statutes of a local and personal nature, the defendant cannot in such cases take advantage of the want of notice, unless he pleads it.]

PARKE, B. There ought to be no rule. With respect to the first point, the refuse of the ash-pit was not "ashes, cinders, dust, or rubbish," within the meaning of the act of Parliament, but an article of commerce used in the process of manufacture. As to the other question, *Richards* v. *Easto* is precisely in point.

ALDERSON, B., and PLATT, B., concurred.

POLLOCK, C. B. I am of the same opinion. The second point is disposed of by the case referred to. As to the **[850]** other question, it is manifest that the contents of the ash-pit were sold as ashes containing metal, for the purpose of being submitted to a manufacturing process; they cannot, therefore, be considered as mere "ashes, dust, or rubbish."

Rule refused.

ROBINSON *v.* HARMAN. Jan. 18, 1848.—Where a party agrees to grant a good and valid lease, having full knowledge that he has no title, the plaintiff, in an action for the breach of such agreement, may recover, beyond his expenses, damages resulting from the loss of his bargain; and the defendant cannot, under a plea of payment of money into court, give evidence that the plaintiff was aware of the defect of title.

[S. C. 18 L. J. Ex. 202. Discussed, *Buckley* v. *Dawson*, 1854, 4 Ir. C. L. R. 211; *Pownsett* v. *Fuller*, 1856, 17 C. B. 660; *Sikes* v. *Wild*, 1861, 1 B. & S. 587: affirmed, 1863, 4 B. & S. 421; *Engell* v. *Fitch*, 1868, L. R. 3 Q. B. 323. Applied, *Lock* v. *Furze*, 1866, L. R. 1 C. P. 450; *Engell* v. *Fitch*, 1869, L. R. 4 Q. B. 665. Adopted, *Bain* v. *Fothergill*, 1874, L. R. 7 H. L. 172; *Wigsell* v. *School for Indigent Blind*, 1882, 8 Q. B. D. 364. Referred to, *Stranks* v. *St. John*, 1867, L. R. 2 C. P. 379; *Joyner* v. *Weeks*, [1891] 2 Q. B. 31.]

Assumpsit on an agreement in writing, dated the 15th April, 1846, whereby the defendant agreed "to grant and deliver to the plaintiff a good and valid lease of a certain dwelling-house, &c., and other hereditaments and premises in the agreement mentioned, for a term of twenty-one years from the 29th day of September then next ensuing, at the yearly rent of £110," &c. The declaration set out the agreement in terms, and, after alleging mutual promises, averred that, although the plaintiff had always been ready and willing to accept a lease, yet the defendant did not nor would grant a good and valid lease of the said dwelling-house, &c., and discharged the plaintiff from preparing and tendering such lease, and wholly neglected and refused to grant or deliver the said or any lease whatever of the said hereditaments and premises; "whereby the plaintiff lost and was deprived of great gains and profits, which would otherwise have accrued to him, and paid, expended, and incurred liability to pay divers sums of money, in and about the preparation of the said agreement and lease, &c., amounting, to wit, to £20."

Plea, payment of £25 into court, and no damages ultra.

The plaintiff replied damages ultra, upon which issue was joined.

At the trial, before Lord Denman, C. J., at the Surrey Spring Assizes, 1847, it was proved that the plaintiff and **[851]** defendant had entered into the agreement set out in the declaration, by which the defendant agreed to grant to the plaintiff a good and valid lease of a dwelling-house and premises, situate in High-street, Croydon, for a term of twenty-one years from the 29th September, 1846, at a yearly rent of £110. The premises in question had belonged to the defendant's father, who was recently dead, and in consequence, the plaintiff's solicitor, while preparing the agreement, asked the defendant whether he was sure that he had power to grant the lease without the concurrence of other parties, and suggested that the will might have vested the legal estate, or the power of leasing, in trustees. The defendant replied, that there was nothing of the sort, that it was his property out and out, and that he alone had the power of leasing. It appeared, however, that the defendant's father had devised the premises in question (subject to an annuity of £300 to his daughter) to trustees, to pay the defendant a moiety of the rent during his life only. The premises were worth considerably more than £110 a year, and the bill of the plaintiff's solicitor, for preparing the agreement and lease, and investigating the title, amounted

to 15l. 12s. 8d. On the part of the defendant, evidence was tendered to shew that the plaintiff, when he entered into the agreement, had full knowledge of the defendant's incapacity to grant the lease; but the learned judge ruled that such evidence was inadmissible. It was urged, on the part of the defendant, that the plaintiff could not recover damages for the loss of his bargain; and that, as the sum paid into court exceeded the expenses which he had been put to, the defendant was entitled to the verdict. The learned judge was of a different opinion, and a verdict was found for the plaintiff for £200, beyond the sum paid into court.

A rule nisi having been obtained to set side the verdict, and for a new trial,

Shee, Serjt., and Willes now shewed cause. First, the **[852]** evidence tendered was inadmissible. It is well established, that when a defendant pleads only a plea which admits the plaintiff's right to recover, evidence of facts which would bar the action is not admissible in mitigation of damages: *Speck* v. *Phillips* (5 M. & W. 279). Secondly, the plaintiff is entitled to recover damages for the loss sustained by the non-performance of the contract. The cases of *Flureau* v. *Thornhill* (2 W. Bla. 1078) and *Walker* v. *Moore* (10 B. & C. 416) are relied upon by the other side. The plaintiff in the former case bought, at an auction, for £270, a rent of 26l. 1s. per annum, for a term of thirty-two years, issuing out of a leasehold house, which let for 31l. 6s. On looking into the title, the defendant could not make it out; but offered the plaintiff his election, either to take the title with all its faults, or to receive back the deposit with interest and costs, but the plaintiff insisted on a further sum for damages in the loss of so good a bargain. The defendant had paid the deposit and interest, being 54l. 15s. 6d., into court; but the jury gave a verdict, contrary to the direction of De Grey, C. J., for 74l. 15s. 6d., allowing £20 for damages. Cause having been shewn against a rule for a new trial, De Grey, C. J., said, "I think the verdict was wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vendor is, without fraud, incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." Blackstone, J., says, "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected. In contracts of that description there is no warranty of title, but merely a condition annexed, that, if the vendor is not able to make a good title, the contract shall be at an end." Such a case essen-**[853]**-tially differs from the present, where the defendant has positively engaged that he will grant a good and valid lease, not having at the time any colour of title. In *Walker* v. *Moore* (10 B. & C. 416), which was a contract for the purchase of a real estate, the vendor, acting bonâ fide, delivered an abstract shewing a good title; and the vendee, before he examined it with the original deeds, contracted to resell several portions of the property at a considerable profit. Upon a subsequent examination of the abstract with the deeds, the vendee discovered that the title was defective; and thereupon the sub-purchasers refused to complete their purchases, and he also refused to complete his purchase, and brought an action, wherein he claimed as damages the expense which he had incurred in the investigation of the title, the profit which would have accrued from the resale of the property, the expense attending the resale, and the sums he was liable to pay to the sub-contractors for the expenses incurred by them in examining the title. It was held that he was entitled to recover only the expense he had incurred in the investigation of the title, and nominal damages for the breach of contract. That case, however, proceeded on the ground of the bonâ fides of the vendor, and on the understanding, which forms part of every contract of that description, that the vendor may not have it in his power to make a good title. Bayley, J., there says, "The defendants undertook to make a good title, and they might honestly think that they should be able to do so. It turned out that they could not, and consequently that the contract was broken, and they were liable to an action. The plaintiff, however, must shew that the damages which he seeks to recover arose from the acts of the defendants, and not from his own haste." Littledale, J., says, "When a contract for the purchase of land is made, each party cannot but know that the title may prove de-**[854]**-fective, and must be taken to proceed upon that knowledge." There is a broad distinction between the case of a party who contracts to sell an estate, subject to an inquiry as to title, and the case of a person who, having no title whatever, sells with warranty of title. In *Hopkins* v. *Grazebrook* (6 B. & C. 31), the defendant, who

had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him; and it was held, that a purchaser of certain lots at the auction, might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect. Abbott, C. J., there says, "Upon the present occasion I will only say, that if it is advanced as a general proposition, that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point, I should desire time for consideration." The present case falls within the principle of that decision.

Montagu Chambers, in support of the rule. The evidence was admissible in mitigation of damages. The plaintiff has no right to claim substantial damages for the loss of a bargain which he knew the other party had no power to make. *Hopkins* v. *Grazebrook* proceeded on the ground of the deception practised by the vendor in holding out the estate as his own, when in point of fact he had not a shadow of title. In all cases of vendor and purchaser, there is an implied agreement that the vendor will take his chance of the title turning out good, and for that reason damages are not recoverable. It is stronger here, since the plaintiff **[855]** knew that the defendant had a defective title. The principle of the decision in *Flureau* v. *Thornhill* (2 W. Bla. 1078) is applicable to the present case. [Alderson, B. In *Flureau* v. *Thornhill*, and *Walker* v. *Moore* (10 B. & C. 416), the defendants had reasonable ground for believing that they had a good title.] In *Johnson* v. *Johnson* (3 Bos. & P. 162), which was an action for money had and received to recover back the purchase-money of a parcel of land, from which the plaintiff was evicted in consequence of a defect of title, Lord Alvanley, C. J., said, that if he were to sue the vendors on the covenant to convey, he would only recover nominal damages.

PARKE, B. The rule must be discharged. The defendant contracted to grant a good and valid lease, and the learned judge was right in rejecting evidence which would go to alter the contract admitted by the plea.

The next question is, what damages is the plaintiff entitled to recover? The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The case of *Flureau* v. *Thornhill* qualified that rule of the common law. It was there held, that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law, and I am unable to distinguish it from *Hopkins* v. *Grazebrook*.

ALDERSON, B. I am of the same opinion. The damages have been assessed according to the general rule of **[856]** law, that where a person makes a contract and breaks it, he must pay the whole damage sustained. Upon that general rule an exception was engrafted by the case of *Flureau* v. *Thornhill*, and upon that exception the case of *Hopkins* v. *Grazebrook* engrafted another exception. This case comes within the latter, by which the old common-law rule has been restored. Therefore the defendant, having undertaken to grant a valid lease, not having any colour of title, must pay the loss which the plaintiff has sustained by not having that for which he contracted.

PLATT, B. Upon general principle, I cannot distinguish this case from *Hopkins* v. *Grazebrook*.

Rule discharged.

HESELTINE *v.* SIGGERS. Jan. 26, 1848.—In an action for not delivering foreign stock, the declaration alleged that the plaintiff "bargained with the defendant to buy, and then bought from him, and the defendant then agreed to sell, and then sold to the plaintiff, certain foreign stock, to wit, 28,000 Spanish Active Stock, &c.:"—Held, that the words "bought" and "sold" must be construed with reference to the subject-matter of the contract, and as meaning an agreement to