laws of that country, and subjected the parties to pains and penalties, and to a criminal prosecution. *Armstrong* v. *Armstrong* (3 Myl. & Keen, 45); *Thomson* v. *Thomson* (7 Ves. 470, 473); *De la Vega* v. *Vianna* (1 Barn. & Adol. 284); 3 Burge on Colonial Law, 757, 759 and 760: Story on the Conflict of Laws, 200; *Talleyrand* v. *Boulanger* (3 Ves. 447).

Mr. Knight Bruce and Mr. Koe, in support of the bill. The plea that has been put in in this case is, in fact, two distinct pleas formed into one. It is a plea to the discovery, on the ground that it would subject the Defendant to pains and penalties; and to the discovery and relief, on the ground that the contract is illegal. A Plaintiff may be entitled to relief, although he may not be entitled to compel an answer to a single allegation in his bill; for he may prove his case without the oath of the Defendant. In *Brownsword* v. *Edwards* (2 Vez. 246) Lord Hardwicke, C., says: "Some collateral arguments have been used, that it is not in every case the party shall protect himself against relief in this Court, upon an allegation that it will subject him to a supposed crime. It is true it never creates a defence against relief in this Court; therefore, in case of usury or forgery, if a proof can be made of it, the Court will let the cause go on still to a hearing, but will not force the party, by his own oath, to subject himself to punishment for it. In a bill to inquire into the reality of deeds on suggestion of forgery, the Court has entertained jurisdiction of the cause; though it does not oblige the party to **[323]** a discovery, but directs an issue to try whether forged." It is manifest therefore that a plea to the discovery, on the ground that it would subject the Defendant to pains and penalties, is quite distinct from a plea to relief. The plea avers that the contract is invalid, and, besides, that the entering into it subjects the parties to pains and penalties: so that it does not aver that the invalidity of the contract creates its criminality, or that its criminality creates its invalidity. Criminality and invalidity are by no means one and the same thing; nor, indeed, is the one the necessary consequence of the other. An act may be invalid

and yet not criminal: or it may be criminal and yet not invalid. *Fieri non debet; sed factum valet,* is a maxim acknowledged by our law. A marriage may be valid, although some of the regulations prescribed by law may not have been complied with. If then, as we contend, criminality and invalidity are not necessarily connected with or deducible from each other, the plea must fail for duplicity.

Secondly. The plea is too loose and vague. It ought to have set forth the particular law of Spain which renders the contract invalid. Is it fair that the Plaintiff should be sent to search all the laws of Spain, in order to find out which of those laws it is that the plea alludes to? Suppose that the Defendant had pleaded that, by the laws of this kingdom, the contract was void: that general mode of pleading would not have been good. The particular Act of Parliament which makes the contract void must be referred to. A private Act of Parliament is as much the law of this country as a public Act is; but, nevertheless, it must be specially pleaded. The Judges of this country are bound to know its laws; but they are not bound to know the laws of a foreign country.

[324] Thirdly. Elizalde is dead; and, consequently, he cannot be subject to a criminal prosecution, or to pains and penalties.

Fourthly. There is no averment connecting the agreement stated in the letter of June 1828 with the agreement stated at the outset of the bill: there is nothing to shew that they are identical: consequently, it is left uncertain to which of the two agreements the plea is addressed.

Fifthly. The bill contains a variety of recognitions of the agreement and promises to perform it, both written and verbal, which were made by the Defendant, in France and England, as well as in Spain, and before as well as since Elizalde's death: and the bill is as much founded on those recognitions and promises as it is upon the original agreement. The plea, however, nowhere avers that the Plaintiffs have no *present* right to sue. Suppose that parties enter into an agreement which is illegal, and one of them gains a large sum of money, and, the money having been realized, promises to pay to the other party the share to which he would have been entitled if the agreement had been valid: is it at all clear that, by the law of Spain or by the law of this country, that promise could not be enforced? *Barnes* v. *Hedley* (2 Taunt. 184). In this case there is nothing to shew that the original agreement, though invalid by the laws of Spain, may not form a good consideration for the subsequently recognized contract, when the parties were not resident in that country.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The bill, in effect, represents but one agreement.

[325] The whole agreement made was that there should be a participation, in the profits of the contract with the Spanish Government, by the party whom the Plaintiffs represent, to the extent of one-fifteenth. The letter of June 1828, which was relied on by the counsel in support of the bill, did not create a new agreement, but was merely an acknowledgment of the prior verbal contract. It is evidence of that contract but nothing more. I have read all the subsequent letters; but my opinion is that they do not shew any promise to account, independently of any obligation which might arise out of the original agreement. The consequence is that the bill does not represent, as it has been said to do, that there were two agreements.

The plea, which is to the whole bill, alleges that, for the reason which it assigns, the agreement in question was null and void by the laws of Spain: and then it makes an averment in support of the plea that the making and entering into such agreement was a crime against the laws of Spain, subjecting the parties to it to pains and penalties and to a criminal prosecution. I see nothing in that averment to vitiate the plea. And, if the fact should turn out as the plea represents, then there must be an end of the Plaintiffs' case.

Plea allowed with costs. The costs of the suit reserved; the Plaintiffs having undertaken to reply. (See *Fry* v. *Richardson*, *ante*, vol. x. p. 475.)