goods, and the tenant, in order to discharge his debt, agrees to their removal, as by law he might do. Where is the fraud in the tenant paying his debt? If it could be said to be fraudulent in any sense, I doubt whether it would be within the meaning of the Act; because it would not be the fraud of the tenant or person removing the property for his benefit; for the removal was the act of the creditor. The proviso in the 2d section relates only to such cases as come within the first. The 3d section, on which this action is founded, does not contain any words which carry the case further. If there be a fraudulent removal within the 1st section, the landlord is empowered to follow the property within a given time; and in such case the 3d section adds to the landlord's remedy by distress, a right of action for double the value of the goods against the tenant or the person aiding him in the removal. It **[205]** seems to me this is not a case either within the letter or meaning of the Act.

Holroyd J.(*a*). I am of the same opinion. The third clause does not make every conveying away of the goods of a tenant penal, although it may operate to defeat the landlord's right, but only such conveying away of the goods by the tenant or person aiding him as is fraudulent. This clause, however, which is a penal one, giving a forfeiture of double the value of the goods, does not interfere with the right of a creditor to use all due diligence for obtaining payment of his debt; although by so doing he may possibly intercept the landlord's distress, and may even do it under the impression that the landlord intends to distrain. In the case of *Meux* v. *Howell* (*b*) a distress had actually been made by the landlord at the time the tenant confessed judgment to another creditor for the benefit of himself and the other creditors; and yet this was held not to be fraudulent within the Statute of Eliz. And it was admitted on all hands in that case that it was competent to a debtor to assign a part of his property in satisfaction of particular creditors, although this might diminish the fund to which the rest of the creditors had to look. And so executors may suffer judgment to one creditor after action brought by another, and plead it in bar to the action. In *Estwick* v. *Caillaud* (*c*), Lord Kenyon said, "It is neither illegal nor immoral to prefer one set of creditors to another;" and in *Nunn* v. *Wilsmore* (*d*), "That putting the bankrupt laws out of the question, a **[206]** debtor might assign all his effects for the benefit of particular creditors." And as every creditor has a right to use all diligence for the recovery of his debt, it seems to follow that he may obtain payment without regarding whether he thereby postpones payment to another. The statute, as it seems to me, was never meant to extend to the creditor who is seeking payment of his debt bonâ fide, when it enacted, that if any person should wilfully and knowingly assist in such fraudulent conveying away he should be liable to a penalty. Upon these grounds, this action appears to me not to be maintainable.

Rule absolute.

THE KING *against* TURNER. Wednesday, June 19th, 1816. Upon a conviction under stat. 5 Ann. c. 14, s. 2, against a carrier for having game in his possession, it is sufficient if in the information and adjudication, the qualifications mentioned in stat. 22 & 23 Car. 2, c. 25, s. 3, be negatived, without negativing them in the evidence.

[Questioned, *Elkin* v. *Jansen*, 1845, 13 M. & W. 662. Discussed, *Graham* v. *Belfast and Northern Counties Railway*, [1901] 2 Ir. R. 27.]

Conviction by two justices, upon the statute 5 Ann. c. 14, s. 2, against a carrier, for having game in his possession. The conviction was to this effect:

"W. Taylor of the parish, &c., cometh before me, J. M., one of the justices of our lord the King, in and for the county of Surry, &c.; and then and there giveth me, the said justice, to understand and be informed, that within three months now last past, that is to say, on the 5th day of February, now instant, at the parish of Send and Ripley, in the said county, John Turner, of the parish of The Holy Trinity, in Guildford, in the county of Surry, carrier, being a person not then having lands, &c. (negativing the qualifications of the 22 and 23 Car. 2, c. 24,) nor then being a person in any manner **[207]** qualified or authorised by the laws of this realm to kill game,

(*a*) Abbott J. was absent on the special commission.
(*b*) 4 East, 1. (*c*) 5 T. R. 424. (*d*) 8 T. R. 528.

and being then and there a carrier, did then and there unlawfully have in his custody and possession sixteen pheasants and five hares, the same not being sent up or placed in the hands of the said J. Turner, by any person or persons qualified to kill game, contrary to the form of the statute, &c., whereby he hath forfeited the sum of 105l., that is, 5l. for each pheasant and hare." And the conviction prays, that the defendant may be summoned to answer the premises, and that the informer may have a moiety of the forfeiture. Whereupon the defendant being summoned on the 10th of February, in the 56th year aforesaid, &c., appeareth before us, the said J. M. and G. M., one other of the justices, &c., and having heard, &c., pleads not guilty. Nevertheless, on the said 10th day of February, at, &c., two credible witnesses, to wit, T. T. and W. S. upon their oath, affirm, in the presence of the said J. Turner, that within three months next before the said information, to wit, on the said 5th day of February, in the 56th year aforesaid, at, &c., the said J. Turner being a carrier, did have in his custody and possession, in his waggon, at the parish of Send and Ripley, in the county aforesaid, sixteen pheasants and five hares, the same not being sent up or placed in the hands of the said J. Turner, by any person or persons qualified to kill game, contrary to the form of the statute, &c. Whereupon the said J. Turner, being asked what he hath to say or offer in his defence, produceth one witness, to wit, G. T., who, being duly sworn, deposeth, in the presence of the said J. Turner, and also of the said W. Taylor, that on the said 5th day of February, at the parish of The Holy Trinity, in Guildford aforesaid, he was present at, and did aid and **[208]** assist in the packing and loading the said waggon of the said J. Turner; and that at the day and parish last aforesaid, when the said waggon of the said J. Turner left the warehouse of the said J. Turner, in the said parish last aforesaid, there was not in the custody and possession of the said J. Turner, in his said waggon, in the parish last aforesaid, any such quantity of game as is above laid to his charge, or any game whatever; and forasmuch as upon hearing the matters, &c. it appears to us, the said justices, that the said J. Turner is guilty of the premises; it is therefore adjudged by us the said justices, upon the testimony of the said T. T. and W. S., that the said J. Turner, on the said 5th day of February, at the parish of Send and Ripley aforesaid, within three months next before the said information was made before me the said J. M. by the said W. T. as aforesaid, unlawfully had in his custody and possession, sixteen pheasants and five hares, contrary to the form of the statute, &c., and that the same were not sent up or placed in the hands of the said J. Turner, by any person or persons qualified to kill game, and that the said J. Turner had not then any lands or tenements, or any other estate of inheritance in his own right, or in his wife's right, of the clear yearly value of one hundred pounds per annum, &c. (negativing the other qualifications); and thereupon we the said justices do convict the said J. Turner of the offence aforesaid, and do adjudge that the said J. Turner, for his said offence, hath forfeited the sum of one hundred and five pounds, that is to say, the sum of five pounds for each and every of the said pheasants and hares; and we do adjudge, that one half of the said sum be paid to the poor of the parish of Send and Ripley aforesaid, where the said **[209]** offence was committed, according to the form of the statute, &c.

And now it was argued by Scarlett and Ross that the conviction was ill; first, because the justices have neglected to set forth the evidence in support of the information, and have only stated the conclusion which they drew from it. For the justices have repeated the charge alleged in the information, as if it were the evidence given in support of that charge; but it is impossible to conceive that the witnesses should have deposed in the very same form and words as laid in the information. It was incumbent therefore, on the justices to set forth the particulars of the evidence and not the result of it, in order that the Court may see that there is sufficient to warrant the conviction. Secondly, it was objected, that it does not appear that any evidence was given in support of the information, negativing the qualifications mentioned in the statute, which is necessary, in order to found the jurisdiction of the justices; for if the party be qualified in any one respect, the justices have no jurisdiction. And herein a proceeding before a justice differs from an action. It seems, therefore, that primâ facie evidence, at least, ought to be required; though it must be admitted, that in *Rex* v. *Stone* (*a*), the Court were divided in opinion upon this point.

(*a*) 1 East, 639.

Lord Ellenborough C.J. The question is, upon whom the onus probandi lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer, who denies any qualification **[210]** to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute (*a*)[1], to which the proof may be applied; and, according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, non liquet, but that the defendant may be qualified under the other. And does not, then, common sense shew, that the burden of proof ought to be cast on the person, who, by establishing any one of the qualifications, will be well defended? Is not the Statute of Anne in effect a prohibition on every person to kill game, unless he brings himself within some one of the qualifications allowed by law; the proof of which is easy on the one side, but almost impossible on the other? I remember the decision of *Rex* v. *Stone;* and the arguments of the learned Judges, who held the necessity of giving negative proof, were undoubtedly urged with great force; but I felt at the time, that if they were right, it would, in most cases, be impossible to convict at all. Bnt in *Spieres* v. *Parker* (*b*), I find Lord Mansfield laying down the rule, that in actions upon the game laws, (and I see no good reason why the rule should not be applied to informations as well as actions) the plaintiff must negative the exceptions in the enacting clause, though he **[211]** throw the burden of proof on the other side. The same was said by Heath J. in *Jelfs* v. *Ballard* (*a*)[2]; and such I believe has been the prevailing opinion of the profession, and the practice. I am, therefore, of opinion, that this conviction, which specifies negatively in the information the several qualifications mentioned in the statute, is sufficient, without going on to negative, by the evidence, those qualifications.

Bayley J. I am of the same opinion. I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative. And if we consider the reason of the thing in this particular case, we cannot but see that it is next to impossible that the witness for the prosecution should be prepared to give any evidence of the defendant's want of qualification. If, indeed, it is to be presumed, that he must be acquainted with the defendant, and with his situation or habits in life, then he might give general evidence what those were; but if, as it is more probable, he is unacquainted with any of these matters, how is he to form any judgment whether he is qualified or not, from his appearance only? Therefore, if the law were to require that the witness should depose negatively to these things, it seems to me, that it might lead to the encouragement of much hardihood of swearing. The witness would have to depose to a multitude of facts; he must swear that the defendant has not an **[212]** estate in his own or his wife's right, of a certain value; that he is not the son and heir apparent of an esquire, &c.; but how is it at all probable, that a witness should be likely to depose with truth to such minutiæ? On the other hand, there is no hardship in casting the burden of the affirmative proof on the defendant, because he must be presumed to know his own qualification, and to be able to prove it. If the defendant plead to the information, that he is a qualified person, and require time to substantiate his plea in evidence, it is a matter of course for the justices to postpone the hearing, in order to afford him time, and an opportunity of proving his qualifications. But if the onus of proving the negative is to lie on the other party, it seems to me, that it will be the cause of many offenders escaping conviction. I cannot help thinking, therefore, that the onus must lie on the defendant, and that when the prosecutor has proved every thing, which, but for the defendant's being qualified, would subject the defendant to the penalty, he has done enough; and the proof of qualification is to come in as matter of defence. As to the objection that this evidence is consistent with the supposition, that the game was in the waggon of the defendant, without his knowledge, I think the fact of its being in his waggon, raises a presumption.

(*a*)[1] 22 & 23 Car. 2, c. 25, s. 3. (*b*) 1 T. R. 144.
(*a*)[2] 1 B. & P. 468.

the other way, that it was there with his knowledge. If the defendant could have shewn, by evidence satisfactory to the justices, that he did not know it, that would have presented a very different case; but where the witness has proved that the defendant had it in his custody and possession in his waggon, surely such evidence being unanswered, warrants this conviction.

[213] Holroyd. J.(*a*). I also am of the same opinion. It is a general rule, that the affirmative is to be proved, and not the negative, of any fact which is stated, unless under peculiar circumstances, where the general rule does not apply. Therefore it must be shewn, that this is a case which ought to form an exception to the general rule. Now all the qualifications mentioned in the statute, are peculiarly within the knowledge of the party qualified. If he be entitled to any such estate, as the statute requires, he may prove it by his title deeds, or by receipt of the rents and profits: or if he is son and heir apparent, or servant to any lord or lady of a manor appointed to kill game, it will be a defence. All these qualifications are peculiarly within the knowledge of the party himself, whereas the prosecutor has, probably, no means whatever of proving a disqualification. If this be so, instead of saying that the general rule of law ought not to apply to this case, it seems to be the very case to which the rule ought peculiarly to apply. The other objections do not appear to me to be well founded; and, therefore, I think this conviction ought to be affirmed.

Conviction affirmed.

Nolan and Berens were to have argued in support of the conviction.

[214] THE KING *against* THE INHABITANTS OF UCKFIELD. Wednesday, June 19th, 1816. Where pauper, at the time of hiring himself, had a daughter of the age of eighteen, who from the age of four had lived with her grandfather, and had been maintained by him until his death, and afterwards by her grandmother, which continued until she attained twenty-one, the grandfather having by his will directed the grandmother to educate and maintain her out of a fund given to the grandmother for life, and after her decease to the daughter: Held, that the daughter was not emancipated, and consequently pauper was not, within stat. 3 and 4 W. & M. a person not having a child at the time of the hiring.

Upon appeal, the Court of Quarter Sessions for the county of Sussex confirmed an order of two justices for the removal of James Marshall from Hurstperpoint to Uckfield, subject to the opinion of this Court upon the following case:

The pauper, James Marshall, being legally settled in the parish of Uckfield, on the 10th of April, 1802, hired himself for a year to one Jeffery, then residing in the parish of Tonbridge, in the county of Kent, and continued in the service of Jeffery in that parish for the whole year. Marshall was a widower at the time of his hiring himself to Jeffery, and had one daughter, Frances, eighteen years of age, who had been separated from him at the age of four years, and had lived with her grandfather until his death in 1801, during which time she was entirely supported by the grandfather, the pauper contributing nothing for her maintenance. The grandfather by his will devised the residue of his estate (which amounted to 1600l.) to his executors in trust, to place the same out upon security, and pay the interest to his wife for life for her own use; and he directed that his wife should, during her life, thereout educate and maintain Elizabeth and Frances, the children of his late daughter Elizabeth Marshall, and after the decease of his wife he gave the said residue equally to be divided between the said Elizabeth and Frances; but in case his wife should die before they attained twenty-one, the interest to be applied to their maintenance and edu-**[215]**-cation during their minority, and upon their attaining twenty-one respectively, the principal to be paid to them accordingly; and if either of them should die under age and without leaving issue, her share to go to the survivor; but if either should die under age leaving issue, her share to be equally divided between such issue, as they attained twenty-one, the interest in the mean time to be applied towards their maintenance and education. After her grandfather's death Frances continued to live with her grandmother, and was entirely supported by her until she had attained twenty-one, and was living with her at the time when the pauper hired himself to

(*a*) Abbott J. was absent upon the special commission.